

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 1041 Unclaimed Property  
**SPONSOR(S):** Hager  
**TIED BILLS:** **IDEN./SIM. BILLS:** SB 966

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Insurance & Banking Subcommittee	12 Y, 0 N	Bauer	Luczynski
2) Government Operations Appropriations Subcommittee	11 Y, 0 N	Keith	Topp
3) Regulatory Affairs Committee			

### SUMMARY ANALYSIS

Unclaimed property consists of any funds or other property, including insurance proceeds, that has remained unclaimed by the owner for a certain period of time. The Florida Disposition of Unclaimed Property Act (“the Act”) requires holders of unclaimed property to exercise due diligence to locate missing owners and pay them the funds. If the owner cannot be located, the holder must report and remit the unclaimed property to the Department of Financial Services (DFS) Bureau of Unclaimed Property.

In 2008-2009, Florida and a number of other state insurance regulators and unclaimed property administrators began investigating large life insurers for their claims settlement practices, and learned that certain insurers selectively used the Social Security Administration’s Death Master File (DMF) to verify the death of an insured or an annuitant, which enabled the insurer to stop making annuity payments, but were not using the same information to ascertain the death of a life insurance policyholder for making payment to a beneficiary or remittance of the proceeds to a state unclaimed property office. From 2011 to the present, Florida entered into a number of regulatory settlement agreements (RSAs) with over 20 of the 40 largest life insurers, which generally require life insurers to attempt to connect beneficiaries with policy benefits, report and remit unclaimed property to states, and to compare all the insureds listed in their company records against the DMF.

The bill amends the Act to codify the RSAs to retroactively require life insurers, for all life policies, annuity contracts and retained asset accounts that were in-force during or after 1992, to conduct a match of all such policies against the DMF. For any person who is revealed to have died while covered, unless the presumed death is rebutted by evidence, the insurer must within four months of gaining knowledge of death, pay the unclaimed benefits to the beneficiary or heir – a process known as “due diligence.” If not accordingly paid within four months, the unclaimed benefits become unclaimed property. The bill requires insurers, in future years, to conduct a similar match of all in-force policies and contracts on at least an annual basis. The bill establishes the date of death as the five-year dormancy trigger for unclaimed policy benefits. It prohibits insurers from charging fees associated with the “due diligence” process or to recipients in the course of obtaining funds they are owed. The legislation clarifies that life insurance proceeds may become unclaimed property, even if the beneficiary of the policy has not yet filed a claim for the death benefits with the insurer and that the dormancy period for life insurance commences upon the date of death of the insured.

The bill has an indeterminate impact on state government revenues and expenditures. However, the DFS indicates that any expenditure increase due to additional workload created by provisions in the bill will be absorbed within existing resources. The bill has no fiscal impact on local government. The bill may impose indeterminate costs to insurers to comply with the search requirements, but may increase the likelihood that Florida beneficiaries will obtain intended death benefits.

The bill takes effect upon becoming a law.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Current Law

##### **Florida Disposition of Unclaimed Property Act**

Unclaimed property constitutes any funds or other property, tangible or intangible, that has remained unclaimed by the owner for a certain number of years. Unclaimed property may include: savings and checking accounts; money orders; travelers' checks; uncashed payroll or cashiers' checks; stocks; bonds; other securities; insurance policy payments; refunds; security and utility deposits; and contents of safe deposit boxes.<sup>1</sup>

In 1987, Florida adopted the Uniform Unclaimed Property Act and enacted the Florida Disposition of Unclaimed Property Act (ch. 717, F.S., "the Act").<sup>2</sup> The Act serves to protect the interests of missing owners of property, while the state derives a benefit from the unclaimed and abandoned property until the property is claimed, if ever. Under the Act, the Department of Financial Services (DFS) Bureau of Unclaimed Property is responsible for receiving property, attempting to locate the rightful owners, and returning the property or proceeds to them. There is no statute of limitations in the Act, and citizens may claim their property at any time and at no cost.

Generally, all intangible property, including any income less any lawful charges, which is held in the ordinary course of the holder's business, is presumed to be unclaimed when the owner fails to claim the property for more than five years after the property becomes payable or distributable, unless otherwise provided in the Act.<sup>3</sup> Holders of unclaimed property (which typically include banks and insurance companies) of \$50 or more are required to use due diligence to locate and notify apparent owners of inactive accounts, at least 60 days but not more than 120 days prior to filing a report with the DFS.<sup>4</sup> If the owners cannot be located, holders must file an annual report with the DFS for all property, valued at \$50 or more, that is presumed unclaimed for the preceding year.<sup>5</sup> The report must contain certain identifying information, such as the apparent owner's name, social security number or federal employer identification number, and last known address of apparent owners.<sup>6</sup> The holder must deliver all reportable unclaimed property to the DFS when it submits its annual report.<sup>7</sup>

Upon the payment or delivery of unclaimed property to DFS, the state assumes custody and responsibility for the safekeeping of the property.<sup>8</sup> The original property owner retains the right to recover the proceeds of the property, and any person claiming an interest in the property delivered to the DFS may file a claim for the property, subject to certain requirements.<sup>9</sup> The DFS is required to make a determination on a claim within 90 days. If a claim is determined in favor of the claimant, the department is to deliver or pay over to the claimant the property or the amount the department actually received or the proceeds, if it has been sold by the DFS.<sup>10</sup>

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<sup>1</sup> ss. 717.104 – 717.116, F.S.

<sup>2</sup> Ch. 87-105, Laws of Fla. See also UNIFORM LAW COMMISSION, *Unclaimed Property Act Summary*, <http://www.uniformlaws.org/ActSummary.aspx?title=Unclaimed%20Property%20Act> (last visited Jan. 19, 2016).

<sup>3</sup> s. 717.102(1), F.S.

<sup>4</sup> s. 717.117(4), F.S.

<sup>5</sup> s. 717.117, F.S.

<sup>6</sup> For unclaimed funds owing under any life or endowment insurance policy or annuity contract, the report must also include the last known address of the insured or annuitant and of the beneficiary according to records of the insurance company holding or owing the funds. s. 717.117(1)(b), F.S.

<sup>7</sup> s. 717.119, F.S.

<sup>8</sup> s. 717.1201, F.S. Like many other states' unclaimed property acts, the Act is based on the common-law doctrine of escheat and is a "custody" statute, rather than a "title" statute, in that the DFS does not take title to abandoned property, but instead obtains its custody and beneficial use pending identification of the property owner.

<sup>9</sup> ss. 717.117 and 717.124, F.S.

<sup>10</sup> s. 717.124, F.S.

If the property remains unclaimed, all proceeds from abandoned property are then deposited by the DFS into the Unclaimed Property Trust Fund.<sup>11</sup> The DFS is allowed to retain up to \$15 million to make prompt payment of verified claims and to cover costs incurred by the DFS in administering and enforcing the Act. All remaining funds received must be deposited into the State School Trust Fund to be utilized for public education.<sup>12</sup>

### Life or Endowment Insurance Policies or Annuity Contracts

The primary purpose of life insurance (the insurance of human lives) is to provide a financial benefit (death benefit) to dependents (beneficiaries) upon the premature death of an insured person. Life insurance also includes *annuity contracts* and *endowment benefits*.<sup>13</sup>

- An *annuity* is a series of payments that acts similarly to a savings plan to provide primary or supplementary retirement income over a period of time. It is a contract where the consumer (annuitant) makes a lump sum payment or a series of payments to an insurer; in return, the insurer agrees to make periodic payments back to the annuitant at a future date for varying periods and amounts. An annuity may or may not have a death benefit upon the annuitant's death, depending on the annuity's payment plan.
- *Endowment policies* offer insurance protection for a fixed period of time, with emphasis on the rapid accumulation of premiums. The policy "endows" if the insured lives to the end of the policy period (such as the 10<sup>th</sup> or 20<sup>th</sup> anniversary, or with a stated age, such as 65), triggering a payment to the owner that is equal to the policy's face amount.<sup>14</sup>

Section 627.461, F.S., requires that every contract of insurance provide that, when a policy becomes a claim upon the death of the insured, settlement of the policy shall be made upon *receipt of due proof of death* and surrender of the policy. Accordingly, life insurance policies and annuities contracts with death benefits issued under Florida law have contractual terms that provide that the policy matures upon the insurer receiving actual proof of death, generally in the form of a certified copy of the death certificate.

Until an insurer receives proof of the insured's death, it uses *retained asset accounts* to hold beneficiaries' proceeds until the beneficiaries withdraw the cash using checks or drafts, payment cards, or other means. Current law does not restrict the use of a retained asset account by an insurer. The beneficiary may move funds from the retained asset account into their own account (whether in a single lump sum payment, in installments, or in interest-only payments until the insured's death).<sup>15</sup>

### Verification of Death Through the Social Security Death Master File

The U.S. Social Security System (SSA) collects death information from many sources (including family members, funeral homes, financial institutions, postal authorities, states, and other federal agencies) in order to administer its programs. This death information is compiled into the Death Master File (DMF) is an extract of death information on the SSA's Numerical Identification System (also known as NUMIDENT), the electronic database that contains records of Social Security Numbers (SSN) assigned to individuals since 1936, and includes, if available, the deceased individual's SSN, first name, middle name, surname, date of birth, and date of death. The SSA prepares two versions of the DMF – a *full file* which is shared only with certain state and federal agencies pursuant to federal law, and a *public file* which does not include death data received from the states. The public file is provided to the Department of Commerce's National Technical Information Service, a clearinghouse for government information, which sells it to the public (other agencies and private organizations such as banks and

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<sup>11</sup> s. 717.123, F.S.

<sup>12</sup> *Id.*

<sup>13</sup> s. 624.602, F.S.

<sup>14</sup> DEPARTMENT OF FINANCIAL SERVICES, *Life Insurance & Annuities: A Guide to Consumers* (p. 7), at

[http://www.myfloridacfo.com/Division/Consumers/understandingCoverage/Guides/documents/life\\_annuities.pdf](http://www.myfloridacfo.com/Division/Consumers/understandingCoverage/Guides/documents/life_annuities.pdf)

<sup>15</sup> DEPARTMENT OF FINANCIAL SERVICES, *Life Insurance: Overview – Common Terms*, at

<http://www.myfloridacfo.com/Division/Consumers/UnderstandingCoverage/LifeInsuranceOverview.htm> (last visited Jan. 19, 2016).

credit companies).<sup>16</sup> Access to the DMF is restricted and requires users to have a legitimate fraud prevention interest or a legitimate business purpose pursuant to a law, governmental rule, regulation, or fiduciary duty, in addition to compliance with strict user agreements.

A variety of individuals and professions, such as medical researchers, hospitals, oncology programs, investigative firms, individuals searching for loved ones, and genealogists, use the DMF to verify death. Additionally, pension funds, insurance organizations, and government entities of all levels responsible for making benefits and payments to recipients use the DMF to make sure they are not sending checks to deceased persons.<sup>17</sup>

As discussed further below, the Act does not currently require insurers to use the DMF to verify the insured's death for the purposes of its payment obligations to beneficiaries or remittance and reporting obligations to the DFS.

### *Unclaimed Property Treatment of Life Insurance or Endowment Policies or Annuity Contracts*

In some instances, life insurance or endowment policies or annuity contracts reach maturity or are terminated, but are unclaimed by the beneficiary, sometimes due to the beneficiary's lack of knowledge that he or she is a named beneficiary. Historically, many life insurance companies have held policy benefits until contacted by a beneficiary, rather than research whether the policyholder is still living. If never contacted, the company never paid the benefit. For unclaimed property purposes, s. 717.107(1), F.S., provides that funds held or owing under a life or endowment insurance policy or an annuity contract that has matured or terminated are presumed unclaimed if unclaimed for more than 5 years<sup>18</sup> (the dormancy period) after the funds became *due and payable* as established by records of the insurance company owing the funds.<sup>19</sup>

In 2014, a Florida appeals court reviewed a declaratory statement<sup>20</sup> by the DFS that interpreted s. 717.107(1), F.S., to require life insurance funds "due and payable" upon the death of the insured, at which time the 5-year dormancy period for unclaimed property purposes is triggered.<sup>21</sup> The DFS declaratory statement, issued to petitioner Thrivent Financial for Lutherans, also asserted that the statute creates an affirmative duty on insurers to use due diligence in searching databases (such as the Google, LexisNexis, or the SSA's DMF), in order to determine if any of its insureds had died. The First DCA reversed the declaratory statement, finding DFS's interpretation to be clearly erroneous and contrary to the plain language of s. 717.107, F.S. In reading the statute in conjunction with s. 627.461, F.S., which requires insurance contracts to state that the policy will be settled upon "receipt of due proof of death and surrender of the policy," the court concluded that the records of the insurance company do not establish insurance funds as "due and payable" under the Act until the insurer receives proof of death and surrender of the policy. Additionally, the court also refused to impose an affirmative duty on insurers to search death records in order to determine whether any insureds have died, noting that the plain language of s. 717.107, F.S., does not impose such a duty. In declining to rewrite the statute contrary to its plain language, it noted that policy considerations such as these must be addressed by the Legislature.<sup>22</sup>

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<sup>16</sup> SOCIAL SECURITY ADMINISTRATION, *Requesting the Full Death Master File: Our Death Data*, at [https://www.ssa.gov/dataexchange/request\\_dmf.html](https://www.ssa.gov/dataexchange/request_dmf.html) (last visited Jan. 19, 2016).

<sup>17</sup> Social Security Death Master File, *SSDMF Database Uses*, at <https://www.ssdmf.com/FolderID/1/SessionID/%7B7B22D106-D899-4C11-B93A-1E389C169B9C%7D/PageVars/Library/InfoManage/Guide.htm> (last visited Jan. 19, 2016).

<sup>18</sup> If the insured attains the limiting age under an in-force policy or would have done so if alive, the funds are deemed unclaimed, if unclaimed for 2 years. s. 717.107, F.S.

<sup>19</sup> s. 717.107(1), F.S. The statute also sets forth grounds for deeming an (otherwise unmatured) policy matured and the proceeds as due and payable, such as if the company knows that the insured or annuitant has died.

<sup>20</sup> Under the Administrative Procedure Act, a declaratory statement may be requested by "any substantially affected person," and is a binding opinion of a state agency as to the applicability of a statutory provision or any rule or order of the agency, as it applies to a petitioner's particular set of circumstances. A declaratory statement is final agency action appealable to the district courts of appeal. See ss. 120.565 and 120.68, F.S.

<sup>21</sup> *Thrivent Financial for Lutherans v. Dep't of Financial Services*, 145 So.3d 178 (Fla. 1st DCA 2014).

<sup>22</sup> *Id.* at 182.

## Regulatory Examinations of Life Insurance Claims Practices

Between 2004 and 2006, Florida received nearly 200,000 unclaimed demutualization accounts (totaling more than \$184 million) from life insurers that demutualized between 1998 and 2001.<sup>23</sup> These accounts were not death benefits, but rather ownership interests in the company by policyholders, and were remitted as unclaimed property to the DFS. Due to the large amount of demutualization proceeds, Florida and many other states questioned the whereabouts of the underlying life policies.

Beginning in 2008, Florida and 43 other states began auditing life insurance companies for compliance with state unclaimed property laws. The auditors' strategy involved comparing policy information to data maintained by the DMF. Between 2009 and 2011, during the course of the initial exams, Florida learned that certain life insurance companies selectively utilized the DMF to verify the death of an annuitant, which then enabled the insurance company to stop making annuity payments. However, the insurance companies were not using the DMF to research the death of a policyholder of a life insurance policy, which would have resulted in payment to a beneficiary or remittance of the policy benefits to a state unclaimed property office.<sup>24</sup>

In 2009, the Office of Insurance Regulation (OIR) conducted market conduct investigations which confirmed the industry's asymmetrical use of the DMF. Because insurers were not using information to find beneficiaries, the practice sometimes resulted in continued payment deductions from the accounts of deceased policyholders for the payment of premiums. Often, claims are not made by the beneficiaries of life insurance policies because the beneficiary is unaware of the policy. Additionally, insurers generally did not remit the benefits under life insurance policies and annuities with a death benefit to the Bureau of Unclaimed Property unless the insured attained, or would have attained, the limiting age on an at-force policy, which for most policies is 100 years of age or greater.

In May 2011, insurance regulators from a number of states, including Florida, established a special task force to coordinate regulatory investigations of the claim settlement practices of life insurance companies. In particular, the task force focused on the allegations that many of the insurers were using the DMF to terminate payments under annuity contracts, but failed to use this information to facilitate claims payments on life insurance policies. Kevin McCarty, the OIR Commissioner, has served as the chair of the task force since its inception. Florida, California, Illinois, New Hampshire, North Dakota, and Pennsylvania, are the lead states for these examinations of the 40 largest insurance groups, which comprise more than 92 percent of the market of life and annuity products nationwide. Currently, an examination has been concluded or a settlement has been reached for 22 of the 40 largest insurers.<sup>25</sup>

## Regulatory Settlement Agreements (RSAs)

From 2011 to the present, Florida entered into a number of settlement agreements with over 20 large life insurers, often as part of multi-state regulatory settlement agreements (RSAs). Participants in the examination and settlement process have included Chief Financial Officer Jeff Atwater through the Bureau of Unclaimed Property at the DFS, Attorney General Pam Bondi through the Office of the Attorney General, and the OIR. According to the OIR, these life claim settlement agreements have resulted in the return of over \$5 billion to beneficiaries directly by the companies and over \$2.4 billion being delivered to the states, which also attempt to locate and pay beneficiaries.

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<sup>23</sup> Demutualization refers to a process whereby a *mutual insurer* (which does not have permanent capital stock and whose policyholders hold certain membership interests) seeks to convert to a *stock insurer* (whose capital is divided into shares and is owned by its stockholders), subject to regulatory approval by the Office of Insurance Regulation pursuant to pt. I, ch. 628, F.S.

<sup>24</sup> DEPARTMENT OF FINANCIAL SERVICES, *Life Insurance/Unclaimed Property/Death Master File Proposed Legislation: Historical Background*, on file with the Insurance & Banking Subcommittee staff.

<sup>25</sup> OFFICE OF INSURANCE REGULATION, *Life Claim Settlement Practices*, at

[http://www.floir.com/Sections/LandH/life\\_claims\\_settlement\\_practices\\_hearing05192011.aspx](http://www.floir.com/Sections/LandH/life_claims_settlement_practices_hearing05192011.aspx) (last visited Jan. 19, 2016).

The RSAs generally require the life insurer to compare all the life insureds listed in company records against the DMF.<sup>26</sup> For all policies the company obtains notice of the death of the insured through the DMF search or company records, it must conduct a thorough search for the beneficiaries. If a life insurance beneficiary contacts the insurer, the company must provide claims forms and instructions for the making of a claim. The insurers retain the right to require a death certificate as proof of death before paying proceeds to a beneficiary. If the company cannot locate the beneficiary, the insurer must remit the proceeds as unclaimed property within 5 years of the date of the death of the life insurance policyholder. The settlement agreements also establish business practices to facilitate payments to owners of assets under annuity contracts and retained asset accounts.

### **Effect of the Bill**

The bill codifies the RSAs to require life insurers, for all life policies, annuity contracts and retained asset accounts that were in-force during or after 1992, to conduct a match of all such policies against the SSA's DMF. For any person who is revealed to have died while covered, unless the presumed death is rebutted by evidence, the insurer must within four months of gaining knowledge of death, pay the unclaimed benefits to the beneficiary or heir – a process known as “due diligence.” If not accordingly paid within four months, the unclaimed benefits become unclaimed property. The bill requires companies, in future years, to conduct a similar match of all in-force policies and contracts on at least an annual basis. The bill establishes the date of death as the five-year dormancy trigger for unclaimed policy benefits. It prohibits insurers from charging fees associated with the “due diligence” process or to recipients in the course of obtaining funds they are owed. The legislation clarifies that life insurance proceeds may become unclaimed property even if the beneficiary of the policy has not yet filed a claim for the death benefits with the insurer and that the dormancy period for life insurance commences upon the date of death of the insured.

Section 1 amends s. 717.107, F.S., of the Act to establish that funds held or owing under any life or endowment insurance policy or annuity contract which has matured or terminated are presumed unclaimed if unclaimed for more than 5 years after the date of death of the insured, annuitant, or retained asset account holder.

The bill requires insurers to at least annually perform a comparison of its insureds against the SSA's DMF. The comparison must be performed for all the insurer's policyholders under life or endowment insurance policies, annuity contracts that provide a death benefit, and retained asset accounts that were in force at any time on or after January 1, 1992. The annual comparison must be made before August 31 of each year. Additionally, if the insurer makes a comparison of its annuity policyholders against the DMF more frequently than once a year, the insurer must perform the DMF comparison required by this bill as frequently. Consequently, the bill will require insurers to perform the searches that the *Thrivent* decision held that the DFS did not have the authority to require under current s. 717.107, F.S.

The bill establishes a rebuttable presumption that an insured, annuitant, or retained asset account holder is deceased if that person's date of death is indicated on the DMF. The insurer is required to account for common variations in data and for partial names, social security numbers, dates of birth, and addresses which would otherwise preclude an exact match.

The bill exempts any annuity contract issued in connection with an employment-based plan subject to the Employee Retirement Income Security Act of 1974 (ERISA) or an annuity contract issued to fund an employment-based retirement plan, including any deferred compensation plans. An insurer is not required to confirm the possible death of an insured for accidental death plans or when the insurer does not perform recordkeeping functions. The provision related to record keeping functions will exempt a policy issued to a group policy owner for which the insurer does not provide record keeping services. The bill defines record keeping services as maintaining the information necessary to process a claim or having access to such information.

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<sup>26</sup> OFFICE OF INSURANCE REGULATION, *Florida's Regulatory Life Claim Settlement Agreements*, <http://www.flor.com/siteDocuments/LifeClaimsSettlements.pdf> (follow hyperlinks to RSAs)(last visited Jan.19, 2016).

Insurers and their agents or third parties may not charge insureds, annuity owners, retained asset account holders, and beneficiaries any fees or costs associated with any search, verification, claim or delivery of funds pursuant to the requirements of s. 717.107, F.S.

Section 2 of the bill states that the bill is remedial and applies retroactively. The retroactive application of the bill evidences legislative intent to apply the bill to policies, contracts and accounts entered into, prior to the effective date of the bill. Fines, penalties, or additional interest may not be imposed on the insurer for failure to report and remit property under the bill if such proceeds are reported and remitted to the DFS no later than May 1, 2021. The prohibition against fines, penalties and additional interest is designed to provide insurers approximately 5 years to comply with the requirements of the bill before being subject to such sanctions.

Section 3 provides that the act is effective upon becoming law.

#### B. SECTION DIRECTORY:

**Section 1.** Amends 717.107, F.S., relating to funds owing under life insurance policies.

**Section 2.** Provides a statement of retroactive applicability.

**Section 3.** Provides that the bill takes effect upon becoming a law.

### II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

#### A. FISCAL IMPACT ON STATE GOVERNMENT:

##### 1. Revenues:

The bill has an indeterminate, but likely positive impact to state revenues. The bill requires life insurance companies to review the DMF at least annually to determine if the death of an insured is indicated so that Florida beneficiaries will receive death benefits as intended.

The bill also provides that fines, penalties, or additional interest shall not be imposed on insurance companies that run the DMF search and report and remit any unclaimed life insurance proceeds, annuities, and retained asset accounts before May 1, 2021. Accordingly, while there may be no revenues for FY 16-17, FY 17-18 or FY 18-19 based on the DMF search required by the bill, the bill will result in insurance companies conducting DMF searches and reporting and remitting the unclaimed property to the DFS soon after the bill becoming law.

According to the DFS, it is anticipated that the first time an insurance company runs the DMF, the amount of unclaimed life insurance proceeds owed to missing beneficiaries that are reported and remitted to the DFS will be greater than the amount of unclaimed life insurance proceeds reported and remitted to the DFS each subsequent year. However, the DFS expects to receive reports and remittances far exceeding \$100 million, from unknown and unclaimed life insurance benefits not returned via "due diligence."<sup>27</sup>

##### 2. Expenditures:

The bill is likely to have an indeterminate impact on DFS expenditures. The DFS has noted that they may incur litigation expenses if the bill is challenged by life insurers.<sup>28</sup> In addition, the DFS could potentially see an increased workload to the Bureau of Unclaimed Property as a result of provisions in the bill. However, the DFS indicates that any additional workload will be absorbed within existing resources.

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<sup>27</sup> Department of Financial Services, Agency Analysis of 2016 House Bill 1041, p. 2 (Jan. 8, 2016).

<sup>28</sup> *Id.*

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Life insurers may incur a cost to use the DMF to comply with this bill, if they are not currently using it to determine whether a death of an insured has occurred. On the other hand, many beneficiaries of life or endowment insurance policies and annuities contracts, who are unaware of such policies, will benefit by claiming benefits after being contacted by a life insurer. If the life insurer remits the funds held or owing under the policy or contract to the Bureau of Unclaimed Property, beneficiaries will benefit by having a central location with which to search for possible life insurance proceeds.

D. FISCAL COMMENTS:

None.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to affect county or municipal governments.

2. Other:

Section 2 of the bill provides a statement of retroactive application and that the amendments are remedial in nature. The bill applies to life or endowment insurance policies, annuity contracts that provide a death benefit, and retained asset accounts that were in force at any time on or after January 1, 1992.

Section 624.21, F.S., provides that each amendment to the Insurance Code<sup>29</sup> (which includes the Act) shall be construed to operate prospectively, unless a contrary legislative intent is specified. This is consistent with the constitutional principle that unless the Legislature states otherwise, legislation is presumed only to operate prospectively. However, even where the Legislature expressly states an intent for a statute to apply retroactively, courts will reject such an application if the statute impairs a vested right, creates a new obligation, or imposes a new penalty.<sup>30</sup> The Contract Clause of article I, section 10 of the U.S. Constitution prohibits states from passing laws which substantially impair contract rights. Courts use a balancing test to determine whether a particular regulation violates the contract clause. The courts measure the severity of contractual impairment against the importance of the interest advanced by the regulation. Also, courts look at whether the regulation is a reasonable and narrowly tailored means of promoting the state's interest.<sup>31</sup> Generally, courts accord considerable deference to legislative determinations relating to the need for laws which impair private obligations.<sup>32</sup>

The DFS asserts that these constitutional concerns are not implicated, because the legislation is remedial in nature (i.e., corrects or remedies a problem or redresses an injury) and does not create new or take away vested rights:<sup>33</sup>

<sup>29</sup> Section 624.01, F.S., provides that chs. 624-632, 634-636, 641-642, 648, and 651, F.S., constitute the Florida Insurance Code.

<sup>30</sup> *Menendez v. Progressive Exp. Ins. Co., Inc.*, 35 So.3d 873 (Fla. 2010).

<sup>31</sup> *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978).

<sup>32</sup> *East N.Y. Sav. Bank v. Hahn*, 326 U.S. 230 (1945).

<sup>33</sup> Department of Financial Services, Agency Analysis of 2016 House Bill 1041, p. 3 (Jan. 8, 2016), citing *City of Lakeland v. Catinella*, 129 So.2d 133 (Fla. 1961).

[E]stimates indicate the amount of unclaimed life insurance proceeds nationwide to be in the billions of dollars. Accordingly, to address this growing problem, the legislation provides that insurance companies utilize the DMF to determine whether any of their insured, annuitants or retained asset account holders may now be deceased. Remedial legislation is appropriate in this instance because the Florida Legislature has the authority to adopt reasonable insurance regulations in the public interest.<sup>34</sup> In addition, there is no vested right to conduct business in Florida without legislatively imposed regulations or even the subsequent abrogation by the legislature of the “right” to engage in the regulated industry.<sup>35</sup> “Where ‘rights’ have been subject to modification or elimination at any time by the Legislature, courts have found them to be neither fixed nor vested.”<sup>36</sup> In such cases, there is no more than an expectation of the continuance of an existing law.<sup>37</sup> Because insurance companies have never been granted a substantive vested right in, or title to, the life insurance proceeds of deceased insured, it is appropriate to redress this injury to Florida consumers.

On the other hand, industry representatives counter that the application of the bill’s requirements to life insurance policies creates an unconstitutional impairment of existing insurance contracts, since the *Thrivent* court held that s. 627.461, F.S., controlled regarding contractual terms requiring proof of death.<sup>38</sup> In 2013, an insurer prevailed in a challenge to a Kentucky statute requiring insurers to conduct DMF searches on a retroactive basis. The Kentucky Court of Appeals held that the statute may only be applied prospectively, and that while “the Act’s requirements are primarily regulatory and do not directly alter the operations of any conditions precedent for coverage under the insurance contracts...the Act clearly imposes new and substantive requirements which affect the contractual relationship between insurer and insureds.”<sup>39</sup>

**B. RULE-MAKING AUTHORITY:**

None provided by the bill.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

The OIR noted that Section 2 should be clarified so that the restriction against fines, penalties, or additional interest imposed for failure to report and remit unclaimed property applies only to the Act, and not to the OIR’s authority to pursue penalties arising from its authority relating to unfair insurance claims settlement practices.<sup>40</sup>

#### **IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

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<sup>34</sup> *Feller v. Equitable Life Assur. Soc. of the United States*, 57 So.2d 581, 586 (Fla. 1952).

<sup>35</sup> *State v. White*, 194 So.2d 601, 603 (Fla. 1967).

<sup>36</sup> *Florida Hospital Waterman, Inc. v. Buster*, 984 So.2d 478, 491 (Fla. 2008).

<sup>37</sup> *Id.* at 490; see also *Lakeland Regional Medical Center, Inc. v. Agency for Healthcare Admin.*, 917 So.2d 1024, 1032 (Fla. 1st DCA 2006); *Campus Communications, Inc., v. Earnhardt*, 821 So.2d 388, 399 (Fla. 5th DCA 2002).

<sup>38</sup> FLORIDA INSURANCE COUNCIL & AMERICAN COUNCIL OF LIFE INSURERS, *Objections to the DFS Proposed Bill on Unclaimed Property*, on file with the Insurance & Banking Subcommittee.

<sup>39</sup> *United Ins. Co. of Am. v. Commonwealth of Kentucky, Dep’t. of Ins.*, 2014 WL 3973160 (Ky. Ct. App. 2014). The insurer in the Kentucky challenge brought similar challenges in Maryland and Indiana, which were dismissed on procedural grounds. *United Ins. Co. of Am. V. Indiana Dep’t. of Ins.*, No. 49D10-1408-PL 029135 (Ind. Sup. Ct. 2014) and *United Ins. Co. of Am., et al. v. Maryland Ins. Admin., et al.*, No. C-13-179785 (Md. Cir. Ct. 2014).

<sup>40</sup> Office of Insurance Regulation, Agency Analysis of 2016 House Bill 1041, p. 5 (Jan. 15, 2016).