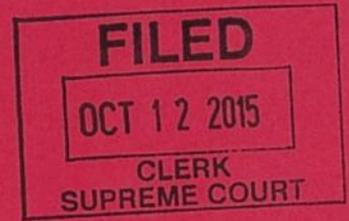


SUPREME COURT OF KENTUCKY

2014-SC-000549-D
(2013-CA-000612)



COMMONWEALTH OF KENTUCKY,
DEPARTMENT OF INSURANCE,
SHARON P. CLARK, IN HER OFFICIAL
CAPACITY AS COMMISSIONER OF
THE KENTUCKY DEPARTMENT OF INSURANCE

APPELLANTS

v. FRANKLIN CIRCUIT COURT
2012-CI-1441

UNITED INSURANCE COMPANY OF
AMERICA, THE RELIABLE INSURANCE
COMPANY and RESERVE INSURANCE
COMPANY

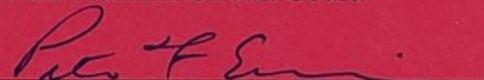
APPELLEES

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CERTIFICATE OF SERVICE

It is hereby certified pursuant to CR 76.12(6) that on this 12th day of October, 2015, copies of this brief were served via U.S. Mail delivery upon: Hon. Jack Conway, Attorney General, 700 Capitol Avenue, Suite 118, Frankfort, KY 40601; Carol Lynn Thompson, SIDLEY AUSTIN LLP, 555 California Street, San Francisco, CA 94104; Sheryl G. Snyder, Joseph L. Ardery, Jason P. Renzelmann, FROST BROWN TODD LLC, 400 West Market Street, Suite 3200, Louisville, KY 40202; Phillip J. Shepherd, Chief Circuit Judge, Franklin County Courthouse, 222 St. Clair Street, Frankfort, KY 40601; Franklin Circuit Court Clerk, Franklin County Courthouse, 222 St. Clair Street, Frankfort, KY 40601; Samuel Givens, Jr., Clerk of the Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601. It is also certified that the record on appeal was not removed from the office of the Clerk of the Franklin Circuit Court.


Counsel for Appellants

INTRODUCTION

This is the appeal of a Court of Appeals opinion concluding that KRS 304.15-420 substantively alters the contractual relationship between insurers and insureds, so that absent an expressed intent to the contrary, retroactive application is prohibited. The Court of Appeals should be reversed because as the circuit court concluded, the statute is remedial and does not impair any obligation under the insuring agreements and is consequently not proscribed by the prohibition on retroactive application.

STATEMENT CONCERNING ORAL ARGUMENT

Appellants suggest that oral argument will aid the Court and the parties in fleshing out the issues raised on appeal.

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STATEMENT OF THE CASE

Introduction

This is the appeal of a Court of Appeals opinion that reverses a trial court judgment upholding important social legislation as remedial, and not subject to prohibitions on retroactive application. The legislation ensures that Kentucky life insurance consumers get what they paid for and that life insurers provide the coverage they sold.

The opinion:

1. Contravenes the plain language of the statute so as to limit the scope of its application and negate its protection to thousands of Kentuckians;
2. Is internally inconsistent, finding that the legislation “does not alter the operation of any condition precedent to performance” and then concludes it substantially alters the obligations between the parties; and
3. Involves an issue of national prominence and will influence, if not control, future interpretations of the model legislation.

Ignoring publically available information of the death of an insured, life insurers rely on the non-forfeiture provisions of their policies to use their insured’s accumulated cash values to continue the payment of premiums until those accumulations are depleted and the policy cancelled. Unknowing beneficiaries are deprived of benefits. The problem has gained national attention.¹

The NAIC model legislation, codified by Kentucky at KRS 304.15-420², requires a life insurer take its head out of the sand “to make a good faith effort to determine whether benefits are due based on [review of] the Social Security Administration’s Death Master File, and if so, attempt to locate beneficiaries and inform them of the claims

¹ http://lifeinc.today.com/_news/2013/02/03/16830168-unclaimed-life-insurance-benefits-top.

² The full text of KRS 304.15-420 is attached for the Court’s convenience, Appendix 3.

procedure.”³ Finding that the legislation was intended to protect the “least privileged” in Kentucky and that “no insurer would be required to pay more than it is already contractually obligated to pay,”⁴ the trial court held:

The statute merely confirms the right of beneficiaries to the money the insured’s premiums have already paid for, and thus the statute must be construed as a remedial or procedural requirement not subject to the prohibition against retroactive legislation.⁵

The Court of Appeals similarly found 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.”⁶ The court then inconsistently and in contravention of controlling case law concluded that the Act’s requirements substantially changed the relationship between the insurers and insureds so as to fall “within the rule prohibiting retroactive application to contracts in effect prior its [sic] effective date.”⁷

The Appellees insure more than 9,000 Kentuckians whom they solicited door-to-door and argue should not be afforded the statute’s protection. On review, the Court of Appeals should be reversed and the trial court judgment should be reinstated.

Predicate Facts

The Appellants are life insurance companies that are licensed to sell coverage in Kentucky. The Appellants presently have 9,098 policies in force in Kentucky. On average, the life policies are for burial type amounts of \$4,800.00 with monthly premiums of \$16.00. All but 42 of the policies were sold door-to-door by individual salespersons. The policies are by and large sold to lower social and economic classes of

³ Franklin Circuit Court Opinion and Order, Appendix 2, p. 1.

⁴ *Id.*, p. 8.

⁵ *Id.*

⁶ Court of Appeals Opinion Reversing, Appendix 1, p. 10.

⁷ *Id.*

people, with the premiums being collected in person, from the insured's home on a monthly basis.⁸

Most of the policies are level term or whole life policies accumulating some cash value at a point certain during the life of the policy. If an insured dies without notice to the insurer, or elects to discontinue his coverage or otherwise permits his coverage to lapse, it is incumbent on the insured to make a "written request in a form acceptable to"⁹ the Appellees to receive the payment of his accumulated cash value. (Depo. Schallhorn, p. 31:11-17; 34:5-6). If the insured fails to make the written request or an alternative election of continued coverage, then, "the policy will be continued under the *extended term* insurance option [*non-forfeiture provision*]."¹⁰ Because of the lower social and economic status of the insureds, this scheme usually allows the Appellees to avoid both the return of accumulated cash value and the payment of death benefits.

The situation is best illustrated by example. If after a few years the policy is permitted to lapse with accumulated cash value, and the insured fails to make written request for payment or election of continued coverage options, then, by default, he is required to purchase *extended term* coverage. (e.g., if the insured has an accumulated cash value of \$200 in relationship to a \$10,000 face amount policy payable with a \$25/month premium, then the insured could continue his coverage for the face amount of the policy for eight (8) months.)¹¹ The unfairness of the situation is magnified if an

⁸ Myers Depo., pp. 14-15.

⁹ R. 1, United Insurance Company of America, Level Term Life Policy, "Non-Forfeiture Options" p. 7, Complaint Ex. 8, Appendix 4.

¹⁰ *Id.*

¹¹ The only alternative that the insured may choose, in writing, is called "reduced paid-up" insurance. Similar to the *extended term* coverage, the *reduced paid-up* coverage applies accumulated cash values to the purchase of continued coverage not only for a limited time but also for an amount substantially less than the face value of the policy. Schallhorn Depo., pp. 59-61, 64-66.

insured dies without his/her intended beneficiaries' knowledge of the policy. By design, expiration of the *extended term* without *taking* notice of death milks the accumulated cash value, avoids payment to beneficiaries and obviates the reporting of any unclaimed property and escheat to the Commonwealth as well.¹²

Regardless of the option applied, few benefits are ever paid on policies in *extended term* or *reduced paid up* coverage status. This is because having died without notice to the company or otherwise allowing the policy to lapse, insureds or beneficiaries are either ignorant or forgetful of the extended coverage they purchased.

The Appellees take advantage of their insureds' and the beneficiaries' ignorance or forgetfulness. They use it to increase their bottom line. "All too often, people buy life insurance and don't let their beneficiaries know about it." ... "[s]ome companies continued to collect premiums after the policyholder died and the [premium] payments stopped by drawing down the policy's cash reserves. Once the reserves were gone, the policy was cancelled."¹³ This is the very process followed by the Appellees here.¹⁴ In spite of readily accessible public data available for notice of the death of an insured (*Death Master File*), the Appellees want to avoid notice of death in order to elude the payment of benefits.

Notice of death is what triggers the insurers' action to find the beneficiary and pay the coverage. In fact, once notice is received, the requirements of the statute are no

¹² In the Company's escheat report covering 7 years, Schallhorn could identify only one payment, in the sum of \$0.66 cents, attributable to a life policy. Schallhorn Depo., pp. 67-68.

¹³ <http://lifeinc.today.com/news/2013/02/03/16830168-unclaimed-life-insurance-benefits-top...> Hard copy attached as Appendix 5.

¹⁴ Schallhorn Depo., pp. 59-61 and 64-66.

different from the adjudication process already followed by the insurers. Appellees have testified:

Q. In fact, that's part of you all's current policy and procedure, is to identify and pay the beneficiary; is it not?

A. It's what we do.

Q. Regardless of where your notice of death comes from.

A. Yes, but presumably now we are receiving notice and we have a contact person that's most often the beneficiary.

Q. Sometimes it's not, though. Sometimes it's not the beneficiary; correct?

A. Could be.

Q. Could be the funeral director.

A. Could be.

Q. It could be the agent.

A. Could be.

Q. In those instances, you seek to determine the identity of the beneficiary in order that you can do what you agreed to do, and that's pay that beneficiary; correct?

A. That's correct. We would - - we would prefer to pay the beneficiary than to have to escheat the claim to the state.

* * *

Q. And you're going to send her an information packet and instructions on what she needs to do to perfect the claim; isn't that right?

A. To - - I'm sorry. To?

Q. To make a valid claim.

A. Yes.

Q. And those instructions are going to be, "Jane, you need to fill out this claim form;" correct? "Jane, we need a certified certificate of death and we need the original policy or your affidavit that it's lost in lieu thereof;" correct?

A. Correct.

Q. And then, if she sends you that information, you're going to determine whether any exclusions apply. If not, you're going to pay Jane.

A. That's correct.¹⁵

The statute merely requires that the insurer take notice.¹⁶ Payment on the policies is not conditioned on notice, but rather, on "proof of death." Mere *notice* is not a requirement in the policies and the Appellees admit they accept notice from whatever source.

¹⁵ Shallhorn Depo., pp. 143-146.

¹⁶ The insurer testified: Q. So that the difference that the Kentucky law requires is that you look to see whether any of your insureds have died according to that record (DMF). A. That's - I don't know for sure that's the only difference, but that's probably the biggest difference. Shallhorn Depo., p. 102.

ARGUMENT

Summary

This is an action in which the Appellees seek the extreme remedy to declare important social legislation unconstitutional. The legislation in question is KRS 304.15-420, which requires that life insurers make an effort to pay benefits on death of the insured, instead of depleting coverage through self-consumption of the insured's accumulated cash values. The statute requires that life insurers check their list of insureds against the Social Security Administration's *Death Master File*. If a match is identified, the insurer is required to make a good faith effort to determine whether benefits are due (i.e., is the policy in force?) and if so, exercise good faith to locate the beneficiaries and inform them of the necessary claims procedures.¹⁷ The insurers testified this is the same process they follow when they receive notice from any other source.

The circuit court correctly reasoned that the statute does not violate a vested right, but merely imposes a remedial administrative burden on all insurers. The court reasoned:

The statute merely confirms the right of beneficiaries to the money the insured's premiums have already paid for, and thus the statute must be construed as a remedial or procedural requirement not subject to the prohibition against retroactive legislation. The regulatory requirements of the statute do not impair the vested rights of the parties to the contract of insurance. No insurer will be required to pay more than 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.¹⁸

The Court of Appeals disagreed, concluding that while the requirements of the Act "may be a valid exercise of the state's regulatory authority, it is a substantive and not

¹⁷ The full text of KRS 304.15-420 is attached for the Court's convenience, Appendix 3.

¹⁸ Opinion and Order, Appendix 2, at p. 8.

a remedial alteration of the contractual relationship between the insurers and insureds.”¹⁹ The Court of Appeals errantly found that “the Act shifts the burden of obtaining evidence of death and locating beneficiaries from the insured’s beneficiaries and estate to the insurer.”²⁰ These findings and conclusions are belied by the testimony recited above and the trial court’s sound reasoning that: “The statute does not require the insurance companies to complete the claims process, despite Plaintiffs’ argument to the contrary. The statute is narrowly tailored to give notice to potential beneficiaries, but leaves intact the contractual burden of proving death....the claimants must still file a proof of death.”²¹

For these reasons and as further demonstrated below, the Court of Appeals should be reversed and judgment of the circuit court should be reinstated.

- I. ABSENT A CLEAR, COMPLETE AND UNEQUIVOCAL SHOWING THAT KRS 304.15-420 IS UNCONSTITUTIONAL, THE SEPARATION OF POWERS DOCTRINE REQUIRES THIS COURT TO UPHOLD THIS DULY ENACTED STATUTE.

This Court has long recognized a strong presumption of the constitutionality of legislative enactments. This presumption requires that any doubts with regard to the constitutionality of a legislative enactment must be resolved in favor of the sovereignty retained by the people and vested in the lawmaking authority of the people’s elected representatives.²² Where a statute is capable of two constructions — one which upholds its validity and one which destroys it — the court must adopt the construction that sustains the constitutionality of the statute.²³ “[A]n act of a state legislature is legal when the

¹⁹ Court of Appeals Opinion, Appendix 1 at p. 10.

²⁰ *Id.*

²¹ R. 772, Opinion and Order, Appendix 2, pp. 11-12.

²² *Kentucky Harlan Coal, Co. v. Holmes*, 872 S.W.2d 446 (Ky. 1994).

²³ *American Trucking Ass’n. v. Commonwealth, Transp. Cab.*, 676 S.W.2d 785, 790 (Ky. 1984)

constitution contains no prohibition against it." *Hopkins v. Ford*, 534 S.W.2d 792, 795 (Ky. 1976).

Any judicial declaration of unconstitutionality of a legislative act raises such serious separation of powers questions that courts refuse to take such a draconian step unless such an interpretation is unavoidable.²⁴ Before the Judicial Branch will exercise its awesome power to invalidate an enactment of the representative legislature, the unconstitutionality of the statute must be "clear, complete and unequivocal." *Cornelison v. Commonwealth*, 52 S.W.3d 570 (Ky. 2001).

Appellants have failed to meet this heavy burden. Accordingly, the circuit court should be affirmed.

II. THE STATUTE DOES NOT VIOLATE THE KRS 446.080 PROHIBITION AGAINST RETROACTIVE LEGISLATION

Relying on KRS 446.080, the Appellees' argue that the Act impairs substantive and vested contractual rights, and absent an expressed intention that it have retroactive application, it should have only prospective application. The circuit court determined that the statute is merely remedial with application to past as well as future transactions.

"The general rule is that a statute, even though it does not expressly state, has retroactive application provided it is remedial." *Kentucky Insurance Guaranty Assoc. v. Jeffers*, 13 S.W.3d 606, 609 (Ky. 2000). Setting the standard for determination of a remedial statute, the *Jeffers* court held:

[D]espite the existence of some contrary authority, remedial statutes, or statutes relating to remedies or modes of procedure, which do not create new or take away vested rights, but only operate in furtherance of the remedy or confirmation of such right, do not normally come within the legal conception of a retrospective law, or the general rule against the retrospective operation of statutes.²⁵ ***

²⁴ *Fletcher v. Peck*, 10 U.S. 87, 6 Cranch 128, 3 L. Ed. 162, 175 (1910).

²⁵ *Jeffers*, at p. 609, quoting from *Peabody Coal Co. v. Gossett*, 819 S.W.2d 33 (Ky. 1991).

Remedial means no more than the expansion of an existing remedy without affecting the substantive basis, prerequisites, or circumstances giving rise to the remedy.²⁶

While the statute does not expressly provide that it shall have retroactive application, the *Jeffers* court observed that if the act is remedial, it “must be so construed as to make it effect the evident purpose ... extend[ing] to past transactions, as well as to those in the future” *Id.* It is obvious that the legislature intended this remedial legislation to apply to past as well as future transactions, because it applies to “*in-force* life insurance policies.” KRS 304.15-420(3)(a) (*emphasis added*). Similarly, “policy” is defined to include “*any* policy or certificate of life insurance that provides a death benefit.” KRS 304.15-420(2)(d) (*emphasis added*). The contrary understanding of the Court of Appeals notwithstanding, *the evident purpose* of the plain language of the statute must be construed to apply to all *in-force* policies.

Though later contradicting itself, the Court of Appeals found and determined all pertinent remedial aspects of the legislation. They found:

1. “The burden of providing such proof [proof of death] and making a claim remains with the potential beneficiary or the estate, and the Act does not alter the insurer’s contractual obligation to pay benefits only upon receipt of proof of death”,²⁷
2. “We 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”,²⁸ and
3. Placing responsibility of finding an insured’s name among the dead and “locating beneficiaries ... By itself, this provision does not alter the operation of any condition precedent to performance.”²⁹

The Court of Appeals then inconsistently concluded:

“Nevertheless, it [the Act] is a substantial obligation.... [that] falls within the rule prohibiting retroactive application to contracts in effect prior its [sic] effective date.”³⁰

²⁶ *Jeffers*, at p. 609.

²⁷ Appendix 1, p. 9.

²⁸ *Id.*, p. 10.

²⁹ *Id.*

The Court of Appeals erred through misapplication of *Moore v. Stills*, 307 S.W.3d 71, 75 (Ky. 2010). In *Moore*, the court concluded that remedial measures “do not impair rights a party possessed when he or she acted or give past conduct or transactions new substantive legal consequences, they do not operate retroactively and thus do not come within the rule against retroactive legislation. *Blake v. Carbone*, 489 F.3d 88 (2nd Cir.2007); *National Mining Association v. Department of Labor*, 292 F.3d 849 (D.C.Cir.2002); *Western Security Bank, N.A. v. Superior Court*, 15 Cal.4th 232, 62 Cal.Rptr.2d 243, 933 P.2d 507 (1997).

Such is the present case because notice of death did not factor into the contractual agreement between United and the insureds. It was neither a substantial right nor obligation placed on either party. As demonstrated in the deposition proof, any person, corporation, event, etc. may trigger notice. The statute requiring Appellees to take notice of public information does not give past conduct or the contractual transaction new substantive legal consequence. The statute merely operates in the furtherance of the contracting parties existing rights and remedies.

The circuit court followed these established rules of statutory interpretation when it reasoned that:

Applying such a remedial statute to claims that are pending at the time of its enactment does not violate the prohibition against retroactive legislation. *Thornsberry v. Aero Energy*, 908 S.W.2d 109 (Ky. App. 1995). As the Court of Appeals has explained, ‘when a statute is purely remedial or procedural and does not violate a vested right, it does not come within the concept of retrospective law nor the general prohibition against the retrospective operation of statutes.’

³⁰ *Id.*

The circumstance remedied by KRS 403.15-420 is identical to that addressed in the recent decision of *State ex rel. Perdue v. Nationwide Life Ins. Co.*, ___ S.E.2d ___, 2015 WL 3823175 (W.Va. 2015)³¹, and principles announced there should be followed here. The West Virginia State Treasurer filed a complaint seeking to collect unclaimed life insurance benefits and alleged:

[t]he United States Department of Commerce maintains a computerized database, known as the Death Master File (“DMF”), compiled from social security records. *Where the insurers have issued an annuity contract payable only during the lifetime of the annuitant, the Treasurer asserts that the DMF is regularly consulted to determine whether the annuitant has died and the contractual obligation has ended. With respect to the life insurance policies they issue, however, the Treasurer contends that the insurers do not avail themselves of the DMF or of any alternative data source to determine whether the insured has died with no claim to the proceeds having yet been filed by a beneficiary. Moreover, the Treasurer alleges that, in certain cases where premiums on whole life products are no longer remitted (or due) because the policy holder has died, the insurers, in the absence of a claim, siphon to exhaustion the underlying cash value in satisfaction of the phantom premiums on the fiction that the policy holder is perhaps alive and would not want the policy to lapse. Perdue, at p. ___. (Appellants’ emphasis)*

Relying on *Connecticut Mut. Life Ins. Co. v. Moore*, 334 U.S. 810, 92 L.Ed. 863, 68 S.Ct. 1014 (1948), the West Virginia Supreme Court rejected the insurance companies’ argument that there could be no duty to report abandoned property from unpaid life policies unless the beneficiary perfects his/her claim, thus creating a contractual “obligation to pay.” The conclusions of the court illustrate the separate remedial purposes of the statute without impairing the contractual rights and duties of the parties to the agreement. The court reasoned:

The mere requirement of a claim in accordance with the Code [contract], however, does not begin to address the wholly different question, decided in *Moore* and present here, regarding duties imposed by a regulatory scheme separate and distinct from any obligation under an insurance contract. *Perdue*, at p. ___.

³¹ Slip opinion attached for the convenience of the Court at Appendix 6.

This same conclusion affirms that reached by the Franklin Circuit Court to the effect that:

While the insurance company has a reasonable expectation that the state will not alter its contractual obligations, it has no reasonable expectation that the state will not impose reasonable regulatory requirements designed to enforce the pre-existing contract rights of insureds and beneficiaries.

Here, the legislature has sought to remedy the problem of insurance companies holding on to funds that should be paid to beneficiaries upon the death of an insured.³²

The circuit court's conclusions are consistent with *Jeffers* and should be reinstated here. The issue addressed by KRS 304.15-420 affects thousands of Kentuckians. It is intended to balance the interest of unsophisticated consumers against the market savvy and bottom-line tactics of insurance companies. It does so without affecting any contractual right or duty between the company and insured. This premise was actually supported by the Court of Appeals findings, and requires that the Court of Appeals be reversed and the circuit court judgment reinstated.

III. REMEDIAL APPLICATION OF KRS 304.15-420 TO EXISTING INSURANCE CONTRACTS DOES NOT IMPAIR CONTRACTUAL OBLICATIONS

The Appellees argue that KRS 304.15-420 violates the Contracts Clause by altering their expectations under the insuring contracts. While the preceding demonstration that the Act is remedial should obviate any claim of contractual impairment, the Supreme Court's impairment test is applied below with like results.

The Supreme Court has established a three part test to determine whether the application of a state statute results in a violation of the Contracts Clause. First, the court must evaluate "whether the state law has, in fact, operated as a substantial impairment of a contractual relationship." *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459

³² Opinion and Order, Appendix 2, p. 7.

U.S. 400, 411 (1983). If a contractual relationship has been impaired, the state must have a "significant and legitimate public purpose" to justify the statute. *Id.* Finally if a legitimate purpose exists, the court must determine whether the adjustment of contractual rights and responsibilities is "of a character appropriate to the public purpose justifying the legislation's adoption." *Id.* In this case, all three factors favor upholding KRS 304.15-420.

Appellees' claim that the Act impairs their contracts is not supported by the facts of record. First, although Appellees (and the Amici below) have oscillated indiscriminately between notice of a claim and proof of death, notice of a claim and proof of death are separate and distinct concepts and events. The Amici's argument suggested that *notice* is a required condition precedent to coverage under their policies and that the statute somehow upsets or alters this requirement. But the Appellees' policies are completely silent on the question of notice. For all the argument, notice is not mentioned in the contracts. It is not even a condition which could be subject to alteration by the statute.

When notice is material to coverage under an insuring agreement, it says so. For example a liability policy provides:

"[y]ou must see to it that we are *notified* as soon as practicable of an 'occurrence'" ... "If a claim is made ... *you must* ... *notify* us as soon as practicable. "³³ (Appellees' emphasis).

There is no similar indicia that *notice* is either a material term or condition under the Appellants' policies of insurance.

The immateriality of notice is further supported by the Appellees' acknowledgement that notice may come from anyone, in any form. (Depo., Schallhorn, p. 24:17-23) There is no

³³ R. 675, Memorandum in Support of Cross-Motion for Summary Judgment, Ex. 4, Specimen Liability Policy. *See*, pp. 10-11.

set standard or requirement. Appellees acknowledge that notice can come from anywhere, even by Appellees themselves. (Depo., Myers, p. 32:16-23; Depo., Schallhorn, p. 24:6-8)

Andrew Schallhorn's Response to Interrogatory No 6, provides: "We will pay the Death Benefit to the beneficiary when we receive proof of the Insured's death" and "We will pay the Insurance Amount to the beneficiary when we receive proof of the Insured's death." *Proof of death* is the contractual obligation, notice of a claim is not. (Depo., Schallhorn, p. 119:2-18)

It is this last admission that makes Appellees' reliance on *Andrews v. Nationwide Mutual Ins.* 2012 WL 5289946, misplaced. This unpublished Ohio decision does not assist the court in the present matter. *Nationwide Mutual Ins.* involved a suit brought by policy holders alleging Nationwide failed in its duty of good faith and fair dealing in identifying life insurance policies that may be payable. The policy holders argued that the language regarding the burden of proof of death in their contracts was ambiguous. The court held that language of the policy regarding proof of death was unambiguous and that requiring Nationwide to provide proof of death would be to rewrite the terms of the policy.

Key points distinguish *Nationwide Mutual Ins.* from the present case, most notable is that this is not first party action by policy holders, but a statutory requirement. The Ohio court acknowledged that such a legislative mandate creates a distinction. In addition, the *Nationwide Mutual Ins.* court looked exclusively at proof of death, while in the present case, the law creates merely an additional administrative step for Appellees, one well within the legislature's domain and separate from the obligations under the contract. *Perdue, supra.* As the Appellees repeatedly acknowledge, *notice* of death, is separate and distinct from proof of death, and that court only made a finding in relation to the burden of proof of death in the

contract. Therefore, *Nationwide Mutual Ins.* is not controlling on the issue of whether notice of a claim is contractually required by the beneficiary.³⁴

The Appellees' reliance on *American Express Travel Related Services Co., Inc. v. Kentucky*, 730 F.3d 628 (6th Cir. 2013), is likewise misplaced. There, without much discussion, the federal court concluded that reducing the time for presumptive abandonment of property under the escheat law, was a substantive and not a remedial change. But *American Express* is distinguishable. There, it was significant that the travelers checks involved are for sums certain that "never expire."³⁵ The amount of the traveler's check would either be paid to the presenter or it would escheat to the Commonwealth 15 years after it was issued. In this action there is no such certainty. The amounts of coverage otherwise payable in benefits are by design intended to be consumed by the company through collection of *extended term* or *reduced paid-up* premiums. Unpaid benefits or cash values are consumed by the company before the limiting age can occur. There is neither payment of cash value, payment of benefits, nor payment in escheat.

The case more directly on point here is *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 190 (1992). Here – as in that case - there simply is no contractual agreement regarding the specific term (notice and burden of notice here) allegedly at issue, therefore there can be no interference with a contractual obligation to satisfy the threshold requirement under *Kansas Power & Light Co.*

In *Romein*, the court held that a later statute on workers compensation benefits did

³⁴ Appellees rely on two additional unpublished cases they argue either "echo" or "reaffirm" the holding in *Nationwide Mutual Ins.* But the holding in *Feingold v. John Hancock Life Insurance Co.*, 2013 WL 4495126 (D. Mass. Aug. 19, 2013) merely affirms the finding of the circuit here, that the insurer may require *due proof of death* before paying on the policy. In *Total Asset Recovery Services, LLC v. MetLife, Inc.*, No. 2010-CA-3719 (Fla. Cir. Ct. Aug. 20, 2013) the court merely acknowledged that the Florida legislature has not adopted legislation like that considered here.

³⁵ 730 F.3d at 631.

not substantially impair contracts in violation of the Contracts Clause for pre-existing collective bargaining agreements because those agreements made no express mention of the benefits. The court also concluded that the later statute caused no change in the legal enforceability of the contract. While here Appellees argue that it is well-settled that notice of a claim must be provided by the beneficiary or claimant, their admitted practices illustrate this is not the case, nor can they point to any language in the contracts to demonstrate that notice of claim was a contracted for term or obligation like the requirement of proof of death.

In fact, not only does the statute not interfere with the requirement of a claimant to supply proof of death, it reinforces it, KRS 304.15-420(3)(b)(2 b), “[P]rovide the appropriate claims forms or instructions to each beneficiary to make a claim, **including the need to provide an official death certificate if applicable under the policy or contract.**” (Appellant’s emphasis).

There is no shift in contractual obligations under the statute, and there are no changes in responsibilities to Appellees’ in-force policies. The deposition proof of record demonstrates that the statute merely affirms procedure already in place once the insurer receives notice, *from whatever source*. Similarly, there are no increases to the rights of either party to the contract, nor does it vary existing terms.³⁶ Altering contractual terms would occur if Appellants were now being required to pay claims *before* proof of death was provided by claimants or were now required to *obtain* proof of death themselves. But this is not the case. There is no alteration of the contracts.

³⁶ The Appellees’ reliance on Utah courts should be distinguished and dismissed. In *Burnham v. Bankers Life & Casualty Co*, 24 Utah 2d 277, 470 P. 2d 261 where the law granted additional time-periods for contestability, the court held that the law cannot vary existing terms, but our statute does not vary terms or conditions to the existing in-force policies.

This is why Appellees' reliance on *Allied Structural Steel Co. v. Spannaus*, 4388 U.S. 234 (1978), is incorrect. First, Appellants have shown no impact on the contractual obligations as laid out in the terms of the in-force policies. Unlike in *Spannaus*, the Act does not increase payouts or claim amounts or otherwise expand benefits under the policies. The Act does not give any greater rights or benefits to any insured, beneficiary, nor other claimant, unlike *Spannaus* where legislation required companies to give a pension funding change to employees.

In the present case, the new duty to query the *Death Master File* in no way diminishes the efficacy of any contractual obligation owed to or from the claimant.

IV. APPELLEES HAVE NO VESTED PROPERTY RIGHT THAT IS BEING IMPAIRED BY KRS 304.15-420

In addition to the failure of the Appellees to demonstrate any alteration of contract terms or conditions, they cannot demonstrate any vested right that is being abridged by KRS 304.15-420. Without an abridgement of a vested right of the Appellees, there can be no contractual impairment violation, even if the statute had retroactive application. *See Walker v. Commonwealth*, 279 Ky. 198, 130 S.W.2d 27, 30-31 (1939). "A right is vested, for these purposes, only if it has ripened into a secure entitlement to present or future enjoyment. The mere expectation of enjoyment is not enough." *King v. Campbell County*, 217 S.W.3d 862 (Ky. App. 2006).

What the Appellees are claiming is a right to future enjoyment based upon investments made as custodian of money otherwise properly payable to their insureds. "However, "[a] right, in order to be vested (in the constitutional sense) must be more than a mere expectation of future benefits or an interest founded upon an anticipated continuance of existing general laws." *Louisville Shopping Center, Inc. v. City of St. Matthews*, 635

S.W.2d 307, 310 (Ky. 1982). Rather, it must be a secure entitlement, one that is not merely speculative and based on future events. *Id.*

The circuit court reasoned that the Appellees do not have a contractual right to an economic expectancy. *King v. Campbell County*, 217 S.W.3d 862 (Ky. App. 2006). As such, no contractual right or relationship is disturbed by application of a statute that only requires payment of life insurance benefits on proof of the death of the insured. The statute does not create new legal consequences for past acts or transactions.

American Express is similarly distinguishable here. In that case, the escheat occurred at a fixed term of 15 years from the date of issuance of every traveler's check. There was an absolute maximum *self-investment period* established by the statute. But in this action, there are too many variables for the Appellees' *expectancy* to mature into a vested right. The Appellees have no contractual entitlement to continued custody of the funds whatsoever. Appellees never had a guarantee as to how long they would have custody of the funds or what benefit they would receive from them. Not only is a policy subject to a claim at any time, the amounts and time of *extended term* or *reduced paid-up* premiums are never the same. For Appellees to suggest they are entitled to rely on the mortality limiting age as fixing their obligation to escheat is belied by the fact that they have engineered their policies to self-consume cash values before ever reaching the limiting age.³⁷ Because of the absence of the precision of circumstances giving rise to a vested right in *American Express*, Appellees cannot demonstrate a vested right here.

The Supreme Court's holding in *United States v. Carlton*, 512 U.S. 26 (1994), further illustrates the flaw in the Appellees' argument that they have a vested right in the retention of

³⁷ See, Note 10, *supra*, wherein the Company reported only \$0.66 cents subject to escheat for a 7 year period.

payable benefits. In *Carlton*, the court upheld an estate tax provision that was clearly retroactive, in part because the taxpayer could not identify an appropriate right he was seeking to protect. *Id.* at 33-34. The Court specifically rejected his argument that he relied on the tax code at the time of his purchase, holding, "reliance alone is insufficient to establish a constitutional violation" as "[t]ax legislation is not a promise, and a taxpayer has no vested right in the Internal Revenue Code." *Id.* at 33. The Court noted that changes in the law "may disturb the relied-upon expectations of individuals, such a change would not be deemed therefore to be violative of due process." *Id.* at 26. Even assuming *arguendo* that the Appellees relied upon the legislature's failure to address their practices, they did so at their own peril. Such reliance does not create a vested property right. Without such a right, "[W]hat the legislature gives the legislature may take away." *Jacober v. Board of Comm'rs of City of Covington*, 607 S.W.2d 126, 127 (Ky. App. 1980).

The regulatory requirement that the Appellees identify potential claimants does not impair a vested right.

V. ENFORCEMENT OF THE STATUTE SERVES IMPORTANT PUBLIC INTERESTS

Enforcement of the statute has the effect of ensuring that Kentucky consumers get what they pay for. The circuit court took notice that "Many Kentucky citizens pay for insurance to help them plan for end of life costs. For insurance companies to attempt to keep the money through willful ignorance of the death of the insured amounts to unjust enrichment at the expense of some of the least privileged citizens in this state.... All but 42 of the policies at issue here were sold door to door to people in lower socio-economic classes."³⁸

³⁸ R. 772, Opinion and Order, Appellants' Appendix A, at p. 11.

Agreeing with the Supreme Court, the circuit court concluded, “the contracts clause is subject to “the inherent police power of the state ‘to safeguard the vital interest of its people.’” *Energy Reserves Group v. Kansas Power and Light*, 459 U.S. 400,410 (1983) (citing *Home Bld’g and Loan Ass’n v. Blaisdell*, 260 U.S. 398, 434 (1934). Allowing enforcement of the statute best serves the public interest here.

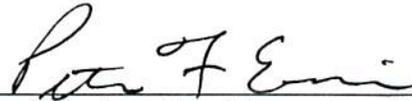
Even if the additional administrative step of using the *Death Master File* were any kind of contractual impairment, the matter would be weighed under *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), which held that “the burden is well-established that legislative acts adjusting burdens and benefits of economic life come to the court with a presumption of constitutionality.” Readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations or that it imposes new duties or liabilities based on past acts.

Similarly, if this additional administrative step of using the *Death Master File* were any kind of impairment, this burden is justified by *significant and legitimate public purposes*. *Kansas Power and Light, supra*. Namely, the need to ensure that Kentucky citizens get what they pay for. The Act simply creates an additional supplemental duty no different from a wide variety of legislative measures which defeat settled expectations. *Usery, supra*. The requirement to use the *Death Master File* or similar database does not shift a burden under the terms of this policy as no burden for notice was ever contractually defined. In fact this is not an impermissible shift but a reasonable sharing, as notice can still come from the same identified sources, including the insurers themselves.

CONCLUSION

The circuit court correctly reasoned that KRS 304.15-420 is remedial and intended to be applied to all outstanding life policies. The Court of Appeals should be reversed with reinstatement of the circuit court judgment.

Respectfully submitted,



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