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ATTORNEY GENERAL

March 18, 2016

The Honorable Robert W. Hayes, Jr.
Senator, District No. 15
Post Office Box 142
Columbia, South Carolina 29202

The Honorable Ronnie W. Cromer
Senator, District No. 18
Post Office Box 142
Columbia, South Carolina 29202

Dear Senator Hayes and Senator Cromer:

You have requested an opinion of this Office pertaining to pending legislation titled the South Carolina Unclaimed Life Insurance Benefits Act ("the Act" or "Bill 972"). S.B. 972, 121st Leg., 2nd Reg. Sess. (S.C. 2015). In its current form, Bill 972 is prospective in application, applying to "a policy or certificate of life insurance issued in this State *after* the effective date of this act that provides a death benefit." Specifically, your question relates to the Act being applied prospectively, as it currently would, to apply only to life insurance policies going into effect after implementation of the Act, or alternatively, to apply the Act to " 'any policy or certificate of life insurance that provides a death benefit,' thereby including policies that are currently in effect." You state that "[t]he key question is whether the state can mandate a change to existing policies (whether that includes all policies or only policies that are currently in effect), thereby altering the provisions of life insurance contracts that are in force."

We note that in the course of writing this opinion, lengthy discussions were held with representatives from the insurance industry, supporting prospective application of the Act, as well as the South Carolina Treasurer's Office, supporting retroactive application of the Act. We have also reviewed memoranda submitted by both the representatives of the insurance industry as well as the State Treasurer's Office. As such, we are well informed and recognize the implications of the legislation at issue and the difficulty surrounding the legal issues involved.

Background

Over the past several years, the problem of unclaimed life insurance benefits has gained national attention. See, e.g., Herb Weisbaum, Unclaimed life insurance benefits top $1 billion, NBC News (Feb. 3, 2013). A Consumer Reports investigation found that approximately $1 billion in life insurance benefits were waiting to be claimed by beneficiaries most commonly due to the beneficiary being unaware that the terms of a life insurance policy require them to

affirmatively establish the death of the insured to receive the benefits to which they are entitled or not being aware that they have been named as the beneficiary of the policy. Id. (citing Finding Lost Life-Insurance Policies, Consumer Reports, Feb. 2013). The response from state insurance departments to this growing concern has been summarized as follows:

> [s]tate insurance departments have made concerted efforts to address unclaimed life insurance benefits and the escheat process of the insurers by initiating high-profile investigations of their practices in the settlement of life insurance and annuity account death benefits. These investigations, taking the form of audits and factual inquiries, have uncovered a widespread lack of identifiable procedures used by insurers to investigate life insurance policy claims and identify beneficiaries. Regulators have expressed concern about insurers possibly using the Social Security Administration's so-called death master file to identify and discontinue payments to deceased annuity holders but failing to use the file to determine whether the insurers owed benefits to their insureds.

Michelle Dicks, Beth A. Dickhaus, Natalie A. Gray, Carla Delpit, Recent Developments in Insurance Regulation, 48 Tort Trial & Ins. Prac. L.J. 305, 314 (2012).

Following the initial investigations, the National Association of Insurance Commissioners ("NAIC") formed the Investigation of Life/Annuities Claim Settlement Practices Task Force to coordinate multistate regulatory investigations, conduct hearings, and facilitate resolution of the issues. Id. at 315. As a result, many large life insurers have reached multistate settlements on the subject of locating beneficiaries and reporting unclaimed life insurance benefits. Id. at 316.

Furthermore, in November of 2011, the National Conference of Insurance Legislators ("NCOIL") adopted the Model Unclaimed Life Insurance Benefits Act (the "Model Act"). The Model Act requires insurers to perform periodic comparisons of in-force life insurance policies, annuities, and retained asset accounts against the death-master file; make a good faith effort to confirm the death for all matches and determine if benefits are due under the policies; make a good faith effort to locate beneficiaries of all unpaid benefits; and in the event that benefits go unclaimed, notify the state treasury departments and escheat the funds per unclaimed property laws. Press Releases, National Conference of Insurance Legislators, NCOIL Model to Ensure Timely Payment of Death Benefits (Nov. 20, 2011). Since passed in 2011, amendments to clarify the Model Act have subsequently been made. Press Release, National Conference of Insurance Legislators, NCOIL Adopts Enhanced Unclaimed Property Model – Provides Vital Update to States (Nov. 28, 2014). Research reveals that nineteen states have passed legislation adopting the Model Act, or their own versions of it, and five states including South Carolina, have legislation pending.

Of the states that have enacted the Model Act, or a modified version of it, some legislation requires application to all in force policies while other legislation limits application to newly-issued policies. The NCOIL has made clear that it was the intent of the drafters for the Model Act to apply retroactively, to all policies in force. Press Release, National Conference of

Insurance Legislators, NCOIL Adopts Enhanced Unclaimed Property Model – Provides Vital Update to States (Nov. 28, 2014) ("The November 2014 model, among other things, affirms the initial model's retroactive provision. . . ."). Insurance companies, however, have challenged legislation based on the Model Act on the grounds that retrospective effect is not expressly declared, and, in the alternative, that retroactive application unconstitutionally alters the substantive contractual relations between the insured and the insurer.

Law/Analysis

I. Relevant Case Law

We are aware of two cases,[1] and their subsequent appeals, directly addressing the questions you have asked us to consider: United Ins. Co. of Am. v. Commonwealth, No. 12-CI-1441 (Franklin, Ky. Cir. Ct., April 1, 2013) and United Ins. Co. of Am. v. Maryland Ins. Admin., No. 0020, 2015 WL 596883 (Md. Ct. Spec. App. Oct. 14, 2015). While in no way binding on our courts, we nevertheless believe the arguments raised and the courts' analysis are helpful in addressing the questions asked of this Office. In part, the legislation based on the Model Act adopted in both Kentucky and Maryland require a life insurer to make a good faith effort to determine whether benefits are due based on a review of the Social Security Administration's Death Master File ("DMF"), and if so, attempt to locate beneficiaries and inform them of their claims procedures. See Ky. Rev. Stat. Ann. § 304.15-420; Md. Code Ann., Insurance, § 16-118. In both cases, United Insurance Company of America, the Reliable Life Insurance Company, and in Commonwealth, the Reserve Insurance Company, sought a declaration that the applicable Unclaimed Life Insurance Benefits Act should not be applied to policies issued prior to the Act's effective date. Maryland, 2015 WL 596883, at *2; Commonwealth, No. 12-CI-1441, at *1.

Arguments in both cases centered on the legislation not expressly stating the intent for the legislation to apply retroactively and, alternatively, that retroactive application would modify the rights and obligations of the parties under the existing contracts in violation of the Contract Clause of the applicable State and the United States Constitutions. Maryland, 2015 WL 596883, at *2; Commonwealth, No. 12-CI-1441, at *4. In Commonwealth, the Department of Insurance and the Commissioner argued that requirements imposed by legislation was a valid exercise of the state's police power to regulate the insurance industry and that the legislation was a necessary and appropriate measure to protect the interests of consumers. Commonwealth, No. 12-CI-1441, at *4. In Maryland, the Insurance Administration alleged that all administrative remedies must be exhausted prior to seeking relief in the judicial system. Maryland, 2015 WL 596883, at *3.

First addressing Commonwealth, the case is awaiting decision from the Kentucky Supreme Court after the trial court ruled in favor of the insured and the court of appeals reversed. Specifically, the Franklin Circuit Court held that the Kentucky prohibition against applying

[1] We also point out a third case was filed challenging retroactive application of Indiana's version of the Model Act. See United Ins. Co. of Am. v. Indiana Dep't of Ins., No. 49D10-1408-PL-029135 (Ind. 2015). However, the parties jointly stipulated to dismiss the case after legislation was passed on May 5, 2015 applying the Act prospectively to life insurance policies issued after June 30, 2015.

statutes retroactively did not apply due to the remedial nature of the legislation. Commonwealth, No. 12-CI-1441, at *6-8 ("[W]hen 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 retroactive operation of statutes") (citations omitted). The court reasoned that the statute was not substantive in nature; rather, it remedied the "traditional industry practice [that] allows insurance companies to stick their heads in the sand and ignore publically available data regarding the deaths of the insureds, to the detriment of the beneficiaries (and the public)." Id. at *7. The court further explained that

> [n]o 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.

Id. at *8.

The court also addressed the insurance companies' constitutional argument that the legislation impaired the obligations of existing contacts in violation of the Constitutions of Kentucky and the Unites States. Id. at *8-12. In doing so, it used the three part test established by the United States Supreme Court to determine whether a statute violates the Contracts Clause, i.e. (1) whether the state law has, in fact operated as a substantial impairment of a contractual relationship; (2) if so, whether the state has a significant and legitimate public purpose to justify the regulation, such as remedying a broad and general social or economic problem; and (3) if a legitimate purpose exists, 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. at * 5 (citing Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 410, 103 S.Ct. 697, 704 (1983)), *8-12.

The court found that the statute did not impair any vested contractual right, specifically rebuffing the insurance companies' notion that they have "a vested right in a potential beneficiary's burden of notice." Id. at *8. In other words, the court rejected the claim that "notice is a required condition precedent to coverage under the policies in question, and that the statute substantially alters this requirement." Id. at *9. The court explained that "notice is never mentioned in the contracts" rather, "[t]he contractual obligation that forms the basis for these insurance contracts is proof of death, not a notice of claims." Id. at 10. Thus, because the statute could be read to allow the burden of proof of death to remain on any potential beneficiary, and not on the insurers, and because notice was not a duty assigned to either party in any of the contracts, the court concluded that "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." Id.

The court took its analysis a step further by moving to the second prong of the Contract Clause test, providing that "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." Id. at *11 (citing Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400 (1983) that held the language of the contracts clause is subject to "the inherent police power of the state to safeguard the vital interest of its people" (citation omitted)). On this point, the court first noted that in determining the extent of impairment, it is to consider whether the industry that the complaining party has entered has been regulated in the past. Id. at *11. It found that "[t]here 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." Id. Directly in relation to the public policy behind the Act, the court explained

> [m]any 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 privileges citizens in this state. On average, the life policies are for burial amounts of $4,800 with monthly premiums of $16. . . . All but 42 of the policies at issue were sold door to door to people in lower socio-economic classes. . . . 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.

Finally, in determining the third prong of the analysis – whether the adjustment of contractual rights and responsibilities was based on reasonable conditions and of a character appropriate to the public purpose to justify the legislation's adoption – the court noted that "[u]nless the state itself is a contracting party, courts defer to legislative judgment as to the necessary and reasonableness of a particular measure." Id. at *12 (citing Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 413 (1983)). Finding the measures imposed by the statute reasonable, the court reiterated that it "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." Id.

On appeal, the court reversed on the grounds that the legislation was substantive and not a remedial alteration of the existing contractual relationship between insurers and insureds. United Ins. Co. of Am. v. Commonwealth, No. 2013-CA-000612-MR, 2014 WL 3973160, *9 (Ky. Ct. App. Aug. 15, 2014). Therefore, the rule against retroactive application to contracts in existence prior to the legislation's effective date was violated. Id. Accordingly, analysis of the alternative constitutional argument was not necessary. See id. at *5 (quoting Louisville/Jefferson County Metro Government v. TDC Group, LLC, 283 S.W.3d 657, 660 (Ky. 2009) for the proposition that "it is well-established that the courts will 'refrain from [addressing] constitutional issues when other, non-constitutional grounds can be relied upon' ").

In reaching its conclusion, first, the court determined retroactive application would not be "*necessarily* implied" from the Act's language requiring insurers to conduct a periodic comparison of "in-force life insurance policies and retained asset accounts" against the DMF and

the Act's definition of the term policy, including "any policy or certificate of life insurance that provides a death benefit." Id. at *6 (emphasis added).

Next, in determining whether the Act would classify as remedial, and not substantive, to prevent the prohibition against retroactive application, the court reasoned as follows:

> [w]e agree with the Department that the Act's requirements are primarily regulatory and do not directly alter the operation of any conditions precedent for coverage under the insurance contracts. Nevertheless, the Act clearly imposes new and substantive requirements which affect the contractual relationships between insurer and insureds. Most notably, the Act shifts the burden of obtaining evidence of death and locating beneficiaries from the insured's beneficiaries and estate to the insurer.
>
> By itself, this provision does not alter the operation of any condition precedent to performance. Nevertheless, it is a substantial obligation.

Id. at *9.

Decision from the Kentucky Supreme Court as to whether the legislation, as determined by the circuit court, is remedial in nature and not subject to prohibitions on retroactive application or, as decided by the court of appeals, whether it is substantive, preventing retroactive application, is forthcoming.

In the second case we referenced above, United Ins. Co. of Am. v. Maryland Ins. Admin., many of the same issues and arguments as those in Commonwealth were presented. United Ins. Co. of Am. v. Maryland Ins. Admin., No. 0020, 2015 WL 596883 (Md. Ct. Spec. App. Oct. 14, 2015). However, the case was decided on different grounds. Specifically, the Maryland Court of Special Appeals upheld the trial court's decision to dismiss the case for to failure to exhaust administrative remedies. Id. at *9.

II. Bill 972

Express Prospective Application

As mentioned above, Bill 972 proposes prospective application of the South Carolina Unclaimed Life Insurance Benefits Act by defining the term "policy" to which the Act applies as "a policy or certificate of life insurance issued in this State *after* the effective date of this act that provides a death benefit." S.B. 972, 121st Leg., 2nd Reg. Sess. (S.C. 2015) (emphasis added). The South Carolina Supreme Court has addressed the effect of similar prospective language in Kirven v. Cent. States Health & Life Co., of Omaha, 409 S.C. 30, 760 S.E.2d 794 (2014).

At issue in Kirven was application of S.C. Code Ann. § 38-71-242 that provides a mandatory, default definition for "actual charges" in certain supplemental health insurance policies. Id. at 34, 760 S.E.2d at 796; see S.C. Code Ann. § 38-71-242(C) ("Notwithstanding

any other provision of law, *after the effective date of this section,* an insurer or issuer of any individual or group specified disease insurance policy shall not pay any claim or benefits based upon an actual charge . . . ."). Addressing the Plaintiff's arguments that the statute in question should not be applied to preexisting insurance contracts because of the presumption against statutory retroactivity and the doctrine of constitutional avoidance, the court set forth the well-established rules of statutory construction that it must ascertain and effectuate the intent of the legislature which is best derived from what the legislature says in the text of the statute. Kirven, 409 S.C. at 38-39, 760 S.E.2d at 798-99. However, when faced with an ambiguity, the court noted that "judicial rules for just such occasions" have been developed. Id. at 39, 760 S.E.2d at 799 (citations omitted).

The Kirven court summarized the "judicial rules" pertaining to ambiguity regarding prospective and retroactive application as follows:

> [b]oth federal and South Carolina courts employ a robust presumption against statutory retroactivity. . . . Under this presumption, courts assume that statutes operate prospectively only, to govern future conduct and claims, and do not operate retroactively, to reach conduct and claims arising before the statute's enactment. . . . Since legislatures generally intend statutes to apply prospectively only, this rule of statutory construction is a means of giving effect to legislative intent.

Id. (citations omitted). In applying the above rules to Section 38-71-242, the court indicated that

> the General Assembly *expressly prescribed the statute's temporal reach* to include the claims at issue in this case [that arose after the statute's June 4, 2008 effective date]. Accordingly, there is no need to resort to the judicial default rules, such as the presumption against retroactively or the doctrine of constitutional avoidance, to determine whether the legislature intended for section 38-71-242 to apply to Kirven's claims.

Id. (citations omitted) (emphasis added).

Like the court's analysis in Kirven, it is our belief that if passed in its current form, Bill 972 would be interpreted as expressly prescribing the prospective application of the Act. Thus, based on the clear legislative intent identified by the plain language of the statute that the Act apply prospectively, it is our opinion that a court would not need to resort to the judicial rules of presumption against retroactive application or the doctrine of constitutional avoidance if faced with this issue. Instead, it would be bound to give effect to the expressed intent of the legislature to apply to the Act prospectively.

Amendment to Bill 972

However, you have asked us "whether the State can mandate a change to existing policies (whether that includes all policies or only policies that are currently in effect)." Again, you reference the language in the NCOIL's Model Act requiring insurers perform a DMF comparison on "any policy or certificate of life insurance that provides a death benefit." As such, it is necessary to analyze whether amendment of Bill 972 to include this language would in effect likely be construed by a court as retroactive application of the Act.

In many prior opinions of this Office, we have emphasized the body of law recognizing that "a statute does not operate retroactively merely because it relates to antecedent events, or because part of the requisites of its action is drawn from time antecedent to its passing." See, e.g., Op. S.C. Att'y Gen., 2014 WL 2619139 (May 20, 2014); Op. S.C. Att'y Gen., 1983 WL 182086 (July 1, 1983) (citing 82 C.J.S., Statutes, § 412 (1953)). Rather, a statute "is retroactive only when it is applied to rights accrued prior to its enactment." Id. Thus, "in order to apply retroactively, a statute must give the previous transaction to which it related *some different legal effect* from that which it had under the law when it occurred." Op. S.C. Att'y Gen., 1983 WL 182086 (July 1, 1983) (emphasis added) (citing Holt v. Morgan, 127 C.A.2d 113, 274 P.2d 915 (1954)); see also 82 C.J.S. Statutes § 574 ("A retroactive or retrospective law is one that takes away or impairs vested rights acquired under existing laws or creates a new obligation, imposes a new duty, or attaches a new disability with respect to transactions or considerations already past. Thus, a retrospective statute is one which gives to preenactment conduct a *different legal effect* from what is would have had without the passage of the statute . . . . [A] statute does not operate retroactively merely because some of the facts or conditions upon which its application depends came into existence prior to its enactment but is retroactive only when it is applied to rights acquired prior to its enactment") (emphasis added).

In reviewing this body of law, we are not convinced that amendment of Bill 972 requiring DMF comparisons on "any policy or certificate of life insurance that provides a death benefit" would result in retroactive application. Although with this amendment the requisites of the Act would be drawn from a time antecedent to its passing, such application would not result in a different legal effect of the insurance policies to which the Act would apply. As pointed out by the circuit court in Commonwealth, no insurer will be required to pay more than is already contractually obligated to pay and no beneficiary will receive more than the insured paid premiums to obtain. Rather, operation of the Act would result in beneficiaries obtaining funds *to which they are already entitled* in a more timely fashion. See United Ins. Co. of Am. v. Commonwealth, No. 12-CI-1441, *8 (Franklin, Ky. Cir. Ct., April 1, 2013).

Because a different legal effect would not result from the Act's application "to any policy or certificate of life insurance that provides a death benefit," we do not believe inclusion of this language would be construed as making the Act a retrospective law. The new requirements merely ensure that beneficiaries who are lawfully entitled to receive funds, as contractually provided, receive their money in due course.

Contract Clause Analysis

Nevertheless, if a court were to construe application of the Act to "any policy or certificate of life insurance that provides a death benefit" as a retrospective law, analysis of whether the requirements of the Act would violate the Contract Clause of the State and Federal Constitutions – like that done by the trial court in United Insurance Co. of Am. v. Commonwealth – would be necessary.

Article 1, Section 10 of the United States Constitution provides that "No State shall. . . pass any . . . Law impairing the Obligations of Contracts . . . . U.S. Const. art. I, § 10. The South Carolina Constitution prohibits the same. S.C. Const. art. I, § 4 ("No . . . law impairing the obligation of contracts . . . shall be passed . . . ."). " 'Although the Contract Clause appears literally to proscribe 'any' impairment, ... 'the prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula.' " Harleysville Mut. Ins. Co. v. State, 401 S.C. 15, 35, 736 S.E.2d 651, 661 (2012) (Beatty, J., concurring in part, dissenting in part) (quoting U.S. Trust Co. of N.Y. v. N.J., 431 U.S. 1, 21, 97 S.Ct. 1505 (1977)). "Retroactive legislation, though frequently disfavored, is not absolutely proscribed." Kirven v. Cent. States Health & Life Co. of Omaha, 409 S.C. 30, 40, 760 S.E.2d 794, 799 (2010) (citing In re Marriage of Bouquet, 16 Cal.3d 583, 546 P.2d 1371, 1376 & n.8 (1976); Calder v. Bull, 3 U.S. (3 Dall.) 386, 1 L.Ed. 648 (1797)). Thus, "a state may pass retroactive laws absent direct constitutional prohibition." Id. (citing Freeborn v. Smith, 69 U.S. 160, 174-75, 2 Wall. 160, 17 L.Ed. 922 (1864)).

As noted above, the United States Supreme Court has established a three-step analysis to determine whether the Contract Clause limits application of certain laws. See Energy Reserves Group, Inc. v. Kansas Power and Light Co., 459 U.S. 400, 411-12, 103 S.Ct. 697, 704-05 (1983). Our courts have adopted the same analysis, which has been summarized as follows:

> [f]irst, the Court must determine whether the State law has in fact operated as a substantial impairment of a contractual relationship. If the State regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation. Once a legitimate public purpose has been identified, the next inquiry is whether the adjustment of contractual rights is based upon reasonable conditions and is of a character appropriate to the public purpose.

Mibbs, Inc. v. S.C. Dep't of Revenue, 337 S.C. 601, 607, 524 S.E.2d 626, 629 (1999) (citing Energy Reserves Group, Inc. v. Kansas Power and Light Co., 459 U.S. 400, 103 S.Ct. 697 (1983)).

Looking at the first prong of the test, as was noted in Mibbs, the South Carolina Supreme Court has "specifically found no substantial impairment of a contract where the subject of the contract is a highly regulated business whose history makes further regulation foreseeable." Id. at 608, 524 S.E.2d at 629 (citing Ken Moorehead Oil Co. v. Federated Mut. Ins. Co., 323 S.C. 532, 476 S.E.2d 481 (1996)). Furthermore, our Supreme Court has made clear that "[i]t is well-established that the insurance industry is highly regulated by the General Assembly."

Harleysville Mut. Ins. Co. v. State, 401 S.C. 15, 28, 736 S.E.2d 651, 657 (2012). Thus, we believe the general regulatory history of the insurance industry makes further regulation imposed by the South Carolina Unclaimed Life Insurance Benefits Act foreseeable.

Furthermore, and as pointed out by the South Carolina Treasurer's Office in its memorandum submitted to this Office on February 22, 2016, the South Carolina Uniform Unclaimed Property Act already requires abandoned life insurance benefits to be seized by the State pursuant to the requirements set forth in S.C. Code Ann. § 27-18-80 (2007). Thus, Bill 972's requirement that "[t]he benefits from a policy, contract, or retained asset account, and any applicable accrued contractual interest, must first be payable to the designated beneficiaries or owners cannot be found [sic], the benefits and contractual interest are subject to the custody of the state as unclaimed property pursuant to [the South Carolina Unclaimed Property Act]" can be interpreted as expanding upon the State's long-standing authority to regulate and seize abandoned property opposed to "altering the provisions of life insurance contracts currently in force."

Also important to the first prong of analysis under the Contract Clause is distinction between the requirement of notice and proof of death as a condition precedent to receipt of benefits under a policy. While no particular life insurance policy is at issue for purposes of this opinion, you note that "prospective application of the bill recognizes the long-standing contractual requirement that beneficiaries must proactively *notify* the insurer of the death of the insured and confines its mandate to future contracts that cannot be priced to take into account new costs." (Emphasis added). As was discussed by the trial court and court of appeals in Commonwealth, notice was not considered a condition precedent to coverage within the life insurance policies at issue in that case; rather, proof of death was interpreted as all that was required. While the court of appeals reasoned that the Act's requirement of shifting the burden of obtaining evidence of death and locating beneficiaries from the insured's beneficiaries and the estate to the insurer was a substantive rather than remedial requirement for purposes of determining the applicability of retroactive application of the Act, it did not analyze the same for purposes of the Contract Clause. Thus, if the requirement of notice is considered to be absent from the terms of the contract, it is questionable whether a court would determine the Act's requirements impose a substantial impairment of the contractual relationship for purposes of Contract Clause analysis.

We also point out that if notice and proof of death are a required condition precedent pursuant to the terms of the contract, it has been recognized that a claim will not be defeated if a beneficiary, who was ignorant of the death of an insured or the existence of the policy, makes the claim within a reasonable time after obtaining knowledge of these facts. Farley v. American Sur. Co. of N.Y., 182 S.C. 187, 188 S.E. 776, 779 (1936), overruled on other grounds by Crystal Ice Co. of Columbia, Inc. v. First Colonial Corp., 273 S.C. 306, 257 S.E.2d 496 (1979). In Farley, the South Carolina Supreme Court explained as follows:

[t]his doctrine is clearly set out in the following note in 111 Am.St.Rep. 612:

> "Although a life insurance policy provides that the insurer must be given notice of the accident to, and proof of the death of, the insured within a specified time thereafter, or the policy will be forfeited, yet a beneficiary who is in ignorance of such death and of the existence of the policy complies with such conditions, if within a reasonable time after obtaining knowledge of these facts he gives the insurer notice and makes proof: Munz v. Standard Life, etc., Ins. Co., 26 Utah, 69, 72 P. 182, 62 L.R.A. 485, 99 Am.St.Rep. 830, and see the cases cited in the cross-reference note thereto. Other decisions bearing on this question are Matthews v. American Cent. Ins. Co., 154 N.Y. 449, 48 N.E. 751, 39 L.R.A. 433, 61 Am.St.Rep. 627; Paul v. Fidelity, etc., Co., 186 Mass. 413, 71 N.E. 801, 104 Am.St.Rep. 594; Mead v. Phoenix Ins. Co., 68 Kan. 432, 75 P.475, 64 L.R.A. 79, 104 Am.St.Rep. 412."

Id.

The Farley court went on the express that requiring the beneficiary to give notice within a specified time when he or she is unaware of the existence of the policy would be requiring an impossible thing. Id. (discussing Continental Cas. Co. v. Lindsay, 111 Va. 389, 69 S.E. 344 (1910)). Thus, like the Farley court, we believe it is probable that a court would take these principles into account in determining whether a substantial impairment exists for purposes of Contract Clause analysis if it is determined that notice as well as proof of death are required conditions precedents for coverage under the contract in question.

Even if a substantial impairment of the contractual relationship of the parties is found, our courts have recognized that "the state may constitutionally impair a party's contract rights provided the impairment serves a significant and legitimate public purpose and that the state law is reasonably related to achieving that public purpose." Kirven v. Cent. States Health & Life Co. of Omaha, 409 S.C. 30, 42, 760 S.E.2d 794, 800 (2014) (referencing an opinion decided by the United States District Court for the District of South Carolina, Montague v. Dixie Nat. Life Ins. Co., No. 3:09-CV-687-JFA, 2011 WL 2294146 (D.S.C. June 8, 2011)).

The public policy underlying the Model Act, as relayed above, seeks to remedy the nationally recognized practice of life insurance companies retaining unclaimed life insurance benefits without attempting to determine whether the insured has died. This is often due to the beneficiaries being unaware that the terms of the policy require them to affirmatively establish the death of the insured to receive benefits to which they are entitled or not knowing that they have been named as a beneficiary of the policy. As one justice addressing this issue summarized well,

> [i]t is estimated that there is over one billion dollars in death benefits held by insurance companies that are unclaimed by the beneficiaries of deceased policy holders. The insurance companies hold onto the policy proceeds without attempting to use technology to determine if the insured has died and track down beneficiaries.

> Insurance companies regularly search the DMF to determine if an annuitant has died allowing it to terminate annuity payments. Conversely, most have not used the DMF to determine if a life insured has died resulting in the payment of life insurance benefits. Life insurance companies have used the DMF when it is to their benefit and ignored the DMF when it may cause them to pay money.
>
> . . . . Ignoring the DMF enriches the life insurance industry to the detriment of their policyholder's beneficiaries and allows them to keep money that should be paid to the unclaimed property fund.

State ex rel. Perdue v. Nationwide Life Ins. Co., 236 W.Va. 1, 777 S.E.2d 11, 21 (W. Va. 2015) (Ketchum, J. concurring). As the problem of unclaimed life insurance benefits is evident, should a court find that there is a substantial impairment of a contract right by retroactive application of the Act, a strong argument exists that a significant and legitimate public purpose exists for the state to constitutionally impair those contract rights.

Finally, under the last step of the analysis, we believe it is also likely that a court would find the Act provides reasonable conditions and is of a character appropriate to achieving the public purpose, as explained above, that would justify its adoption. In making this determination, deference is given to the legislative judgment concerning the necessity and reasonableness of economic and social regulation which affects private contracts. Ken Moorehead Oil Co. v. Federated Mut. Ins. Co., 323 S.C. 532, 544, 476 S.E.2d 481, 488 (1996) ("When a state acts to impair a purely private contract, 'courts properly defer to legislative judgments as to the necessity and reasonableness of a particular measure' " (quoting U.S. Trust Co. of N.Y. v. N.J., 431 U.S. 1, 23, 97 S.Ct. 1505, 1518 (1977)).

Under this prong of the test, our Supreme Court continues to examine the traditional analysis of reasonableness and necessity, which includes the following factors:

> (1) whether an emergency exists justifying the impairment; (2) whether the law was enacted to protect a basic societal interest, rather than a favored group; (3) whether the law is narrowly tailored to the emergency at hand; (4) whether the imposed conditions are reasonable; and (5) whether the law is limited to the duration of the emergency.

See Harleysville Mut. Ins. Co. v. State, 401 S.C. 15, 30, 736 S.E.2d 651, 658-59 (2012); see also Ken Moorhead Oil Co. v. Federated Mut. Ins. Co., 323 S.C. 532, 545, 476 S.E.2d 481, 488-89 (1996) (citing Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 98 S.Ct. 2716 (1978); G-H Ins. Agency, Inc. v. Continental Ins. Co., 278 S.C. 241, 294 S.E.2d 336 (1982)).

The United States Supreme Court has recognized the existence of a temporary emergency is no longer an essential criterion in assessing the public purpose at issue when applying the Contract Clause test. See Energy Reserves Group, Inc. v. Kansas Power and Light Co., 459 U.S. 400, 412, 103 S.Ct. 697, 705 (1983) ("Since *Blaisdell*, the Court has indicated that the public

purpose need not be addressed to an emergency or temporary situation") (citations omitted). The South Carolina Supreme Court has recognized the same in its analysis of the third prong of the Contract Clause test in Ken Moorhead Oil Co. v. Federated Mut. Ins. Co., 323 S.C. 532, 476 S.E.2d 481 (1996), specifically providing that "[o]f course, there need not be an emergency situation before a state may pass a law impairing a private contract." (citing Spannaus, 438 U.S. 234, 98 S.Ct. 2716). Thus, in applying the traditional five factor test as listed above, the court only applied factors two and four that do not pertain to an emergency situation. Ken Moorehead Oil, 323 S.C. at 545-46, 476 S.E.2d at 489.

However, we acknowledge that more recently in Harleysville Mut. Ins. Co. v. State, 401 S.C. 15, 736 S.E.2d 651, 658-59 (2012), the court considered all five traditional "reasonableness and necessity" factors in analyzing the third prong of the Contract Clause test. Specifically, it stated that "[c]onsidering these factors and given the lengthy and drawn out history of litigation in this area, we cannot conclude that the General Assembly needed to enact Act No. 26 in order to address a pressing emergency. Consequently, the retroactivity provision is neither necessary nor reasonable, and therefore we hold it unconstitutional." Id. at 30, 736 S.E.2d at 659.

Due to the contradiction between Ken Moorehead Oil and Harleysville as to whether the presence of an emergency situation is necessary, we provide our opinion that should the court require an emergency situation exist, it would likely rely on a finding from the General Assembly that the issue at hand necessitates sufficient attention to constitute an emergency. The magnitude of the problem of unclaimed life insurance benefits is illustrated by the national attention it has received in recent years as well as the national effort to remedy the problem. Thus, while Ken Mooreheard Oil plainly adopts the United States Supreme Court finding that an emergency situation need not be present before a state can pass a law impairing a private contract, even if it were to impose such a requirement, we believe the problem of unclaimed life insurance benefits is of a sufficient magnitude to be deemed an emergency situation.

Accordingly, based on our analysis of each portion of the Contract Clause test described above, we believe retroactive application of Bill 972 has a strong likelihood of surviving scrutiny under the Contract Clause of both the South Carolina and United States Constitutions.

Conclusion

In its current form, Bill 972 proposes prospective application of the South Carolina Life Insurance Benefits Act applying to "a policy for certificate of life insurance issued in this State after the effective date of this act that provides a death benefit." By expressly prescribing the statute's temporal reach to policies issued after the effective date of the Act, we believe a court would be bound to give effect to such expressed intent of the Legislature.

Should the Act be amended to apply to "any policy or certificate of life insurance that provides a death benefit," we do not believe inclusion of this language would be construed as making the Act a retrospective law. Although the requisites of the Act would be drawn from a time antecedent to its passing with this amendment, such application would not result in a different legal effect of the insurance policies to which the Act would apply. Instead of imposing

a different legal effect, operation of the Act would result in beneficiaries obtaining funds to which they are already entitled in a more timely fashion.

Nevertheless, if a court were to construe application of the Act to "any policy or certificate of life insurance that provides a death benefit" as a retrospective law, it is our opinion that a strong argument can be made that the requirements imposed would not violate the Contract Clause of the South Carolina and United States Constitutions. As noted above, we question whether a substantial impairment of a contractual relationship would exist due to the high level of regulation imposed on the insurance industry by the General Assembly. Furthermore, additional support exists in this regard as our state already regulates abandoned life insurance benefits under the South Carolina Unclaimed Property Act. Thus, Bill 972 can be viewed as an expansion of the South Carolina Unclaimed Property Act.

Also for purposes of whether a substantial impairment of the contractual relationship exists, we believe it would be necessary to establish whether the life insurance policy in question is interpreted as requiring notice as a condition precedent to coverage, or, as was the case in Commonwealth, whether proof of death is required. We acknowledge, as did our court in Farley, that it is often the practice that an insurer must be given notice and proof of death. Thus, Bill 972's requirements could be deemed as altering a material term of the contract. Even if notice is required, however, if the beneficiary is ignorant of the existence of the policy, many courts have determined that a claim cannot be defeated if the beneficiary gives the insurer notice and makes proof of death within a reasonable time after obtaining knowledge of such facts.

Even if a substantial impairment of the contractual relationship exists, the state may still impair a party's right to contract provided the impairment serves a significant and legitimate public purpose and the state law is reasonably related to achieving that public purpose. As emphasized above, we think a court would likely find that the nationally recognized practice of life insurance companies retaining unclaimed life insurance benefits without attempting to determine whether the insured has died constitutes a significant and legitimate public purpose. And, in determining whether the Act provides reasonable conditions and is of a character appropriate to achieving this public purpose under the final prong of the test, it is clear a court would give deference to the legislative judgment of the regulations imposed in the Act and would also rely upon the fact that "the insurance industry is highly regulated by the General Assembly." Harleysville, supra. Finally, pursuant to Energy Reserves Group, supra, and our Supreme Court's analysis in Ken Moorhead Oil, supra, providing that "[o]f course, there need not be an emergency situation before a state may pass a law impairing a private contract," it is our belief that a court would no longer require an emergency as a condition for avoiding an unconstitutional impairment of a contract. However, even if an emergency were required, we believe a strong argument could be made that the widespread attention and national response to remedy the problem of unclaimed life insurance benefits would constitute an emergency requiring sufficient and immediate attention.

In sum, if the language used in the potential South Carolina Unclaimed Life Insurance Benefits Act was viewed as retroactive in application, it is our belief that it would nevertheless survive constitutional scrutiny under the Contract Clause of our State and Federal Constitutions.

While this is our opinion, and because of the important constitutional question, we would strongly advise seeking clarification from the courts on this matter by filing a declaratory judgment. This would be the most appropriate mechanism to provide a binding decision and resolve this issue with finality.

Very truly yours,

Anne Marie Crosswell

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