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ARTICLES

DEAD OR ALIVE? THE LAW, POLICY, AND MARKET EFFECTS OF LEGISLATION ON UNCLAIMED LIFE INSURANCE BENEFITS

James M. Carson, Robert E. Hoyt, and Tim R. Samples*

Abstract

A wave of multi-state audits on the insurance industry's use of the Social Security Administration's Death Master File (DMF) stirred national controversy over the status of unclaimed life insurance proceeds. Multi-state investigations uncovered "asymmetric" use of the DMF among many large insurance companies. Accusations of unethical behavior led to numerous settlement agreements between state regulators and insurers. Payouts and fines stemming from these settlements already number in the billions of dollars.

Legislative responses are also underway. Some states have adopted—and others are considering—legislation requiring life insurers to search the DMF to identify and pay (or eascheat) unclaimed death benefits. Currently, legislative responses vary among the states, underscoring the long-standing tension between uniformity and state-centric regulation of insurance in the United States. Some states have imposed DMF search requirements on a prospective basis. Others have attempted to apply such requirements on a retroactive basis, affecting both new and existing policies.

Emerging legislation on unclaimed life insurance has significant implications for consumers, insurance markets, and even state finances. This Article focuses on the crucial question of retroactive versus prospective applicability of legislation on unclaimed life insurance benefits. In considering the financial implications and legal dimensions of this question, this

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Article concludes in favor of prospective applicability. Though presumably well intentioned, the downsides of retroactive legislation on unclaimed life insurance benefits outweigh the upsides.

Introduction

Insurers pay out tens of billions on life insurance policies each year, distributing over $62 billion for claims in 2011 alone. [1] But, what happens to the money when life insurance policies go unclaimed? In 2008, this question led various state treasurers to audit insurance industry use of the Social Security Administration's Death Master File (DMF)[2] to identify and pay unclaimed benefits.[3] In the course of these audits, state treasurers identified "asymmetric" use of the DMF by some insurers.[4] Asymmetric use involves using the DMF to terminate payments on annuity policies of deceased contract holders while neglecting to use the DMF to locate potential payouts on life insurance policies.[5] Accusations of impropriety stirred a national controversy.[6] A slew of multi-million dollar settlement agreements between insurers and state regulators followed.[7]

Subsequent court decisions[8] have ruled that insurers are not required—absent legislation or contractual obligations to the contrary—to search external databases to discover obligations to pay or "escheat" life insurance benefits to the states.[9] But, payouts required

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1. News Release, American Council of Life Insurers, ACLI On Unclaimed Life Insurance Benefits (Mar. 21, 2013), https://www.acli.com/Newsroom/News%20Releases/Pages/NR13-008.aspx?PF=true&Pub=false.

2. *See* Social Security Administration, *Social Security Death Master File, https://www.ssdmf.com/ (establishing the DMF to create a* master list of deceased persons, the Social Security Administration wanted to prevent fraud and verify death records).

3. *See, e.g.*, Press Release, Controller Betty T. Yee , Cal. St. Controller's Office, Chiang Sues Life Insurance Company for Violating Unclaimed Property Law (May 7, 2013), http://www.sco.ca.gov/eo_pressrel_13429.html (describing audits undertaken in California).

4. *See* Devin Hartley, Note, *A Billion Dollar Problem: The Insurance Industry's Widespread Failure to Escheat Unclaimed Death Benefits to the States*, 19 Conn. Ins. L.J. 363, 368–70 (2013).

5. *Metropolitan Life Insurance Company's Practices and Procedures Relating to the Use of the Death Master File Data and Related Information: Hearing Before Ins. Comm'r of the State of Cal.*, 6 (Cal. 2011) [hereinafter *California Metlife Hearing*] (statement by California Insurance Commissioner Dave Jones that "[s]ome insurers appear to use the [DMF] to cut off payments on annuities when an annuity owner dies, but do not use that information to identify life insurance policyholders who die and pay their beneficiaries.").

6. *See* Leslie Scism & Vauhini Vara, *Life Insurers Skimp on Payouts: States*, Wall St. J. (Apr. 28, 2011), http://www.wsj.com/articles/SB10001424052748703367004576289423732099868.

7. *See, e.g.*, Mary Williams Walsh, *MetLife Settles Cases on Benefits*, N.Y. Times (Apr. 23, 2012), http://www.nytimes.com/2012/04/24/health/policy/metlife-settles-cases-on-benefits.html (reporting on various Metlife settlements); s*ee also infra* Part I.A (providing details on DMF settlement agreements).

8. *See* cases cited *infra* note 91.

9. *Escheat*, Black's Law Dictionary (9th ed. 2009) (generally is the "[r]eversion of property (esp. real property) to the state upon the death of an owner who has neither a will nor any legal heirs.").

under settlement agreements already exceed $7.4 billion dollars.[10] As of 2015, over twenty mostly large life insurers, comprising more than 70% of the United States life insurance market (as measured by premium volume) had entered into settlements with state treasurers and state insurance regulators.[11] In these settlements, insurers voluntarily agreed to check the DMF for deceased insureds to mirror the practice of checking for deceased annuitants—and to escheat any unclaimed death benefits identified through that process.[12]

Legislative responses in several states followed as well, some of which are still underway.[13] Public responses to the unclaimed life insurance benefits controversy underscore tensions between state regulation and market uniformity, which have a long history in the insurance industry.[14] Among the states, regulatory and legislative responses have been uneven thus far.[15] The scope of applicability—namely, *retroactive* versus *prospective*—of the legislation is especially key.[16] While some states have opted for prospective-only application (i.e., applying to policies issued on or after the effective date of legislation), others have opted for retroactive application (i.e., applying to all policies regardless of when issued).[17] Meanwhile, some statutes are silent on the question.[18]

The outcome of public responses to the unclaimed life insurance benefits controversy has timely and relevant implications for consumers

10. *See* Leslie Scism, *Why Decades-Old Life-Insurance Benefits May Still Go Unpaid*, WALL ST. J. (Feb. 26, 2016), http://www.wsj.com/articles/why-decades-old-life-insurance-benefits-may-still-go-unpaid-1456507761 (reporting that the 22 largest insurers in the United States have paid over $7.4 billion to beneficiaries and state unclaimed property accounts).

11. Press Release, Cal. Dep't of Ins., Two Additional Insurers Agree to Appropriate Use of Death Master File (Mar. 23, 2015), http://www.insurance.ca.gov/0400-news/0100-press-releases/2015/release031-16.cfm (explaining that in the insurance context, a premium is the amount of money that an individual or business pays to maintain an insurance policy).

12. *See, e.g.*, Press Release, Cal. Dep't of Ins., "Death Master" Investigation Results in National Settlement With Major Life Insurer (Feb. 2, 2012), http://www.insurance.ca.gov/0400-news/0100-press-releases/2012/release010-12.cfm (summarizing and providing link to Regulatory Settlement Agreement between several state insurance departments and Prudential).

13. *See* legislation cited *infra* p. 11 and notes 56–57.

14. *See* Susan Randall, *Insurance Regulation in the United States: Regulatory Federalism and the National Association of Insurance Commissioners*, 26 FLA. ST. U. L. REV. 625, 630 (1999).

15. *See* Stephen L. Poe, *Insurance Regulations and Unclaimed Property: A Dilemma for Life Insurers*, 7 SOUTHERN J. OF BUS. & ETHICS 160, 165 (2015) (describing differences in regulatory responses among states); *see also infra* Part I.B.

16. In this context, we consider "retroactive" to mean the application of new laws that affect the legal status of past behavior that was undertaken before the existence of the new law. *See, e.g.*, Landgraf v. USI Film Prods., 511 U.S. 244, 269–70 (1994) (stating that "the court must ask whether the new provision attaches new legal consequences to events completed before its enactment").

17. *See infra* Part I.B (illustrating various approaches among states on the applicability question).

18. *Id.*

and insurance markets alike.[19] Another key policy issue is the role of unclaimed property in state finances.[20] As cash-strapped states seek new sources of funding, unclaimed property has become increasingly important as a source of revenue.[21] Though this trend has been particularly critical in the wake of the Great Recession, the practice of states seeking revenue by asserting jurisdiction over unclaimed life insurance has a fairly long history in the United States.[22] Accordingly, we consider the fiscal implications of retroactive versus prospective legislation on unclaimed life benefits.

Lawmakers, courts, and regulators now face important questions concerning implementation, ranging from the scope of applicability to more technical DMF search requirements. This Article focuses on the specific and critical question of *retroactive* versus *prospective* applicability. Namely, should DMF search requirements apply retroactively to both past and future policies, or should they apply prospectively to future policies only? On one hand, this question raises important legal questions about the fairness and legality of retroactive legislation.[23] On the other hand, the applicability question involves financial consequences for insurance markets and consumer interests alike.[24] In addressing these issues, this Article contributes an analysis of empirical and legal questions to the ongoing debate over appropriate responses to the insurance industry's unclaimed benefits controversy.

Our findings suggest that the downsides of retroactive application—while presumably well intentioned—outweigh the upsides for consumers and insurance markets alike. However, we do believe it is reasonable to require insurers to comply with DMF search requirements on a prospective basis. A prospective-only approach would allow insurers to implement adequate data collection practices in line with

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19. *See* Randall, *supra* note 14, at 627 *citing* German Alliance Ins. Co. v. Lewis, 233 U.S. 389, 411–15 (1914) (noting deep connections between consumer interests and insurance business); *see also* Part III (explaining implications of emerging legislation for insurance markets and consumers).

20. *See* Sean M. Diamond, Comment, *Unwrapping Escheat: Unclaimed Property Laws and Gift Cards*, 60 EMORY L.J. 971, 973 (2011) (describing the practice among states of raising revenue through unclaimed property laws as an alternative to raising taxes); *see also* William S. King, Note, *A Bridge Too Far: Due Process Considerations in State Unclaimed-Property Law Enforcement*, 45 SUFFOLK U. L. REV. 1249, 1249 ("[S]tates have looked toward new sources—unclaimed property, in particular—to find much needed cash.").

21. *See* Teagan J. Gregory, Note, *Unclaimed Property and Due Process: Justifying "Revenue Raising" Modern Escheat*, 110 MICH. L. REV. 319, 319 (2011) ("In the face of increasing fiscal challenges, states have worked to increase their collection of unclaimed property via new escheat legislation that appears to bear little or no relation to protecting the interests of owners.").

22. *See, e.g.*, H.C., Note, *Jurisdiction to Escheat Abandoned Life Insurance Policies*, 35 VA. L. REV. 336, 336 (1949) (addressing issues of jurisdiction over life insurance policies for states "[i]n their search for new sources of revenue").

23. *Compare* Daniel E. Troy, *Toward a Definition and Critique of Retroactivity*, 51 ALA. L. REV. 1329, 1332 (2000) (distinguishing among justifiable and unjustifiable retroactive laws), *with* Bernard W. Bell, *In Defense of Retroactive Laws*, 78 TEX. L. REV. 235, 239–41 (1999) (reviewing DANIEL E. TROY, RETROACTIVE LEGISLATION (1998)) (critiquing Troy's arguments).

24. *See* DANIEL E. TROY, RETROACTIVE LEGISLATION 22 (1998).

the unique requirements of DMF searches.[25] We believe that prospective applicability would allow all insurers, but especially medium and smaller insurers, to adjust to these requirements without problematic disruptions to insurance markets or significant adverse impacts on consumers. Prospective applicability also stands on firmer legal ground, particularly where legislation is silent on the question of retroactive applicability.[26]

This Article is organized as follows: Part I provides details on regulatory and legislative responses to the unclaimed life insurance controversy, including settlement agreements with state regulators, existing and emerging state legislation, and other relevant state laws. An assessment of competitiveness and market concentration in the insurance industry in Part II finds that insurance markets in the United States are highly competitive, which has important benefits for consumers. Specific consequences of retroactive legislation are addressed in Part III. Then, in Part IV, we consider the implications of legislation on unclaimed life insurance benefits for state revenues.

I. The Legal and Regulatory Environment

Following the DMF controversy, litigation and settlement agreements have reshaped the legal and regulatory environment for insurance markets. Accordingly, this Part begins with an overview of regulatory responses (i.e., audits and settlement agreements with state regulators) and legislative responses (i.e., state legislation on unclaimed life insurance benefits). This Part then discusses the state-centric approach to insurance regulation in the United States. As a result of this regulatory dispersion, responses among the states have been uneven, reflecting tensions between the state-centric approach and uniformity in insurance regulation. Next, this Part addresses legal and policy arguments related to the retroactivity of legislative responses to unclaimed life insurance. And, finally, this Part explains the role of unclaimed property laws and life insurance contracts in the unclaimed life benefits debate.

A. *Settlement Agreements*

After audits on DMF practices in the insurance industry ignited a national controversy, as many as forty insurance companies were accused of asymmetric practices.[27] Strongly worded statements about asymmetric practices cast much of the insurance industry in a harsh

25. *See* Poe, *supra* note 15, at 167–69 (discussing problems associated with reliance on DMF for unclaimed life benefits searches); *see also infra* Part III.F.

26. *See infra* p. 12-13 and notes 63–74 (discussing legal constraints on retroactive legislation).

27. Cyril Tuohy, *Jackson National, Axa Settle Death Master File Suit,* InsuranceNewsNet (Jan. 11, 2016), http://insurancenewsnet.com/innarticle/2016/01/11/two-more-carriers-settle-dmf-dispute-bringing-total-to-24.html. For an explanation of the meaning of "asymmetric" practices in this context, *see supra* note 5 and accompanying text.

light.[28] While many insurance companies were found by regulators to be using the DMF appropriately,[29] this episode is arguably one of the most contentious in the history of insurance regulation in the United States.[30] The outcome of the public response to these issues has important implications for state finances, consumers, and life insurance markets alike.[31] Although the percentage of death benefits that goes unclaimed is quite small—approximately 1% according to industry estimates—the volume of unclaimed benefits easily exceeds one billion dollars.[32] Unclaimed property assets, including life insurance benefits, are playing an increasingly important fiscal role for many state governments.[33]

In 2011, the National Association of Insurance Commissioners (NAIC) established a Task Force to review payment practices on life insurance benefits, including the asymmetric use of the DMF.[34] Primary goals of this Task Force included coordinating the multi-state regulatory response and conducting hearings on life insurance payment practices.[35] A broad regulatory response encompassed over thirty states and numerous insurance companies, including the largest insurers in the United States.[36] Regulators from California, Connecticut, Illinois, Michigan, Florida, New York, Iowa, North Dakota, New Hampshire, and Pennsylvania led the investigations.[37] However, much of the auditing was handled with the assistance of specialized auditing firms formed specifically to target this area of the insurance industry.[38] The role and

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28. *See, e.g.*, Press Release, Controller Betty T. Yee, Cal. St. Controller's Office, Controller Chiang, Insurance Commissioner Jones Announce Settlement With AIG Insurance (Oct. 22, 2012), http://www.sco.ca.gov/eo_pressrel_12705.html ("For decades, too many insurers have fleeced their policyholders. . ."); *see also* Zachary Tracer, *Transamerica Among Insurers in $763 Million Settlement*, BLOOMBERG (June 7, 2013, 5:29 PM), http://www.bloomberg.com/news/articles/2013-06-07/transamerica-among-insurers-in-763-million-settlement (quoting California Controller's statement that "[t]oo often, insurers have sidestepped their legal responsibility to make good on insurance policies purchased by their clients").

29. *See, e.g.*, Press Release, Fla. Office of Ins. Reg., Multistate Report Finds USAA Used the Death Master File (DMF) Appropriately (Feb. 10, 2014), http://www.floir.com/pressreleases/viewmediarelease.aspx?id=2051.

30. Mary Jo Hudson & Jill Murphey, *Am. Council of Life Insurers, Life Insurance, Unclaimed Property and the Death Master File: Toward a Uniform National Framework* 3 (3d ed. 2016) ("These issues have become some of the most contentious in the history of life insurance regulation in the United States.").

31. *See supra* notes 20–22 and accompanying text.

32. *See California Metlife Hearing*, *supra* note 5, at 77–78; *see also infra* p. 28-29 and notes 187–189.

33. *See supra* notes 20–22 and accompanying text; *see also infra* Part IV.

34. *See* NAT'L ASS'N OF INS. COMM'RS, *Regulators to Review Life Insurance Payment Practices* (May 17, 2011), http://www.naic.org/Releases/2011_docs/regulators_review_life_payment_practices.htm.

35. *Id.*

36. *See* Tuohy, *supra* note 27.

37. *Id.*

38. *See* Poe, *supra* note 15, at 165 (explaining the role of auditors).

fee structure of the firms carrying out audits of the insurers on behalf of the states has attracted some controversy as well.[39]

A wave of settlement agreements followed the audits and the Task Force investigations.[40] By 2015, over twenty mostly large life insurers, comprising nearly 70% of the United States life insurance market (as measured by premium volume) had entered into settlements with state treasurers and state insurance regulators.[41] In addition to fines and interest penalties, many of the settlement agreements required insurers to escheat unclaimed life benefits worth hundreds of millions of dollars into state unclaimed property accounts.[42] Other obligations for the signatory companies in the settlement agreements include requirements for periodic DMF searches, timelines for payments on future benefits, and various compliance measures.[43] Below, Table 1 identifies settlement agreements entered into by insurance companies with unclaimed property regulators and insurance regulators in various states.[44]

39. *See, e.g.*, King, *supra* note 20, at 1257–60, 1262–65; *see also* MAEVE O'CONNOR ET AL., U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, *Land Rush!: The Latest Legal Frontier of Unclaimed Property Enforcement and Litigation* 16–17 (Oct. 2012), http://www.instituteforlegalreform.com/uploads/sites/1/Uncaimed_Property_Paper.pdf.

40. *See, e.g.*, CAL. ST. CONTROLLER, *Protecting Life Insurance Beneficiaries*, http://www.sco.ca.gov/protecting_life_insurance_beneficiaries.html (listing and providing links to settlement agreements between the California State Controller and various insurance companies).

41. *See supra* note 11 and accompanying text.

42. *See* Tracer, *supra* note 28.

43. *See* Poe, *supra* note 15, at 164–65 (describing obligations of insurers under settlement agreements); Michelle Dicks et al., *Recent Developments in Insurance Regulation*, 48 TORT TRIAL & INSURANCE PRACTICE L.J. 305, 316–18 (2012).

44. Table 1 includes fines and interest payable by insurers under settlement agreements, but not the value of unclaimed benefits escheated to states and/or beneficiaries. For some companies, specific amounts are not available. For instance, the Hartford and Western & Southern settlements were reported at $18 million and $165 million, respectively, which includes not only fines and interest but also escheatment obligations. *See* Tracer, *supra* note 27. Likewise, Northwestern Mutual was part of a massive multi-state and multi-insurer settlement worth $763 million nationwide but the specific amounts paid by Northwestern are unknown at this time. *See* Press Release, Cal. St. Controller Betty T. Yee, Cal. St. Controller's Office, Controller Reaches Settlements with Transamerica, New York Life and 9 Others (June 7, 2013), http://www.sco.ca.gov/eo_pressrel_13539.html.

TABLE 1: SETTLEMENTS BETWEEN INSURERS AND STATE REGULATORS

Insurer	*Date*	*Amount**
John Hancock (FL)	May 2011	$3 million
John Hancock (CA)	Nov. 2012	$15 million
Prudential	Jan. 2012	$17 million
MetLife	Apr. 2012	$40 million
Forethought	Oct. 2012	$25 million
Nationwide	Oct. 2012	$7.2 million
AIG	Oct. 2012	$11 million
Lincoln National and affiliates	Nov. 2013	$13.2 million
TIAA-CREF	June 2013	$6.2 million
ING	Aug. 2013	$10.7 million
Transamerica	Sep. 2013	$11.2 million
Genworth	Dec. 2013	$1.9 million
Pacific Life	Mar. 2015	$2.45 million
New York Life	Oct. 2013	$15 million
Symetra	Nov. 2014	$1.2 million
Midland Nat'l & North American Co.	Nov. 2013	$3.3 million
Aviva	Nov. 2013	$4 million
Sun Life	Nov. 2014	$3.2 million
Allianz	Dec. 2014	$4.7 million
Guardian Life	Mar. 2015	$2 million
Axa	Dec. 2015	$3.3 million
Jackson National	Dec. 2015	$2.5 million

* *These settlement amounts do not include the value of unclaimed benefits escheated to state unclaimed property accounts, which are often much larger in volume.*

B. *The NCOIL Model Act and State Legislation*

In the midst of the NAIC Task Force investigation and the ongoing settlements, the National Conference of Insurance Legislators (NCOIL) proposed model legislation in 2011 to address the issues surrounding unclaimed death benefits.[45] The NCOIL Model Act, known as the "Unclaimed Life Insurance Benefits Act," is based in part on the settlements that were reached through the NAIC Task Force.[46] Amendments were introduced to the NCOIL Model Act in 2012, including an important adjustment in DMF search requirements from quarterly to semiannual frequency.[47] In 2014, the NCOIL Model Act was revised again by the NAIC Task Force following further consultation and input.[48] As further explained below, these more recent revisions again included changes to DMF search requirements, but left the retroactive application in place.[49]

45. *See* NCOIL MODEL UNCLAIMED LIFE INSURANCE BENEFITS ACT (Nov. 17, 2011), http://ncoil.org/wp-content/uploads/2016/04/2011-Annual-Report-MeetingonUnclaimedBenefitsMinutes.pdf.

46. *See* NAT'L ASS'N OF INS. COMM'RS, *supra* note 34.

47. *See* Dicks et al., *supra* note 43, at 320.

48. *See* NAT'L ASS'N OF INS. COMM'RS, *Unclaimed Life Insurance Benefits (a) Working Group* (Mar. 28, 2015), http://www.naic.org/meetings1503/committees_a_unclaimed_life_benefits_wg_2015_spring_nm_materials. pdf [hereinafter NCOIL MODEL ACT 2014].

49. *Id.*

In terms of search requirements, the current version of the NCOIL Model Act requires life insurers to regularly (at least twice per year) compare the insurer's in-force life insurance policies against the DMF (or other similar databases).[50] Following verified matches of insurer data with the DMF, insurers would then either pay death benefits to beneficiaries identified through this process or escheat those death benefits to states as unclaimed property.[51] The NCOIL Model Act is retroactive in that it can be read to apply to not only new, but also to existing life insurance policies, annuity contracts, and retained asset accounts.[52] If the insurer detects a possible match between the insured's name, date of birth and/or Social Security Number and a person listed in the DMF, the NCOIL Model Act requires the insurer to take steps to confirm the death of the insured through other available information and to locate and contact the beneficiary within ninety days of a match.[53] For some beneficiaries, however, insurers lack address information and will have to develop processes for attempting to locate these beneficiaries.[54] That is particularly true of older policies with imperfect data.[55]

Twenty-three states have already enacted legislation on unclaimed life insurance benefits.[56] Others—including Massachusetts, New Jersey, Oklahoma, Pennsylvania, and South Carolina—are currently considering legislation.[57] As illustrated in Table 2, while some state legislation is explicitly prospective, many statutes are silent on the question of applicability.[58] In some states, regulators have taken the position that the

50. *Id.*

51. *See infra* Part I.D (discussing unclaimed property laws and escheatment obligations in the life insurance context).

52. NCOIL MODEL ACT 2014, *supra* note 48, § 3 (defining various insurance products).

53. NCOIL MODEL ACT 2014, *supra* note 48, § 4.

54. *See* Part III.A (discussing limitations of data quality in older policies).

55. *Id.*

56. States with legislation that is prospective in application include Alabama, Arkansas, Georgia, Mississippi, New Mexico, North Carolina, Tennessee, and Utah. ALA. CODE § 27-15-51 (2013); ARK. CODE ANN. § 23-81-904 (West 2015); GA. CODE ANN. § 33-25-14 (West 2014); MISS. CODE ANN. § 83-7-307 (West 2014); N.M. STAT. § 59A-16, N.C. GEN. STAT. ANN. § 58-58-390 (West 2015); TENN. CODE ANN. § 56-7-3404 (West 2015); UTAH CODE ANN. § 31A-22-1903 (West 2015). States with legislation that is explicitly retroactive include Florida and West Virginia. FLA. STAT. § 717.107 (2016), W. VA. CODE § 33-13D (2016). States with legislation that is silent on the question of retroactive or prospective application include Idaho, Indiana, Illinois, Iowa, Kentucky, Maryland, Montana, Nevada, New York, North Dakota, Rhode Island, and Vermont. IDAHO CODE ANN. § 41-3002 (West 2016), 215 ILCS 185 (2016), IND. CODE ANN. § 27-2-23-11 (West 2015), IOWA CODE § 556.3 (West 2013), KY. REV. STAT. ANN. § 304.15-420 (West 2014), MD. CODE ANN., INS. § 16-118 (West 2014), MONT. CODE ANN. § 33-20-1605 (West 2014), NEV. REV. STAT. ANN. § 688D.090 (2014), N.Y. INS. § 3240 (McKinney 2014), N.D. CENT. CODE, § 26.1-55-02 (2013), R.I. GEN. LAWS § 27-80-4 (West 2014), VT. STAT. ANN. tit. 27, § 1244a (West 2015).

57. *See, e.g.*, Keane's Unclaimed Property Blog, KEANE http://unclaimed-property.keaneco.com/ (last visited Sept. 9, 2016) (providing updates on unclaimed life insurance benefits legislation).

58. *See supra* note 56.

legislation should apply retroactively.[59] Another key issue that varies across states is the DMF search methodology required by various statutes.[60] This is especially important for small and mid-sized insurance companies because the search and matching process can be resource-intensive.[61] Additionally, as explained later in this Article, the accuracy of the DMF presents considerable limitations.[62]

TABLE 2: STATE LEGISLATION ON UNCLAIMED LIFE INSURANCE BENEFITS

State	*Date*	*Prospective*	*Silent***	*Retroactive*
Alabama	May 2012	X		
Arkansas	June 2015	X		
Florida	Apr. 2016			X
Georgia	Apr. 2014	X		
Idaho	July 2015		X	
Indiana	Mar. 2014		X	
Iowa	May 2014		X	
Illinois	Aug. 2016		X	
Kentucky	Apr. 2014		X	^
Maryland	May 2012		X	^
Mississippi	Mar. 2014	X		
Missouri	June 2016		X	
Montana	Mar. 2013		X	
Nevada	June 2013		X	
New Mexico*	Apr. 2013	X		
New York	Dec. 2012		X	
North Carolina*	Oct. 2015	X		
North Dakota	Apr. 2013		X	
Rhode Island	June 2014		X	
Tennessee*	May 2014	X		
Utah*	July 2015	X		
Vermont	May 2013		X	
West Virginia	Apr. 2016			X

Notes: * Four states (New Mexico, North Caroline, Tennessee, and Utah) have adopted prospective legislation that also requires retroactive application for those insurers who have *asymmetrically* used the DMF.

** Where the NCOIL Model Act is silent, the language typically states that the law applies to all "in-force" policies, leading some state regulators to believe the Act applies retroactively.

^ Insurance regulators have taken the position that the NCOIL statute applies retroactively.

59. For an example of litigation in Kentucky courts that addressed the question of retroactivity, *see infra* notes 75–79.

60. Memorandum from Matt Holman, Counsel, Neb. Dep't of Ins. to Unclaimed Benefits Model Drafting (A) Subgroup (June 23, 2015), http://www.naic.org/documents/committees_a_unclaimed_benefits_sg_150626_nebraska_doi_memorandum.pdf.

61. *See* Part III.F (discussing implications of DMF search requirements for medium and small-size insurers).

62. *See* Poe, *supra* note 15, at 167–69 (addressing limitations of the DMF); *see also infra* Part III.F.

Presumptions against retroactive legislation are rooted in the Federal Constitution. Some restrictions on retroactive government actions are expressly provided in the Constitution, such as the Ex Post Facto Clause, the Contract Clause, the Takings Clause, and the Bills of Attainder Clause.[63] In *Landgraf v. Usi Film Prods.*, the Supreme Court made clear that Congress is constrained by a presumption that legislation applies prospectively unless retroactive intent is clearly stated.[64] *Landgraf* also reinforced the point that retroactive legislation touches fundamental notions of due process and fair notice.[65] Similar approaches are taken to statutory construction among the states.[66]

From an economic standpoint, retroactive legislation can have negative consequences for investments made based on settled expectations.[67] Certainty and predictability—in legal and regulatory environments as well as in contracts—are critical factors in business decisions.[68] The importance of legal certainty to commerce has a long history in American political thinking.[69] But, on the issue of retroactivity, the distinction between civil legislation and criminal legislation is critical.[70] While a restrictive approach to retroactive criminal legislation has remained intact, the post-*Lochner*[71] era has seen permissive treatment of retroactive civil legislation.[72] As a result, state legislatures have relatively few constraints when it comes to enacting retroactive

63. Landgraf v. Usi Film Prods., 511 U.S. 244, 267 n.20 (1994). The Ex Post Facto Clause, for instance, flatly prohibits retroactive applicability in criminal legislation.

64. *Id.* at 268.

65. *Id.* at 265 ("[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.").

66. *See, e.g.*, Myers v. Philip Morris Cos., 50 P.3d 751, 759 (Cal. 2002) ("California courts apply the same 'general prospectivity principle' as the United States Supreme Court."); Majewski v. Broadalbin-Perth Cent. School Dist., 696 N.E.2d 978, 980 (N.Y. 1998) (referring to New York's "strong presumption of prospectivity"); *infra* note 78 and accompanying text.

67. *See supra* notes 23–24 and accompanying text.

68. *See* Gerlinde Berger-Walliser, Robert C. Bird & Helena Haapio, *Promoting Business Success Through Contract Visualization*, 17 J. L. BUS. & ETHICS 55, 58–62 (2011) (articulating the importance of legal certainty and predictability in business decisions); *see also* Troy, *supra* note 23, at 21 (explaining economic arguments against retroactivity).

69. *See, e.g.*, THE FEDERALIST NO. 62, at 317–318 (James Madison) (Ian Shapiro ed., 2009) ("What prudent merchant will hazard his fortunes in any new branch of commerce when he knows not but that his plans may be rendered unlawful before they can be executed? What farmer or manufacturer will lay himself out for the encouragement given to any particular cultivation or establishment, when he can have no assurance that his preparatory labors and advances will not render him a victim to an inconstant government?").

70. Harold J. Krent, *The Puzzling Boundary Between Criminal and Civil Retroactive Lawmaking*, 84 GEO. L.J. 2143, 2146–52 (1996) (describing the distinction as a "sharp contrast").

71. Lochner v. New York, 198 U.S. 45 (1905).

72. Charles Tiefer, *Did* Eastern Enterprises *Send Enterprise Responsibility South?*, 51 ALA L. REV. 1305 (2000) (describing constitutional tolerance of policy-based civil retroactivity since *Lochner*).

state legislation.[73] But the law generally requires a clear expression of retroactive intent in legislation.[74]

For reasons elaborated throughout this Article, the question of retroactive versus prospective applicability in legislation on unclaimed life insurance benefits is a crucial issue. This question was confronted directly in Kentucky courts after insurance regulators sought to apply the state's Unclaimed Life Insurance Benefits Act retroactively.[75] Initially, a Kentucky trial court granted summary judgment in favor of the Department of Insurance, finding that the Act did not violate the rule against retroactive application.[76] On appeal, the appellate court reversed the trial court, finding that retroactive application of the Act was improper.[77] Statutory construction in Kentucky provides that statutes operate prospectively, unless "it is absolutely certain" that retroactive application was intended by the legislature.[78] Finding that the presumption against retroactivity sufficient to rule against retroactive application of the Act, the appellate court did not rule on the constitutional issues raised by the appeal.[79]

C. *State Regulation of Insurance Contracts*

Formal regulation of the insurance industry by the states took root as early as the mid-1800s.[80] Among financial services, the regulation of the insurance industry is something of an outlier.[81] Still today, insurance regulation remains the domain of the states.[82] Accordingly, life insurers and life insurance contracts are primarily regulated by the states rather than the federal government.[83] Beginning with *Paul v. Virginia*,[84] which established state supremacy over insurance regulation, the Supreme Court has maintained that insurance regulation is not

73. Jeffrey Omar Usman, *Constitutional Constraints on Retroactive Civil Legislation: The Hollow Promises of the Federal Constitution and Unrealized Potential of State Constitutions*, 14 NEV. L.J. 63, 78 (2013).

74. *See, e.g.*, Landgraf v. USI Film Prod., 511 U.S. 244, 268 (1994).

75. United Ins. Co. of Am. v. Commonwealth, No. 2013-CA-000612-MR, 2014 Ky. App. LEXIS 139, at *8 (Ct. App. Aug. 15, 2014).

76. *Id.* at 5–6.

77. *Id.* at 7.

78. *Id.* at 7.

79. *Id.* at 11.

80. Randall, *supra* note 14, at 630.

81. *Id.* at 629 ("Insurance is unique among financial services in that it is regulated by the states.").

82. *See* Jonathan R. Macey & Geoffrey P. Miller, *The McCarran-Ferguson Act of 1945: Reconceiving the Federal Role in Insurance Regulation*, 68 N.Y.U. L. REV. 13, 14–15 (1993) ("Among major financial institutions in the United States, only insurance firms are subject to plenary state regulation.").

83. *See* Robert F. Weber, *Combating the Teleological Drift of Life Insurance Solvency Regulation: The Case for a Meta-Risk Management Approach to Principles-Based Reserving*, 8 BERKELEY BUS. L.J. 35, 39 nn.2–3 (2011) (specifying exemptions in federal regulation for insurers); *see also* Feingold v. John Hancock Life Ins. Co. (USA), 753 F.3d 55, 62 (1st Cir. 2014).

84. Paul v. Virginia, 75 U.S. 168 (1869).

within the purview of federal oversight.[85] Coordinated efforts among state insurance commissioners—namely, through the NAIC—have given rise to a roughly uniform legal and regulatory landscape for the insurance industry, though tensions between state-centric system and uniformity persist.[86]

Life insurance contracts long have contained regulator-approved language that the insurer will investigate and pay a claim upon receipt of proof of death.[87] Life insurance contracts generally require the performance of certain acts, such as premium payments and proof of death, as conditions precedent to the insurer's obligation to pay.[88] The requirement for proof of death is well established in the business of life insurance for both operational and public policy reasons.[89] In some states, this practice has been codified by statute.[90]

These contractual terms imply an obligation on the part of the beneficiary or insured's estate to initiate the claims process. In other words, the responsibility for initiating the process for a death claim lies not with the insurer but with the beneficiary or the insured's estate. Under state insurance laws, and as a matter of contract, insurers historically have not had an affirmative duty to investigate whether an insured has died.[91] A number of recent court decisions have confirmed that insurers have no obligation to affirmatively search for evidence of an insured's death, including by performing searches of the DMF.[92]

Clearly the incentive to file a death claim lies with the beneficiary, which stands in contrast to the lack of incentive to notify the insurer to cease annuity income with respect to an annuity.[93] Once a claim has been filed, life insurance contracts include language that the insurer will pay interest on the proceeds.[94] Some states mandate that the

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85. *See* Randall, *supra* note 13, at 631 (describing Supreme Court decisions on the question of federal regulation of insurance and noting the failure of an attempt to amend the Constitution to permit federal regulation of insurance).

86. *Id.* at 630.

87. *See, e.g.*, United Ins. Co. of Am. v. Commonwealth, No. 2013-CA-000612-MR, 2014 Ky. App. LEXIS 139, at *8 (Ky. Ct. App. Aug. 15, 2014).

88. KENNETH BLACK JR. & HAROLD D. SKIPPER JR., LIFE AND HEALTH INSURANCE 191, 204–05 (13th ed. 2000) ("[T]he insurer's obligation to pay a claim depends upon the performance of certain acts, such as payment of premiums and furnishing proof of death.").

89. *Id.* ("Life insurance policies understandably require 'due proof' of the insured's death before paying the face amount.").

90. *See, e.g.*, Thrivent Fin. v. Florida, 145 So. 3d 178, 180–181 (Fla. Dist. Ct. App. Aug. 5, 2014) (citing statutory language that life insurance claims shall be made once the insurer receives due proof of death).

91. *See, e.g.*, Feingold v. John Hancock Life Ins. Co. (USA), 753 F.3d 55, 61 n.6 (1st Cir. 2014); *Thrivent Fin.*, 2014 Fla. App. LEXIS 11923 at 182; Total Asset Recovery Servs. v. Metlife, Inc., No. 27-CV-11-2113, 2012 Minn. Dist. LEXIS 92, at *4 (Minn. Dist. Ct. Dec. 31, 2012); Andrews v. Nationwide Mut. Ins. Co., 2012 WL 5289946, at *1 n.1, *4 (Ohio Ct. App. Oct. 25, 2012); State *ex rel.* Perdue v. Nationwide Life Ins. Co., No. 12-C-287, slip op. at 14 (W. Va. Cir. Ct. Dec. 27, 2013).

92. *See* cases cited *supra* note 91.

93. *See infra* Part III.B.

94. JAMES S. TRIESCHMANN, ROBERT E. HOYT & DAVID W. SOMMER, RISK MANAGEMENT AND INSURANCE Appendix D-11 (12th ed. 2005).

insurer pay interest from the date when a claim is filed to the date the claim is paid, if that period exceeds thirty days.[95] Other states provide for the payment of interest from the date the insured died until the claim is paid.[96] Thus, once a death claim is filed, it is generally in the insurer's interest to promptly pay.[97]

For the purposes of unclaimed benefits, the mortality limiting age is the age at which the applicable mortality table assumes death occurs.[98] If no claim is made and the life insurance policy remains in force when the insured attains the mortality limiting age, the insurer then is required either to pay the policy proceeds to the insured or the beneficiary, or to hold the funds with accumulated interest.[99] Generally speaking, the mortality limiting age is established by statute or is mandated by state insurance departments.[100]

As discussed in this section, the insurer is obligated to pay a claim following the performance of certain acts by the policyowner (or the beneficiary or estate), such as payment of premiums and furnishing proof of death.[101] Additionally, the requirement for proof of death is well established.[102] These expectations are well settled and longstanding.[103] Retroactive requirements to search the DMF for evidence of death of an insured among the insurer's entire book of policies would clearly be activity that was not anticipated at the time the policies were underwritten, priced, and issued. Thus, legislation requiring retroactive DMF searching would have adverse impacts on the financial strength of insurers and the insurer's policyholders and/or shareholders.

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95. Such states include Arizona, Arkansas, Idaho, Iowa, Kentucky, Maine, Missouri, Montana, Nebraska, North Carolina, Oklahoma, South Carolina, and Wisconsin. AMERICAN COUNCIL OF LIFE INSURERS, ACLI LAW SURVEY: PAYMENT OF INTEREST ON LIFE INSURANCE DEATH CLAIMS 2–9 (2008), https://www.acli.com/Events/Documents/718fbcfecad942c9af78191e456d5344Fri072409IndustryResourcesTipsandTricksforUndersta.pdf.

96. *Id.* Such states include California, Colorado, and New Hampshire.

97. *In Re: Nationwide Insurance Company: Hearing Before the Florida Office of Insurance Regulation*, 42 (2011) (statement of Eric Henderson, Senior Vice President of Individual Investments, Nationwide Life Insurance Company) ("[A]ctually if you just go for pure financial interest, it's in our interest to [escheat unclaimed insurance benefits] so we don't have [to pay] that statutory interest.").

98. This mortality limiting age in most cash value policies has traditionally been age 100. In more recently issued policies the age may be higher, often age 120. *See* Aubrey Cohen, *What You Need to Know About Unclaimed Life Insurance Policies*, NERDWALLET (July 2, 2015), http://www.nerdwallet.com/blog/insurance/life/what-to-know-about-unclaimed-life-insurance-policies/.

99. *Id.*

100. *See, e.g.*, GA. CODE ANN. § 33-10-13 (2016) (setting insurance tables); W. VA. CODE ANN. § 33-7-9 (2014) (setting insurance tables).

101. *See supra* text accompanying notes 87–90.

102. *See supra* text accompanying notes 88–91.

103. *See supra* text accompanying notes 87–90.

D. *Unclaimed Property Laws*

Like insurance regulation, unclaimed property law has been left to the states.[104] But most states have adopted a version of uniform legislation on unclaimed property, which emerged in the 1950s to resolve divergence and confusion among the states.[105] After the wide adoption of this uniform legislation, unclaimed property laws only vary slightly from state-to-state.[106] Generally speaking, unclaimed property laws in the United States are custodial in nature, meaning that the state holds the unclaimed property in perpetuity until the rightful owner makes a claim of ownership.[107] Modern escheat laws provide that the state is entitled to take title in or take custody of unclaimed property that is presumed abandoned.[108]

Consistent with insurance regulation and insurance contract terms, state unclaimed property laws (e.g., Arkansas) historically have provided that life insurers have an obligation to escheat policy proceeds either where death benefits are unclaimed after the insurer receives proof of death or where the insured has attained the mortality limiting age but cannot be located.[109] That is, unclaimed life insurance proceeds do not stay with insurers indefinitely.[110] Some state unclaimed property laws (e.g., Virginia) also require escheatment where the insurer learns of an insured's death even though the insurer did not receive a claim and proof of death from the beneficiary.[111]

Property escheated to the state does not become titled property of the state.[112] That is, unclaimed property laws generally are "custodial" in the sense that the state takes custody of unclaimed property that has been escheated to the state until the property is claimed (if ever) by the rightful owner.[113] Unclaimed property laws typically allow states to use a portion of the funds held in state unclaimed property accounts, so

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104. King, *supra* note 20, at 1256.

105. *See* Diamond, *supra* note 20, at 980–81 (citing uniform unclaimed property acts and discussing their historical context).

106. *Id.* at 981. Most states have adopted model legislation on unclaimed property.

107. *See* Susan T. Kelly, Note, *Unclaimed Billions: Federal Encroachment on State Rights in Abandoned Property*, 33 B.C. L. REV. 1037, 1043 (1992).

108. *Id.* at 1037.

109. ARK. CODE ANN. § 18-28-202 (2015).

110. *See, e.g.*, Paul Sullivan, *Tracking Down and Collecting Unclaimed Life Insurance,* N.Y. TIMES (Feb. 25, 2011), http://www.nytimes.com/2011/02/26/your-money/life-and-disability-insurance/26wealth.html?pagewanted=all&_r=0.

111. VA. CODE ANN. § 55-210.4:01 (1984).

112. King, *supra* note 20, at 1250.

113. *See, e.g.*, Fong v. Westly, 12 Cal. Rptr. 3d 76, 84 (Cal. Ct. App. 2004) ("Under the Unclaimed Property Law, property received by the state cannot permanently escheat to the state. No unconstitutional taking occurs where a state exercises its right to take custody of abandoned property, as opposed to taking absolute title." (citation omitted)); TXO Prod. Corp. v. Okla. Corp. Comm'n, 829 P.2d 964, 971 (Okla. 1992) (Finding the unclaimed property act is not an escheat statute, but a "'custodial taking law[ ]' which make[s] the State custodian of proceeds . . . whose owners are unknown or cannot be located, subject to the claims of those who prove ownership or a prior right to possession.").

long as the state maintains adequate funds to satisfy claims of the rightful property owners who may appear.[114]

Increasingly, unclaimed property accounts comprise a significant role in the fiscal picture of state governments.[115] As noted in a report of the Legislative Analyst's Office, unclaimed property is the fifth-largest revenue source for the California General Fund.[116] Most states do not pay interest on the funds held in unclaimed property accounts. For example, California stopped paying interest in 2003 on the value of unclaimed property in possession of the state.[117] Some states, however (e.g., Virginia), pay interest if the property would be interest bearing in the custody of the holder.[118] While state laws vary with respect to the payment of interest on unclaimed property, insurers do pay interest on life insurance proceeds.[119] Thus, beneficiaries can be disadvantaged by escheat when an insurance company would owe statutory interest from date of death because most states, like California, do not pay interest on escheated funds.[120]

II. Competition and Insurance Markets

Regulators and consumers rely on the competitive nature of the insurance market to help keep prices relatively low. Competition in the insurance market contributes to better prices and products being available to consumers.[121] Competition forces insurers to charge prices that closely match the costs they face. In life insurance this not only includes core costs like mortality charges, but also costs imposed by regulation. Factors that threaten the ability of small and medium-sized insurers to continue operating or lead to consolidation in the industry can result in fewer insurers and less competition.

Therefore, it is important to understand the competitive landscape of the insurance industry. In assessing the competitiveness of a market, Vaughan and Vaughan indicate that economists typically focus on mar-

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114. *See, e.g.*, Morris v. Chiang, 77 Cal. Rptr. 3d 799, 802, (Cal. Ct. App. 2008) ("The purpose[ ] of the [Unclaimed Property Law is] to protect the owners of unclaimed property . . . and 'to give the state rather than the holders of unclaimed property the benefit of the use of it . . . .'") (quoting Harris v. Westly, 10 Cal. Rptr. 3d 343, 346 (Cal. Ct. App. 2004)); Clark v. Strayhorn, 184 S.W.3d 906, 910 (Tex. App. 2006) ("[T]he unclaimed property act creates a mechanism for individuals to reclaim their lost property but empowers [Texas] to use abandoned property for the benefit of the State until a claim of ownership has been asserted.").

115. *See supra* notes 20–21 and accompanying text; *see also infra* Part IV.

116. Mac Taylor, Legislative Analyst's Office, Unclaimed Property: Rethinking the State's Lost & Found Program 3 (2015), http://www.lao.ca.gov/reports/2015/finance/Unclaimed-Property/unclaimed-property-021015.pdf.

117. *Id.* at 10.

118. Va. Code Ann. § 55-210.21 (2016).

119. For a multi-state survey of state laws on the payment of interest on life insurance claims, see American Council of Life Insurers, *supra* note 94.

120. *See* Taylor, *supra* note 116.

121. *See* Robert E. Hoyt et al., An Examination of the Role of Insurance Producers and Compensation in the Insurance Industry 6–8 (2005), http://www.ibawest.com/pdf/Articles/IIABAContigencyCommissions2006.pdf.

ket structure and market conduct as measures of competition.[122] According to their framework, important factors in assessing market structure are the number of competitors and the percentage of the market controlled by one or a few insurers.[123] They suggest that market conduct is reflected by the ease of entry and exit into the market and changes in market share over time, which is also impacted by the regulatory environment.[124]

What does the evidence suggest regarding the relative competitiveness of the life insurance market in the United States? Perfect competition in the classical sense requires the following characteristics in the marketplace: (1) many buyers and sellers; (2) perfect information; (3) unrestricted entry and exit; and (4) a homogenous product. However, rarely does perfect competition exist.[125] Even if all of these characteristics are not fully met, a market can be viewed as competitive.[126]

A. *Market Participants*

In the United States, thousands of insurance companies compete for business.[127] While differences do exist between the exact products offered by different insurers, a relatively homogenous set of insurance products are offered by these insurers including term life, permanent life, and annuities. A number of insurers have been in business for well over 100 years, but many insurers have formed in recent periods or have entered new markets. This confirms the relative ease of entry into and exit from the insurance business as compared to firms in capital-intensive industries like heavy manufacturing, pharmaceuticals, and energy production.

Historically the life insurance industry overall has been a highly competitive business, in terms of both the numbers of insurers and the products, services, and prices they offer. In 2012, more than 800 life insurers were operating in the United States.[128] The top ten insurers in individual life insurance represent about 57% of the market, but the remaining 43% of the life insurance market is distributed across a large number of insurers of varying size.[129] Many smaller and medium-sized insurers continue to exist and thrive in the insurance marketplace, adding substantial amounts of capacity to the market. In turn, these insurers help to increase competition, reduce prices, and increase availability of insurance to consumers.

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122. Emmett J. Vaughan & Therese Vaughan, Fundamentals of Risk and Insurance 91 (8th ed. 1999).

123. *Id.*

124. *Id.*

125. *See* Kenneth Black, Jr. et al., Life Insurance 10–14 (14th ed. 2013).

126. *Id.*

127. James M. Carson et al., *Incentive Compensation and the Use of Contingent Commissions: The Case of Smaller Distribution Channel Members*, 25 J. Ins. Reg. 53, 54 (2007).

128. American Council of Life Insurers, Life Insurers Fact Book 5 (2013), https://www.acli.com/Tools/Industry%20Facts/Life%20Insurers%20Fact%20Book/Documents/Life_Insurers_Fact_Book_2013_All.pdf.

129. *See id.* at 99.

In terms of insurance buyers, data from the Life Insurance Marketing and Research Association (LIMRA) reveals that the life insurance industry has been able to reach most United States citizens. About 62% of all people in the United States were covered by some type of life insurance in 2013, according to LIMRA's 2014 *Insurance Barometer Study*.[130]

B. *Market Share Characteristics*

The second factor that Vaughan and Vaughan consider in assessing the competitiveness of a market is the market share characteristics and the level of concentration.[131] A commonly accepted measure of market concentration is the Herfindahl-Hirschman Index (HHI), which is calculated by squaring the market share of each firm competing in a market, and then summing the resulting numbers.[132] The HHI number can range from close to zero to 10,000.[133] In this context, by any accepted measure the life insurance marketplace is a very competitive one. The United States Department of Justice and the Federal Trade Commission generally consider markets with HHI scores under 1,500 as unconcentrated.[134] Unconcentrated markets are generally viewed as being more competitive. Based on data from A.M. Best for the ordinary life insurance market, the concentration score (HHI) in 2013 was 450.[135]

Thus, while not all of the characteristics for perfect competition are fully met in the insurance marketplace, most observers would conclude that the market for insurance is highly competitive. Given the value of competition to insurance consumers, it is important to consider the impact of any regulatory actions on the competitiveness of the insurance marketplace.[136] In the next Part, we address implications of retroactive DMF-search legislation on competition for insurance markets.

III. Retroactive DMF-Search and the Insurance Marketplace

"The rule of law, to summarize, is a defeasible entitlement of persons to have their behavior governed by rules publicly fixed in advance."[137]

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130. Ashley V. Durham, Life Insurance Marketing and Research Association, Insurance Barometer Study 3 (2014).

131. Vaughan & Vaughan, *supra* note 122, at 91–92.

132. *See, e.g.*, Jerry A. Hausman & J. Gregory Sidak, *Evaluating Market Power Using Competitive Benchmark Prices Instead of the Herfindahl-Hirschman Index*, 74 Antitrust L.J. 387–88 (2007) (pointing out widespread reliance on the HHI by regulators in the United States, the European Union, Australia, and New Zealand).

133. *See* Eli M. Noam, *Deregulation and Market Concentration: An Analysis of Post-1996 Consolidations*, 58 Fed. Comm. L.J. 539, 541 (2006).

134. *See* U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines 19 (Aug. 19, 2010), http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf.

135. A.M. Best, 2014 Statistical Study: U.S. Ordinary Life 222–28 (2014).

136. *See supra* Part II.

137. Stephen R. Munzer, *A Theory of Retroactive Legislation*, 61 Tex. L. Rev. 425, 471 (1982). Though boldly stated, this quote underscores connections between notice, predictability, and notions of fairness in the law.

As discussed earlier, several states have enacted legislation that requires insurers to search the DMF on a regular basis in order to identify deceased insureds with unclaimed death benefits.[138] Given modern technology, the costs of complying with these statutes are not unduly burdensome for policies issued after the effective date of the new legislation because insurers have much better data for these policies that is readily accessible through modern electronic databases. However, costs of compliance for legislation that is applied retroactively on existing policies would be significant, as explained in this Part.

In addition, such compliance costs were not contemplated in pricing of these in-force policies. For some policies with inadequate data, compliance is especially challenging, or even impracticable.[139] Thus, while there seems to be general agreement that such legislation is reasonable and appropriate on a prospective basis, the impact of legislation, if applied retroactively to existing (and especially older) policies, is an area of concern due to its potential cost implications for insurers and consumers.[140] This Part addresses various issues related to the proposed legislation on unclaimed death benefits, focusing particularly on implications stemming from retroactive legislation in the context of the insurance market.

A. *Quality of Records on Existing Books of Policies*

Understandably, many individuals are unaware of the data quality challenges faced with existing books of mature policies held by insurers. Prior to the early 1980s, most data processing was handled with the standard IBM punch cards that often contained just eighty columns. As a result, only critical data fields were collected electronically, and in many cases information was abbreviated. Social security numbers were not usually collected until after the mid-1980s. Names were often abbreviated, full birthdate information was not routinely entered, and insurers often only captured the insured's age at policy issue. Prior to the 1970s, many insurers relied heavily on paper records. This pattern was even more pronounced in smaller and medium-sized insurers due to the high cost of data processing and data storage. These normal business practices of the past make data matching with the DMF for older policies difficult, costly, and much more susceptible to errors.

B. *Life Insurance versus Annuities*

Some observers have commented on the asymmetric practice of using the DMF to review benefits being paid on annuities but not doing the same on life insurance for unclaimed death benefits.[141] Whereas life insurance pays benefits upon the death of the insured policyholder, annuities are a financial contract that pays the holder on regular inter-

138. *See supra* Part I.B.

139. *See* Poe, *supra* note 15, at 164 (citing the difficulty of using DMF searches without accurate social security numbers).

140. *See* O'CONNOR ET AL., *supra* note 39, at 3–7.

141. *See, e.g.*, Hartley, *supra* note 4, at 379.

vals, typically for the rest of their life.[142] Key differences between these two financial products explained below are especially relevant.

First, contact information is readily available and recent for annuity business that is in payout mode because regular checks are being sent and collected, and the interaction with the claimant is recent and ongoing.[143] Differences in the tax treatment of annuities and life insurance products have also contributed to contrasts in data collection practices. Unlike annuities, which often involve the issuance of tax documents, life insurance proceeds received as death benefits generally are excluded from taxable income.[144] As a result, data such as social security numbers and addresses were historically more frequently and consistently collected for annuity policies than for life insurance policies.[145] In the case of life insurance, mature policies have data that is much older, less accurate, and less complete, and contact with the policyholder is much less frequent.[146]

Second, annuities in payout, which some insurers searched against the DMF, represented a much smaller portion of the book of business than would be impacted by the proposed legislation on unclaimed death benefits from life insurance policies.[147] In life insurance, searches are required of the entire book of business since every policy on the insurer's books would need to be evaluated. This is much more costly and more likely to result in false positives, especially for older policies that would be included in legislation that is retroactive.[148]

Third, in the case of life insurance, money is held in trust by the insurer pending notification that payment under the contract should be made.[149] In the case of annuities, payments are being made from policyholder funds. If insurers did not monitor the appropriateness of continued payouts on annuities, not only would it encourage fraud, but it would also be contrary to the interest of all policyholders and other stakeholders of the insurer.[150] It would lead to increased costs for all other policyholders and would force the insurer to raise prices for its products going forward. Taking these differences into account, asymmetrical use of the DMF for matches in annuities but not for life insurance policies is not as unreasonable as it appears at first glance.

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142. *See* BLACK, JR. ET AL., *supra* note 125, at 123.

143. *See* Poe, *supra* note 15, at 161.

144. *See* BLACK, JR. ET AL., *supra* note 125, at 544.

145. *See* Ed Leefeldt, *'Death Master' Limits Life Insurance Companies' Access to Death Records*, INSURE.COM (Jan. 9, 2012), http://www.insure.com/life-insurance/ssa-limits-death-records.html (quoting American Council of Life Insurers (ACLI) spokesperson Whit Cornman statement that "Social Security numbers generally weren't collected [by insurers] decades ago, making matches much less reliable. In contrast, insurers tend to have up-to-date records of Social Security numbers for annuity buyers for tax reasons.").

146. *Id.* (describing deficient data in old life policies and reasons for lack of contact between policyholders and insurers).

147. As recently as 2013, annuities in payout represent approximately 5% of the total book of business in force of United States insurers. *See* A.M. BEST, *supra* note135.

148. *See* Poe, *supra* note 15, at 164.

149. *See supra* notes 90–91 and accompanying text (citing relevant case law).

150. L. Lee Colquitt & Robert E. Hoyt, *An Empirical Analysis of the Nature and Cost of Fraudulent Life Insurance Claims*, 15 J. INS. REG. 451, 452, 477–78 (1997).

C. *Industrial Life Insurance and Small Face Value Policies*

Insurers often specialize, focusing on different segments of consumers. While some insurers write primarily large face value policies, others focus on providing coverage through policies with much smaller face values. Historically, many of the small face value life insurance policies were referred to as "industrial" life insurance.[151] One insurance textbook states that "industrial life, home service life, or debit insurance, refers to a type of cash value life insurance that is sold in very small amounts, primarily to meet the burial needs of low-income insureds."[152] Due to insurance company financial reporting requirements, we are able to collect specific data on industrial life insurance. However, the analysis provided here would apply equally to other forms of small face value life insurance. The same textbook further notes that "because the face amount is so small, underwriting standards often are fairly liberal, and medical exams are rarely required."[153] Similarly, the limited underwriting requirements frequently resulted in relatively limited information being collected by the insurer at time of issue.[154]

In the 1960s, approximately ninety-eight million industrial life policies were in force, with approximately $41 billion in face amount of coverage.[155] In Metropolitan Life's settlement with states, most of the policies at issue in the multistate settlement were industrial life policies, which MetLife stopped selling in the 1960s.[156] Even today, however, some insurers—most often small and medium-sized insurers—have industrial life insurance as part of their overall book of business. Also, as noted above, a number of insurers continue to provide other small face value life insurance to consumers.[157] These categories of life insurance products are important to many modest and low-income consumers.[158]

While this line of insurance has continued to decline in significance relative to new issues, a large number of very small policies remain in force with insurers. Based on data from A.M. Best, approximately twelve million industrial life insurance policies with a total face amount of coverage of approximately $11 billion remain in force in 2014.[159] The average policy face amount was $903 for industrial life, which compares to an average policy face amount of $106,761 for ordinary life insurance.[160]

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151. *See* TRIESCHMANN ET AL., *supra* note 94, at 329.

152. *Id.* at 329–30.

153. *Id.* at 330.

154. *See* L. Lee Colquitt et al., *Adverse Selection in the Credit Life Insurance Market*, 31 J. INS. REG. 157 (2012).

155. *See* Joseph M. Belth & E.J. Leverett, Jr., *Industrial Life Insurance Prices*, 32 J. RISK & INS. 367 (1965).

156. *See* Walsh, *supra* note 7.

157. *See* Colquitt et al., *supra* note 154, at 172.

158. *Id.*

159. A.M. BEST, *supra* note 135, at 67.

160. *Id.* at 51–52.

From these figures, if we assume a relatively fixed cost per policy of conducting a DMF search and verification process, this would mean that it is roughly 100 times more costly per unit of coverage to comply with retroactive requirements for industrial life insurance than for ordinary life insurance. Additionally, this cost estimate assumes that the quality of records between industrial life and ordinary life are equal, which of course is not the case.[161] As a result, the cost multiple would be even higher than 100 times for industrial life insurance. Retroactive requirements to search for evidence of death of an insured among the insurer's book of industrial life insurance or other small face value policies would clearly be activity that was not anticipated or legally required at the time the policies were underwritten, priced, and issued.[162] Legislation requiring retroactive DMF searching would impact adversely on policyholders and/or shareholders of these companies.

D. *Price Sensitivity of the Demand for Insurance*

Since insurance is often viewed as a necessity, or is required by law or by other entities as part of financial transactions, the demand for most insurance is relatively price inelastic.[163] That is, the overall demand for these products does not decline significantly when the price increases.[164] For the life insurance market, Browne and Kim estimated the price elasticity for life insurance as -0.24.[165] Their finding suggests that demand for life insurance is relatively insensitive to changes in price. This means that a 10% increase in the price of life insurance would lead to only a 2.4% decline in the demand for life insurance.

So, what is the relevance of these findings for consumers in the market for life insurance? Competition means that insurers will be forced to charge prices that reflect the cost of the product. Also, it is important to note that life insurance rates are not closely regulated. As stated by Rejda and McNamara, "[l]ife insurance rates are not directly regulated by the states. Rate adequacy is achieved by laws that require legal reserves to be at least a minimum amount."[166] This prevents rates from being set too low, but the states depend on market competition to assure that rates are not set at excessive levels. However, since the NCOIL Model Act prohibits passing on the increased compliance costs to existing customers in the form of premium increases, the costs necessarily have to be passed on to future customers. Moreover, these increased costs necessarily will be significant because insurers not only assume new administrative burdens, but the NCOIL Model Act acceler-

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161. *See* Colquitt et al., *supra* note 154, at 158; *see also* Poe, *supra* note 14, at 161.

162. *See* Poe, *supra* note 15, at 161 (discussing data deficiencies in small policies).

163. *See* Robert E. Hoyt, *The Effect of Insurance Fraud on the Economic System*, 8 J. INS. REG. 304, 308 (1990).

164. *Id.* at 307.

165. Mark J. Browne & Kihong Kim, *An International Analysis of Life Insurance Demand*, 60 J. RISK & INS. 616, 628 (1993).

166. GEORGE E. REJDA & MICHAEL J. MCNAMARA, PRINCIPLES OF RISK MANAGEMENT AND INSURANCE 150 (12th ed. 2014).

ates the escheatment of death benefits that could not be paid to beneficiaries which otherwise would be escheated at the mortality limiting age.[167]

As discussed above, in a competitive market such as the insurance market, all costs of doing business must be incorporated and these added costs have to be borne by someone (shareholders, policyholders, or future customers). It is worth noting that in the ordinary life insurance market, the majority of premiums are written by stock insurers, with the remaining premium written by mutual and fraternal insurers.[168] So, for a significant part of the market, the owners are the policyholders and they will bear the compliance costs along with future consumers.[169] It is also important to note that for consumers with very limited disposable income, who generally purchase industrial or small face value policies, even small increases in premium may actually dissuade them from purchasing insurance at all.

E. *Impact of Retroactivity on Small and Medium Insurers*

The impact of requiring insurers to retroactively search the DMF would be greatest on medium and smaller-size insurers. These insurers have less internal technology and personnel resources available to address these requirements than large insurers. While insurer records are perfectly adequate to properly service policies, many insurers' records, especially for medium and small-size insurers, are not adequate to comply cost-effectively with a law that retroactively changes the underlying insurance contract. These insurers would be more likely to require external consulting and analytics support to comply with these requirements. Due to their smaller size, the impact of these additional costs on a per policy basis would be much higher. This could result in financial solvency issues or departure of these insurers from the market.[170] Loss of these insurers from the market would result in reduced underwriting capacity, and the availability and price of coverage would be adversely affected. This impact would be most severe in local markets and for moderate and low-income consumers.

Consumers benefit from competition in the marketplace.[171] In the long run, competition generates better products and services at lower prices. An environment in which insurers of varying sizes can compete results in consumers having more choices. It also leads to more insurers competing in the market place, and a competitive insurance marketplace makes insurance relatively more available and more affordable to millions of insurance consumers.[172] Imposing costs that disproportionately affect small and medium insurers is likely to have an

167. *See supra* notes 99–100 and accompanying text.
168. AM. COUNCIL OF LIFE INSURERS, *supra* note 128, at 1.
169. *Id.*
170. *See, e.g.*, James M. Carson & Robert E. Hoyt, *Life Insurer Financial Distress: Classification Models and Empirical Evidence*, 62 J. RISK & INS. 764, 767 (1995); Mark J. Browne et al., *Dynamic Financial Models of Life Insurers*, 5 N. AM. ACTUARIAL J. 11, 12–13 (2001).
171. *See* BLACK, JR. ET AL., *supra* note 125, at 10–12.
172. *See* HOYT ET AL., *supra* note 121, at 7.

adverse impact on the level of competition in the insurance market.[173] In insurance, "one-size doesn't fit all." These added costs, especially for medium and smaller insurers, will reduce profitability, cash flow, financial strength, solvency and/or return on capital. As noted earlier, many insurers are owned by their policyholders, and so legislation that negatively impacts the insurance market ultimately also negatively impacts insurance consumers as policyholders and as owners.[174]

F. *Error Rates, Fuzzy Matching, and the DMF*

The Social Security Administration's DMF, created to assure that Social Security checks would not be sent to people who had died, contains over 80 million records.[175] Errors in the data, such as incorrect Social Security numbers, misspelled names, or erroneous birthdates, are known to exist.[176] These errors have been the subject of a wide range of inquiries, from coverage on *60 Minutes* to formal reports by the United States Government Accountability Office.[177] DMF errors would have a material impact on insurers, particularly small and medium-sized companies. A review conducted by one modest-sized midwestern life insurer exposed a significant incidence of false positive matching in search results.[178]

Another report found that, of the roughly 2.8 million deaths reported to the Social Security Administration and listed in the DMF each year, approximately 14,000 entries per year were incorrect in that the person listed was not actually dead.[179] That the DMF is far from error-free is well established.[180] Less widely appreciated, but also critically important, are the practical difficulties of conducting DMF matching with poor data quality.[181] With low data quality, especially for mature books of business with policies issued many years ago, false positive rates are significant.[182]

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173. *Id.*

174. *See supra* notes 168–169 and accompanying text.

175. *See* HUDSON & MURPHEY, *supra* note 30, at 12.

176. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, PRELIMINARY OBSERVATIONS ON THE DEATH MASTER FILE (2013) [hereinafter *Testimony*] (statement of Daniel Bertoni, Director, Education, Workforce, and income Security Issues), http://www.gao.gov/assets/660/654411.pdf; Rae Ellen Bichell, *Social Security Data Errors Can Turn People into the Living Dead*, NPR (Aug. 10, 2016, 5:01 PM), http://www.npr.org/sections/health-shots/2016/08/10/489318279/social-security-data-errors-can-turn-people-into-the-living-dead.

177. *See* CBS, *Dead or Alive*, 60 MINUTES (Mar. 15, 2015), http://www.cbsnews.com/news/social-security-identity-fraud-scott-pelley-60-minutes/; *Testimony*, *supra* note 175.

178. *See* NEB. DEP'T. OF INS., *supra* note 60.

179. *See* Blake Ellis, *Social Security Wrongly Declares 14,000 People Dead Each Year*, CNN MONEY (Aug. 22, 2011, 1:41 PM), http://money.cnn.com/2011/08/17/pf/social_security_deaths_mistakes/index.htm.

180. *See* Michael Hiltzik, *'60 Minutes' Bungles Another Hit Piece on Social Security*, L.A. TIMES (Mar. 16, 2015, 12:26PM), http://www.latimes.com/business/hiltzik/la-fi-mh-60-minutes-bungles-20150316-column.html (characterizing reports on DMF inaccuracies as "a hardy journalistic perennial", like reports on how bad the traffic is in your town or sweeps-week TV pieces on gourmet restaurants flunking sanitary inspections").

181. *See supra* Part III.A (describing the low data quality in older policies).

182. *See, e.g.*, NEB. DEPT. OF INS., *supra* note 60.

The challenges to matching insurer records with data in the DMF are exponentially larger if combined with "fuzzy matching" criteria whereby recognition of data quality issues in the DMF are addressed by allowing for non-exact matches in order to expand the likelihood of possible matches. For example, instead of searching only on "James," an insurer also would search for "Jim," "Jimmy," and so on. Likewise for Social Security numbers, instead of searching for an exact match of all nine digits, fuzzy matching would return a hit if at least seven or eight digits matched. The use of fuzzy matching vastly increases the number of possible names, which then would have to be searched and verified against the insurer's records to see if an insured is dead or alive.

Thus, errors in the database imply that it is not as straightforward in practice to simply search the DMF for matches to the insurer's customer data. The erroneous entries in the DMF, especially when coupled with fuzzy matching criteria as required by some states (e.g., New York), significantly increase the search and verification costs for life insurers seeking to comply with DMF-related legislation. The burden of these requirements is significantly higher for small and mid-sized insurance companies.[183] And costs would be even higher across the board if legislation applies retroactively to older policies.

IV. DMF Legislation and State Revenues

According to one estimate, over $40 billion of unclaimed property is currently held by states.[184] Unclaimed life insurance benefits are relatively rare at just 1% of all policies.[185] But, because insurers pay out tens of billions in death benefits every year, the volume of unclaimed benefits is considerable in the aggregate.[186] One estimate placed the approximate value of unclaimed life insurance transferred to the states at $351 million in 2009.[187] New York alone received about $400 million in unclaimed life insurance property between 2000 and 2011.[188] Meanwhile, as of 2011, Florida had approximately $355 million in unclaimed life insurance in its accounts.[189] These figures have grown as states have increasingly looked to unclaimed property law as an alternative to raising revenues through taxes.[190] Unclaimed property is now the fifth-largest revenue source for the California General Fund.[191]

183. *See* Scism, *supra* note 10 (explaining the contrasting economics of new statutory requirements for smaller insurers versus the largest insurers).

184. *See What Is Unclaimed Property*, Nat'l Ass'n of Unclaimed Prop. Adm'rs (last visited Feb. 29, 2016), https://www.unclaimed.org/what/.

185. *See supra* note 32 and accompanying text.

186. Insurers distributed over $62 billion in life insurance claims in 2011. *See supra* note 1 and accompanying text.

187. These figures are acknowledged as likely underestimating the total value. *See* Sullivan, *supra* note 109 (citing a Joseph M. Belth study of the largest twenty insurance companies and their activities in the twenty largest states).

188. *Id.*

189. *Id.*

190. *See* Diamond, *supra* note 20.

191. *See supra* note 116 and accompanying text.

Legislation requiring insurers to search the DMF to identify unclaimed death benefits may accelerate the payment of funds to the unclaimed property accounts of the states, but will not lead to finding significant new funds. Effectively, legislation will accelerate the escheatment of unclaimed policy proceeds when the beneficiary does not make a claim following the death of the insured. In the absence of a death claim, policy proceeds would otherwise escheat at the mortality limiting age.[192] As a result, states will benefit only to the extent that they obtain custody of funds (and associated float) at an earlier date.[193]

To be sure, DMF-related settlements have resulted in significant flows into unclaimed property accounts for some states.[194] But most of the low-hanging fruit has already been picked. Our analysis leads us to believe that states would be ill-advised to believe forecasts of sustained revenue increases related to DMF-settlements or legislation.[195] Many insurers already have turned over unclaimed funds to state accounts and beneficiaries.[196] Since many of the largest insurers have already reached settlements, the magnitude of the remaining recoveries is rather limited.[197] As a result, states have already received the bulk of the escheated death benefits subject to acceleration by related DMF legislation.

Specifically, as we point out earlier in this report, over twenty mostly large life insurers, comprising more than 70% of the United States life insurance market (as measured by premium volume), have already voluntarily entered into settlement agreements as reflected in Table 1.[198] Payments due under those settlements represent all unclaimed benefits due for several decades for deceased insureds and the acceleration of amounts that previously would have been paid at mortality limiting age. But, at this point, those payments have already have been made or will be paid by 2017. Thus, legislation that requires the remainder of the life insurance industry to perform additional DMF matches to identify previously deceased insureds will very likely generate far smaller amounts of funds.

While there have been fiscal upsides for states associated with the escheatment of unclaimed life insurance, benefits for consumers are even less clear. Of the property that states receive through escheatment, state officials and consultants say that states typically return 25% to 40% of the money they collect to owners.[199] If a clear beneficiary

192. *See supra* notes 99–100 and accompanying text.

193. *See supra* notes 99–100 and accompanying text.

194. *See* Walsh, *supra* note 7 (citing state officials' estimate that payouts from three large insurance companies alone would eclipse one billion in the coming years).

195. *See, e.g.*, VA. DEP'T OF PLANNING AND BUDGET, 2015 FISCAL IMPACT STATEMENT: UNCLAIMED PROPERTY; DEATH MASTER FILE, http://leg1.state.va.us/cgi-bin/legp504.exe?151+oth+SB1305FS1122+PDF.

196. *See supra* Part I.A.

197. *See* CAL. STATE CONTROLLER'S OFFICE, *supra* note 39 (providing links to settlement agreements with various insurance companies).

198. *See supra* note 11 and accompanying text.

199. *See* Scism & Vara, *supra* note 6.

existed, the funds likely would have already been claimed.[200] As discussed earlier, unclaimed funds held by the state that are later claimed by the beneficiary are sometimes payable *without* interest.[201] If the funds remain with the insurer pending proper documentation of the insured's death, those funds are generally required to be paid to beneficiaries *with* interest.[202] As a result, in some states, consumers are actually worse off with the state as custodian than if an insurer holds the funds in a retained assets account.[203]

V. Conclusion

Our findings suggest that the downsides of retroactive application of unclaimed life insurance legislation—though presumably well intentioned—outweigh the upsides for consumers and insurance markets alike. Further, prospectively applicable legislation stands on firmer ground from legal and policy perspectives. Taking into account settled expectations, data deficiencies, and the practical realities of the insurance business, retroactive legislation becomes an even less attractive solution. Finally, remaining fiscal upsides for states in terms of revenues available through retroactive legislation are limited.

Based on our analysis, we provide the following policy recommendations. Given the regulatory structure that insurers have operated under and the enhanced data collection and analysis capabilities that insurers now have, we believe it is reasonable to require insurers to comply with DMF search requirements on a prospective basis. In addition to legal presumptions against retroactive legislation, prospective application would also provide fair notice, allowing insurers to assure their data collection procedures reflect the unique requirements posed by searches utilizing the DMF. We believe that a prospective-only focus would allow all insurers—particularly small and medium-sized insurers—to adjust to these requirements without significant adverse disruptions to the insurance market or significant adverse impacts on consumers.[204]

200. Issues related to unclaimed death benefits are less problematic for legislation that is prospective-only, as data collection is much better today and can be enhanced as necessary going forward. *See supra* Part III.A.

201. *See supra* notes 116–117 and accompanying text.

202. *See supra* notes 95–96 and accompanying text.

203. *See supra* notes 118–120 and accompanying text.

204. To avoid confusion and reduce the likelihood of litigation, legislators could consider making unclaimed life insurance statutes expressly prospective. Though silence on applicability generally equates to a presumption against retroactive applicability, statutory language that is expressly "prospective-only" could provide additional clarity and certainty on the question of enforcement and application.