FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D18-2114

JIMMY PATRONIS, in his official capacity as Chief Financial Officer of the State of Florida, and the FLORIDA DEPARTMENT OF FINANCIAL SERVICES,

Appellants,

v.

UNITED INSURANCE COMPANY OF AMERICA; THE RELIABLE LIFE INSURANCE COMPANY; MUTUAL SAVINGS LIFE INSURANCE COMPANY; and RESERVE NATIONAL INSURANCE COMPANY,

Appellees.

On appeal from the Circuit Court for Leon County.
Terry Lewis, Judge.

June 3, 2020

MAKAR, J.

This case involves life insurance, unclaimed property, and the ominous sounding "Death Master File," which is a federal electronic database administered by the Social Security Administration that includes the agency's records of the names, social security numbers, dates of birth and, of course, dates of

death for individuals, going back many decades. Over the past two decades, the insurance industry's selective use of the DMF spawned numerous investigations and reports, litigation by state attorneys general, insurer settlements over disputed practices, and ultimately nationwide reforms. The controversy arose because insurers were routinely using the DMF to identify and stop paying annuities to deceased annuity holders, but they were not using it to identify deceased insurance policyholders, resulting in an asymmetric practice that benefited insurers and disadvantaged consumers of life insurance. Failing to promptly identify a policyholder's death has many detrimental effects: beneficiaries are not notified or paid benefits, premiums continue to be deducted from the deceased's accounts, and the five-year "dormancy" period before unclaimed death benefits are transferred to the State of Florida's custody isn't triggered (i.e., insurers continued to hold and invest hundreds of millions of funds for a longer period of time). *See* § 717.107(1), Fla. Stat. (2020) ("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, the annuitant, or the retained asset account holder . . . .").

In response to industry practices and their adverse effects on consumers, the Florida Department of Financial Services (Department) issued a declaratory statement October 2013 that concluded that under existing law a life insurance policy "becomes a claim upon the death of the insured" and that insurers have a duty to search accessible databases to determine whether policyholders had died. That determination was ultimately invalidated in substantial part in *Thrivent Financial for Lutherans v. State, Department of Financial Services*, 145 So. 3d 178, 182 (Fla. 1st DCA 2014), which held that the Department's declaratory statement as to when proceeds are due and payable was erroneous. Under the then-existing version of section 717.107(1), Florida Statutes, this Court concluded that life insurance proceeds became "due and payable *as established from the records of the insurance company*" only when the insurer receives proof of death and the surrender of the policy in their official records. *Id.* at 180 (emphasis added). In other words, an insurer—though having statutory duty to act with due diligence—could passively await the arrival of

documents placed in its records before taking any action, sometimes decades after a policyholder's death.

In response to *Thrivent* and the ongoing industry practices, the Florida Legislature in 2016 removed the language that allowed insurers to passively rely on their company records and, instead, imposed a statutory duty on insurers to use the DMF (or its equivalent) at least annually (or as often as they use the DMF to check on annuity contracts) to compare DMF death records against holders of their life insurance policies and annuities. Ch. 2016-219, § 1, Laws of Fla. (codified at § 717.107(8), Fla. Stat. (2016)). The requirement to use the DMF applied to all "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" and the DMF was required to be used for all "future comparisons." *Id.* Upon discovering an insured is listed in the DMF, an insurer has 120 days to undertake various tasks to confirm the insured's death, to determine whether benefits may be due, and to make efforts to locate beneficiaries. *Id.* at § 1 (codified at § 717.107(9)). Finally, the 2016 act also changed the date upon which the five-year dormancy period was triggered to the date of an insured's death rather than the date the insurer received in its records proof of death of the insured (or the date the insured, if living, would reach the so-called mortality limiting age, i.e., an age in the applicable mortality table at which an insured is presumed dead). *Id.* at § 1 (codified at § 717.107(1)).

These three related amendments to the unclaimed property statute have been dubbed the "search amendment," the "contact amendment," and the "escheat amendment." The Legislature directed that the "amendments made by this act are remedial in nature and apply retroactively" and that any applicable fines, penalties, or additional interest would not be imposed for failures to report or remit an "unclaimed life or an endowment insurance policy, a retained asset account, or an annuity contract with a death benefit" if such assets are "reported and remitted to the Department of Financial Services on or before May 1, 2021." *Id.* at § 2. The effect of the 2016 amendments was to override this Court's decision in *Thrivent* by requiring a process that insurers must follow to make insurance proceeds more readily available to beneficiaries upon the death of an insured and to change and

generally shorten the timeframe for the escheat of unclaimed insurance proceeds.

In May 2016, four insurance companies challenged these amended portions of the 2016 act, seeking a declaration that retroactive application violates their state constitutional rights. No claim was made that the three amendments, applied prospectively, are invalid. The insurers' initial complaint alleged two counts, one claiming a denial of due process under article I, section 9, of the state constitution, and another claiming that the 2016 act was an unconstitutional impairment of contract under article I, section 10, of the state constitution. The latter count was subsequently voluntarily dismissed and eliminated in their last-amended complaint, leaving only the due process claim for adjudication, one the insurers stressed repeatedly throughout the litigation was only a *facial* challenge to the new statutory provisions ("The Second Amended Complaint as amended by dismissal of Count II asserts a single facial Due Process claim.") that required no discovery ("Because Plaintiffs' claim is a facial challenge to the Act involving no issues that require factual development, no discovery is necessary to resolve the fundamental legal questions presented.").

The insurers moved for summary judgment on their facial due process claim. Based solely on the parties' legal memoranda, the trial judge ruled in the insurers' favor, concluding that the three challenged aspects of the act violated due process and could only be applied prospectively. It held that the DMF search amendment, beneficiary contact amendment, and escheat-five-years-from-time-of-death amendment are substantive (rather than procedural or remedial), and that retroactive application of them (a) adversely affected the insurers' vested rights and (b) imposed new obligations and duties in connection with past transactions or considerations (it found it unnecessary to rule on whether they insurers were subject to new penalties). This appeal ensued.

I.

The theory of the insurers' case is that the three challenged portions of the 2016 act are facially unconstitutional under the

state due process clause, meaning they have no possible lawful applications. *Fraternal Order of Police, Miami Lodge 20 v. City of Miami*, 243 So. 3d 894, 897 (Fla. 2018) ("To succeed on a facial challenge, the challenger must demonstrate that no set of circumstances exists in which the statute can be constitutionally valid."); *Cashatt v. State*, 873 So. 2d 430, 434 (Fla. 1st DCA 2004) (a facial challenge "must fail unless no set of circumstances exists in which the statute can be constitutionally applied"). Stated differently, if a challenged portion has any lawful application, the insurers' facial challenge fails as to that portion. Showing that a statute "might operate unconstitutionally in some hypothetical circumstance is insufficient to render it unconstitutional on its face," which explains why a "facial challenge to a statute is more difficult than an 'as applied' challenge" as a general matter. *Ogborn v. Zingale*, 988 So. 2d 56, 59 (Fla. 1st DCA 2008) (quoting *Cashatt*, 873 So. 2d at 434); *see also Abdool v. Bondi*, 141 So. 3d 529, 538 (Fla. 2014) (statute "will not be invalidated as facially unconstitutional simply because it could operate unconstitutionally under some hypothetical circumstances"). Moreover, courts do not overturn statutes casually. That's because "statutes come clothed with a presumption of constitutionality" and "must be construed whenever possible to effect a constitutional outcome." *Brinkmann v. Francois*, 184 So. 3d 504, 507–08 (Fla. 2016) (citations omitted). The presumption of constitutionality is overcome only upon a showing of invalidity "beyond reasonable doubt," meaning that the presumption "applies unless the legislative enactments are clearly erroneous, arbitrary, or wholly unwarranted." *State v. Hodges*, 506 So. 2d 437, 439 (Fla. 1st DCA 1987) (citing *State v. State Bd. of Educ. of Fla.*, 467 So.2d 294 (Fla. 1985). "All doubts as to validity must be resolved in favor of constitutionality, . . . and if a constitutional interpretation is available, the courts must adopt that construction." *Hodges*, 506 So. 2d at 439 (internal citation omitted).

With this backdrop of standards governing our appellate review in this facial constitutional challenge, we turn to the merits.

II.

At the core of this litigation is whether the challenged amendments are remedial/procedural and thereby operate

retroactively, or, alternatively, whether they are substantive ones that—despite the Legislature's intent that they apply retroactively—impair vested rights, create new obligations, or impose new penalties. Some substantive amendments are capable of retroactive application, but not if they violate due process principles.

As to all three amendments, the trial court noted the difficulty of applying the general legal principle that "remedial" and "procedural" laws are constitutionally applied retroactively, *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So. 2d 55, 61 (Fla. 1995) ("a procedural or remedial statute is to operate retrospectively"), while "substantive" laws may not be applied retroactively if they abolish or curtail protected rights or impose unconstitutional obligations. *See Maronda Homes, Inc. of Fla. v. Lakeview Reserve Homeowners Ass'n, Inc.*, 127 So. 3d 1258, 1272 (Fla. 2013) ("[A] substantive law prescribes legal duties and rights and, once those rights and duties are vested, due process prevents the Legislature from retroactively abolishing or curtailing them."). The trial court said:

> Like many definitions, this one is easier announced then applied. It is not difficult to imagine an interpretation that would render many statutes remedial, substantive and procedural at the same time. Indeed, the [three] amendments under review can be said to have remedial, procedural, and substantive aspects. The act operates to further a remedy and to confirm rights of life insurance beneficiaries, and directs how it is to be done. But it also proscribes new legal duties and imposes new obligations upon life insurance companies.

The trial court, though recognizing the "act operates to further a remedy and to confirm rights of life insurance beneficiaries[,]" nonetheless concluded that the three amendments were substantive and could be applied only prospectively. Although the question is a debatable one, we conclude that the three amendments to the unclaimed property act are remedial and facially valid.

To begin, unclaimed property laws are inherently remedial in nature and generally understood as advancing a state's strong interest in protecting consumers of financial and insurance services. Their raison d'être is principally to safeguard the economic rights of consumers by providing means to reunite unclaimed property, such as life insurance proceeds, with its rightful and lawful owners. Nationwide, unclaimed property laws—many deriving from the uniform act[1] on the topic—exist to advance this purpose.

In this same regard, the long-standing legislative purpose underlying chapter 717, entitled "Disposition of Unclaimed Property," is clear:

> This chapter shall be applied and construed as to effectuate its general purpose of protecting the interest of missing owners of property, while providing that the benefit of all unclaimed and abandoned property shall go to all the people of the state, and to make uniform the law with respect to the subject of this chapter among states enacting it.

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[1] *Unclaimed Property Act, Revised*, Uniform Law Commission, https://www.uniformlaws.org/committees/community-home?CommunityKey=4b7c796a-f158-47bc-b5b1-f3f9a6e404fa (last visited April 29, 2020) (the act provides a system for transferring property held by an entity other than the rightful owner to the state when it is deemed abandoned by the rightful owner. This revised act updates provisions on numerous issues, including escheat of "gift cards and other stored-value cards, life insurance benefits, securities, dormancy periods, and use of contract auditors.") (the first uniform act on unclaimed property was enacted in 1954, was superseded in 1981, 1995 and 2016); *see Comptroller of Treasury v. PHH Corp.*, 717 A.2d 950, 952 (Md. Ct. Spec. App. 1998) ("The Uniform Act is remedial legislation 'designed to put an end to the unearned and fortuitous enrichment of the holders of abandoned property and to provide instead for the interests of the citizens . . . and ensure that any such escheat would be for public benefit rather than for private gain.'" (citing *Riggs Nat'l Bank of Washington, D.C. v. District of Columbia*, 581 A.2d 1229, 1233–34 (D.C.App. 1990))).

§ 717.139(1), Fla. Stat. (2020) (adopted in 1987). The 2016 act punctuated this legislative purpose in stating that "[i]t is the public policy of the state to protect the interests of owners of unclaimed property. It is declared to be in the best interests of owners of unclaimed property that such owners receive the full amount of any unclaimed property without any fee." Ch. 2016-219, § 10, Laws of Fla. (codified at § 717.139(1), Fla. Stat. (2016)). Insurers and the states merely hold unclaimed property for the benefit of policyholders and beneficiaries and do not have a proprietary property interest in its ownership. For that reason, unclaimed property laws are interpreted broadly in favor of protecting consumers' interests, not those of the insurer or the government. In these situations, the state is deemed the preferred custodian of escheatable funds (versus private companies), such that unclaimed property laws are distinctively and characteristically ones that further important regulatory interests as well as the remedial purposes of safeguarding consumer interests and remedying marketplace imperfections. *See, e.g.*, *Yee v. Am. Nat'l Ins. Co.*, 185 Cal. Rptr. 3d 363, 365 (Cal. Ct. App. 2015) (unclaimed property laws have a "dual objective," which "is to end the fortuitous enrichment of holders of unclaimed property and to return such property to its rightful owner or, if that is not possible, to the state (i.e., escheat) for public benefit rather than for private gain.").

The Legislature made clear that it deems the challenged 2016 amendments to section 717.107 as remedial with retroactive application: "The amendments made by this act are remedial in nature and apply retroactively." Ch. 2016-219, § 2, Laws of Fla. This legislative statement arose from the need to correct insurance industry practices the act addressed. As to insurance proceeds, it is clear that some, if not many, insurers nationwide and in Florida were not complying with their pre-existing obligations to ensure that life insurance contracts were handled with consumers' interests in mind. Rather than vigilantly using the DMF (or some other equivalent or substitute) to track possible deaths of holders of life insurance, many insurers used the DMF only as a means to curtail annuity payments when an annuity recipient died. The investigations, litigation, and settlements in the industry nationwide over the past decade about the practices at issue in this

case, which need not be recounted in detail, provide the foundation for remedial statutes enacted in many states, including in Florida, to formally rectify industry practices harmful to consumers. The foremost purpose of the legislation was to "further a remedy or confirm rights that already exist[ed]" that were not being honored by all insurers. *Maronda Homes*, 127 So. 3d at 1272; Ch. 16-219, § 2, Laws of Fla. The imposition of a requirement that insurers use the DMF (or an equivalent), when most, if not all, insurers were already doing so as to annuities, does not facially seem as anything other than a modest attempt to remedy an industry problem with a search process that most insurers already used. The same can be said of the contact amendment, which merely codified practices that do not facially seem as anything unusual if the goal is to notify possible beneficiaries.

Finally, the requirement that the five-year escheat period begin at the insured's death presents a slightly more nuanced legal question as to remediation. Although the dormancy period of five years has not changed, the overall period during which insurers hold funds and earn interest will likely decline. And the new and typically shorter effective holding period might pose difficulties in situations where it is determined that a policy holder died a decade earlier and the five-year dormancy period has elapsed; in those situations, the insurer holds funds that presumptively should have already escheated to the State. As to these situations however, the 2016 act created a safe harbor provision, stating that no fines, penalties, or additional interest would be imposed if insurers had previously failed to report or remit unclaimed insurance proceeds but reported and remitted them to the Department by May 1, 2021. Ch. 2016-219, § 2, Laws of Fla. In other words, so long as insurers do the one-time check of the DMF as to pre-existing policies and document their due diligence in attempting to contact beneficiaries, they will not be subject to fines, penalties, or additional interest if done by the designated statutory date. On balance, the escheat amendment tips heavily towards the remedial purpose of chapter 717, which is "protecting the interest of missing owners of property, while providing that the benefit of all unclaimed and abandoned property shall go to all the people of the state[.]" § 717.139(2), Fla. Stat. (2020).

Overall, the three amendments are consistent with the remedial purpose of Florida's unclaimed property laws, supporting the conclusion—as intended by the Legislature—that they apply retroactively. The trial court was correct in concluding that the "act operates to further a remedy and to confirm rights of life insurance beneficiaries [remedial purpose], and directs how it is to be done [procedural]," but erred by invalidating all potential retroactive applications. On their face, the three amendments are intended to be, and are in fact, remedial in nature such that their retroactive application is generally permissible.

III.

Despite their remedial nature, the trial court concluded that the three amendments violated due process because they are substantive and "proscribe[d] new legal duties and impose[d] new obligations upon life insurance companies." A "substantive" label, however, does not necessarily preclude retroactive application. If statutory amendments are deemed substantive, two factors come into play in deciding whether they apply retroactively: "(1) whether the statute itself expresses an intent that it apply retroactively; and, if so, (2) whether retroactive application is constitutional." *Old Port Cove Holdings, Inc. v. Old Port Cove Condo. Ass'n One, Inc.*, 986 So. 2d 1279, 1284 (Fla. 2008). The intent of the Legislature is that the three amendments apply retroactively; but if doing so violates the constitution, the inquiry is at an end and the amendments are properly enjoined as to such applications. Thus, "[e]ven when the Legislature does expressly state that a statute is to have retroactive application, this Court has refused to apply a statute retroactively if the statute impairs vested rights, creates new obligations, or imposes new penalties." *Laforet*, 658 So. 2d at 61. The parties agree that insurers have no vested rights in unclaimed property, so the question before the trial court—after its determination of the substantive nature of the amendments—was whether the amendments facially and unconstitutionally impose new obligations or new penalties.

As to new obligations, the three amendments generally are consistent with the pre-existing duties of insurers under chapter 717. Those duties included: paying beneficiaries when insureds die; settling policy claims upon proof of death and policy surrender;

reporting and remitting to the Department the unclaimed proceeds within the five-year dormancy period; and conducting reasonable searches and using prudent means of locating insureds and beneficiaries. These pre-existing duties included a "due diligence" requirement stating that insurers are to use

> reasonable and prudent methods under particular circumstances to locate apparent owners of inactive accounts using the taxpayer identification number or social security number, if known, which *may include*, but are not limited to, *using a nationwide database*, cross-indexing with other records of the holder, mailing to the last known address unless the last known address is known to be inaccurate, or engaging a licensed agency or company capable of conducting such search and providing updated addresses.

§ 717.101(9), Fla. Stat. (2020) (emphasis added) (added by Ch. 2001-16, Laws of Fla.). The overall tenor and terminology of the pre-existing obligations were designed to ensure that insurers used due diligence and good faith efforts to ascertain whether policyholders had died and to locate beneficiaries so that policy proceeds would be given to the rightful owners.

Given the broad existing statutory duties of insurers, it cannot be concluded that the three amendments are a facially unconstitutional imposition of new obligations as to all insurers in all situations. It is likely that most insurers were already using the DMF or some other search tools in ascertaining whether annuity holders had died. The same is true as to their efforts to contact potential beneficiaries, which were already required by statute. Neither the search nor contact amendments can be said to be facially unconstitutional as "new obligations" in every instance. Perhaps an insurer can show that the search and contact amendments, as applied to its pre-existing insurance policies, pose an unconstitutional hardship, but no individual "as applied" challenge is made here. We see no general impediment or burden on all insurers as to justify facially invalidating these provisions in toto.

The search and contact requirements also do not change the central purpose or terms of pre-existing insurance contracts. Insurers continue to have an obligation to pay only upon proof of death and surrender of the policy. *See* §§ 627.461 & 717.107, Fla. Stat. (2020). Those core obligations remain unchanged. Perhaps an insurer may have insurance contracts in its portfolio that have search and contact requirements that are so negatively impacted by the search and contact amendments as to be a due process violation; but, again, an as-applied challenge would be required to resolve such a matter. Although we determine that the amendments are remedial, even if they are deemed substantive their retroactive application is valid: the Legislature clearly expressed a remedial intent and the amendments are facially constitutional.

As to new penalties, the trial court—having ruled in the insurers' favor on other grounds—chose not to adjudicate the issue. The insurers ask that we affirm the trial court's ruling on this undecided ground under the Tipsy Coachman doctrine, i.e., that affirmance is warranted on alternative grounds if the record establishes a basis for doing so. *See Dade Cty. Sch. Bd. v. Radio Station WQBA*, 731 So. 2d 638, 644 (Fla. 1999) ("Stated another way, if a trial court reaches the right result, but for the wrong reasons, it will be upheld if there is any basis which would support the judgment in the record."). We hesitate to do so primarily because the insurers' facial challenge would require us to conclude that no possible application of the penalty provisions is constitutional, an undertaking fraught with difficulty on an undeveloped record. Though it is conceivable that some insurers may have valid claims, it is not clear that all would, making this issue one more amenable to as-applied challenges.[2]

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[2] We note that the act provides a safe harbor provision stating that no fines, penalties, or additional interest would be imposed if insurers had previously failed to report or remit unclaimed insurance proceeds but reported and remitted them to the Department by May 1, 2021. Ch. 2016-219, § 2, Laws of Fla. This provision ameliorates some, but not all, of the concerns raised.

Finally, we do not view *Thrivent* as precluding the Legislature from enacting remedial measures designed to address and rectify the types of insurance industry practices that potentially thwart the interests of policyholders, beneficiaries, and the State. *Thrivent* addressed the limited question, under the prior version of the statute, of when insurance proceeds become "due and payable" and did not speak to the extent to which the Legislature could enforce the "due diligence" requirements of section 717.101(9); rather, the Department in *Thrivent* "argue[d that] *this court* should impose an affirmative duty on insurers to search death records in order to ascertain whether any insured has died." 145 So. 3d at 182 (emphasis added). This Court rightly chose not to do so, but that does not prevent the Legislature from enacting a remedial statute that further defines, clarifies, or refines the pre-existing and long-standing obligation of insurers to use due diligence and act in good faith as to their insureds.

REVERSED.

M.K. THOMAS, J., concurs; WINOKUR, J., dissents with opinion.

APPENDIX

> (8)(a) Notwithstanding any other provision of law, an insurer shall compare the records of its insureds' 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, against the United States Social Security Administration Death Master File once to determine whether the death of an insured, an annuitant, or a retained asset account holder is indicated and shall thereafter use the Death Master File update files for future comparisons. The comparisons must use the name and social security number or date of birth of the insured, the annuitant, or the retained asset account holder. The comparisons must be made on at least an annual basis before August 31 of each year. If an insurer performs such comparisons regarding its annuities or other books of business more frequently than once a year, the insurer must also make comparisons regarding its life insurance policies, annuity contracts that

> provide a death benefit, and retained asset accounts at the same frequency as is made regarding its annuities or other books or lines of business. An insurer may perform the comparisons required by this paragraph using any database or service that the department determines is at least as comprehensive as the United States Social Security Administration Death Master File for the purpose of indicating that a person has died.

Ch. 2016-219, § 1, Laws of Fla.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

WINOKUR, J., dissenting.

Undeniably, a sound argument can be made that the disputed statutory requirements can be constitutionally applied to insurance policies that were executed prior to the effective date of chapter 2016-219, Laws of Florida (the Act). Nor is it deniable that the aims of the new law are salutary, as set out admirably in the majority opinion. But our supreme court has already decided clearly when new statutory requirements related to insurance policies can be imposed. Under this binding case law, we have no option but to conclude, as the trial judge did, that application of the new requirements to existing policies violates the constitutional rights of appellees. For this reason, I believe we must affirm the trial judge's order.

1. Facial vs. as-applied challenge

The majority claims that the insurers cannot make a case that the disputed law is facially unconstitutional, which requires them to prove that the challenged law has "no possible lawful applications." Maj. op. at 4-5. Instead, the majority suggests that the specificity of many of the insurer's claims show that they are best suited to as-applied challenges, which can be made when

certain actions are taken against them.[1] I find no such impediment.

As the United States Supreme Court has explained, "the distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge. The distinction . . . goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 331 (2010). In other words, it is the remedy sought that determines whether a challenge is facial or as-applied.

The insurers' complaint made clear what portion of the Act it alleged was unconstitutional. Section 2 of Chapter 2016-219, Laws of Florida, reads in part, "[t]he amendments made by this act are remedial in nature and apply retroactively." The remedy the insurers sought was what one seeks in a facial challenge. They did not seek to enjoin the Department from taking certain action against it on the ground the action is unconstitutional. Instead, they asked the court to "[declare] invalid the retroactive provision of the Act on the grounds that it violates [their] right to due process of law as guaranteed by the Florida Constitution . . ." and "enjoining retroactive enforcement of the Act." The retroactivity provision is plainly the enactment that the insurers challenged. I submit that this claim is a valid facial challenge.

Moreover, the Florida Supreme Court has allowed facial challenges specifically to the retroactive application of new statutory provisions. For instance, in *Maronda Homes, Inc. of Florida v. Lakeview Reserve Homeowners Ass'n, Inc.*, 127 So. 3d 1258, 1272 (Fla. 2013), the plaintiffs challenged the retroactive application of a newly-enacted statute that would preclude relief if applied to their case. The court did not consider whether the plaintiffs brought a facial or as-applied challenge to the retroactivity of a statute, but only whether retroactivity would violate due process. *Id.* at 1275-76 (holding that "section 553.835 does not apply to any causes of action that accrued before the

[1] "A facial challenge, as distinguished from an as-applied challenge, seeks to invalidate a statute or regulation itself." *United States v. Frandsen*, 212 F.3d 1231, 1235 (11th Cir. 2000).

effective date of this section" as the "retroactive application of section 553.835 would offend due process because . . . [it] would abolish actions that have accrued under the common law"). The court again allowed a challenge to the retroactive application of a new law, this time regarding insurance policies, in *Menendez v. Progressive Exp. Ins. Co., Inc.*, 35 So. 3d 873, 875 (Fla. 2010): "Because we conclude that the 2001 amendment . . . constitutes a substantive change to the statute, we hold that it cannot be retroactively applied to insurance policies issued before the effective date of the amendment" despite its legislative intent to be applied retroactively. The issue here is whether the Act should "apply retroactively," as the Legislature explicitly directed in the Act itself. The insurers label their challenge "a facial challenge to the retroactive application of the Act," and I would find that it was a valid facial challenge.

2. Retroactive application – in general

The Florida Supreme Court has generally discussed the due-process implications of statutes intended to apply retroactively as follows:

> Article I, section 2, of the Florida Constitution guarantees to all persons the right to acquire, possess, and protect property. Section 9 of article I provides that "[n]o person shall be deprived of life, liberty or property without due process of law." These constitutional due process rights protect individuals from the retroactive application of a substantive law that adversely affects or destroys a vested right; imposes or creates a new obligation or duty in connection with a previous transaction or consideration; or imposes new penalties. For the retroactive application of a law to be constitutionally permissible, the Legislature must express a clear intent that the law apply retroactively, and the law must be procedural or remedial in nature.
>
> Remedial statutes operate to further a remedy or confirm rights that already exist, and a procedural law provides the means and methods for the application and enforcement of existing duties and rights. In contrast, a substantive law prescribes legal duties and rights and,

> once those rights and duties are vested, due process prevents the Legislature from retroactively abolishing or curtailing them.

Maronda Homes, 127 So. 3d at 1272 (citations omitted).

The Legislature plainly intended for the Law to apply retroactively. However, even with such expressed intent, we still have an obligation to "determine whether retroactive application would violate any constitutional principles." *Menendez*, 35 So. 3d at 877.

3. Substantive vs. remedial legislation

I agree with the majority that the distinction between substantive and remedial legislation, which courts have drawn to determine whether the legislation can be applied retroactively, is not a simple one to apply. The majority concludes that the Act is remedial——and therefore may be applied retroactively—because it was enacted to "formally rectify industry practices harmful to consumers." Maj. op. at 9. I respectfully disagree that this fact makes the statute "remedial" for the purpose of retroactive application. Presumably, all new laws are "remedial" in the sense that they intend to rectify a perceived problem. I do not believe that this broad definition is appropriate for determining whether a law can be applied retroactively. For this purpose, remedial statutes "operate to further a remedy or confirm rights that already exist[.]" *Maronda*, 127 So. 3d at 1272. Put another way, "[r]emedial 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 rights already existing," may be applied retroactively. *E. Airlines v. Planet-Reliance Ins. Co.*, 695 So. 2d 732, 734 (Fla. 1st DCA 1996) (quoting *City of Lakeland v. Catinella*, 129 So. 2d 133, 136 (Fla. 1961)). The Act simply imposes new requirements on insurers and alters when insurance proceeds escheat to the State. It has nothing to do with remedies or modes of procedure.[2] The fact that the Act

[2] It should be noted that this Court rejected its declaratory statement that directed when insurance funds are "due and payable" under section 717.107(1), and the extent of an insurer's duty "to use due diligence in searching databases" to determine if

may have been intended to rectify industry practices deemed harmful to consumers does not make it "remedial."[3]

A law is not remedial and will not be given retroactive effect, even if expressly labeled as retroactive, if it impairs vested rights, creates new obligations, or imposes new penalties.[4] *See Menendez*, 35 So. 3d at 878-80 (holding that an amendment to a PIP statute was substantive and could not apply retroactively (although the legislature intended it to be) because it attached new legal consequences to pre-existing policies, specifically by imposing a penalty, implicating attorney's fees, granting additional time for payment, and delaying an insured's right to bring suit); *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So. 2d 55, 61 (Fla. 1995) (holding that an amendment altering bad-faith damages could not be applied retroactively even though argued to be "simply a remedial

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insureds had died. *See Thrivent Fin. for Lutherans v. State, Dep't of Fin. Servs.*, 145 So. 3d 178, 181 (Fla. 1st DCA 2014). This Court found that the Department's interpretation was "clearly erroneous," and concluded that nothing in the plain language of section 717.107 supported either contention. *Id.* at 181-82. As such, the Act establishes new requirements and does not confirm rights that already existed.

[3] Even though this case concerns requirements imposed on insurers to ensure that policy proceeds go to their intended beneficiaries, the statute at issue is in the chapter concerning unclaimed property. I also disagree that any law regarding the disposition of unclaimed property, no matter what it requires, may be applied retroactively because unclaimed-property laws are remedial. The majority cites *Yee v. Am. Nat'l Ins. Co.*, 185 Cal. Rptr. 3d 363, 365 (Cal. Ct. App. 2015) and *Comptroller of Treasury v. PHH Corp.*, 717 A.2d 950, 952 (Md. Ct. Spec. App. 1998), for the proposition that unclaimed property laws are remedial. However, neither of these cases hold that new laws regarding unclaimed property may be applied retroactively because they are "remedial."

[4] While the *Menendez* opinion uses broad language that suggests that any statute that imposes a "new obligation" cannot be imposed retroactively, the principle clearly relates more narrowly to "new legal consequences" to existing insurance policies. *Menendez*, 35 So. 3d at 877.

clarification of legislative intent" because it significantly altered damages). *Cf. Rustic Lodge v. Escobar*, 729 So. 2d 1014, 1015 (Fla. 1st DCA 1999) (noting that "[r]emedial statutes simply confer or change a remedy in furtherance of existing rights and do not deny a [party] his or her vested rights").

At the least, the Act creates a new legal consequence upon existing policies, by a new and accelerated escheat obligation (five years after death), which applies even where insurers were unaware of insureds' deaths, effectively eliminating the dormancy period in these cases. The other requirements of the Act, specifically 1) a DMF search of all policies in effect at any time since 1992—including accounting for variations in search data, *see* section 717.107(8)(c)—and subsequent annual searches; and 2) completion and documentation of efforts to locate and contact beneficiaries and send policy information within 120 days of learning of an insured's death, present a much closer question. I agree that the majority makes a compelling argument that these requirements do not relate in any way to the insurers' obligations under the policies. Rather, they simply place obligations on the insurer to ensure that its policy is carried out. However, I agree with the trial court, which found persuasive an unpublished Kentucky appellate decision, *United Ins. Co. of Am. v. Com., Dept. of Ins.*, 2013-CA-000612-MR, 2014 WL 3973160 (Ky. Ct. App. Aug. 15, 2014), that found that a law's similar search-and-notification obligations were new and made the law substantive, "shift[ed] the burden of obtaining evidence of death and locating beneficiaries from the insured's beneficiaries and estate to the insurer," and thus could not be applied retroactively. I recognize that the Kentucky law did not state that it was to be applied retroactively, but find that this difference does not save the Florida law.[5] In

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[5] *See also Biogen IDEC MA, Inc. v. Treasurer & Receiver Gen.*, 908 N.E.2d 740, 753 (Mass. 2009) (rejecting the state's argument—that the regulation was not substantive and could apply retroactively as the business had no right to unclaimed funds—because the regulation would make the business liable for the funds while the prior regulation would not); *A.W. Fin. Services, S.A. v. Empire Res., Inc.*, 981 A.2d 1114, 1120 (Del. 2009) (holding that the "Escheat Statute" shortening the dormancy period was

summary, the Act plainly sets forth new obligations for insurers, and thus is substantive.

4. Impairment of vested rights and attachment of new obligations

I also disagree that retroactive application of the Act does not violate due process because it neither impairs vested rights nor attaches new obligations or penalties to events completed before its enactment.

> [E]ven where the Legislature has expressly stated that a statute will have retroactive application, this Court will reject such an application if the statute impairs a vested right, creates a new obligation, or imposes a new penalty. Therefore, the central focus of this Court's inquiry is whether retroactive application of the statute "attaches new legal consequences to events completed before its enactment." In order to answer this question, we compare [the statute] as it existed at the time the insureds' insurance policy was issued with the [] amendment.

Menendez, 35 So. 3d at 877-78 (citations and footnote omitted); *see also Coventry First, LLC v. State, Office of Ins. Regulation*, 30 So. 3d 552, 558 (Fla. 1st DCA 2010) (finding that the legislature intended the statute to have retroactive effect, but holding it could not be so applied because it impaired vested rights). Substantive amendments "may have retroactive effect if constitutionally permissible." *Lakeland Reg'l Med. Ctr., Inc. v. State, Agency for Healthcare Admin.*, 917 So. 2d 1024, 1031 (Fla. 1st DCA 2006) (permitting retroactive application because the right impaired by the legislation—destroying hospital's pending administrative challenge to another hospital's license issuance—was not a vested right, thus due process was not violated); *see also Metro. Dade Cty.*, 737 So. 2d at 499 ("[T]he court must ask whether the new provision attaches new legal consequences to events completed before its enactment.") (quoting *Landgraf v. USI Film Products*, 511 U.S. 244, 269-70 (1994)).

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substantive because it divested the company of its ownership rights two years earlier than previously permitted).

Here, the question is not whether the Act impairs vested rights, but whether it either creates new obligations or imposes new penalties for events completed before its enactment. When applied to policies where the insured died before the effective date, the Act clearly does. The more difficult question concerns policies where the insured was still alive at the time of enactment. When, for the purpose of permitting new obligations or imposing new penalties, is the transaction or event completed or the consideration is past—at the point the policy is issued, when the insured dies and the policy is no longer in force, or only when the insurer pays out the insurance proceeds?

There is little precedent on when an insurance contract becomes a "previous transaction or consideration" or "an event completed." The Department argues that because these are life insurance policies, they cannot be completed until the insured dies and the insurance proceeds are paid out or remitted, but cites no precedent for this point. The insurers point to *Menendez*, which determined that the new amendment's retroactivity analysis was to be compared to the automobile "insurance policy issued prior to the enactment of the statute," continuing as follows:

> In our analysis, we look at the date the insurance policy was issued and not the date that the suit was filed or the accident occurred, because "the statute in effect at the time an insurance contract is executed governs substantive issues arising in connection with that contract." *Hassen v. State Farm Mut. Auto. Ins. Co.*, 674 So. 2d 106, 108 (Fla. 1996); *see also Lumbermens Mut. Cas. Co. v. Ceballos*, 440 So. 2d 612, 613 (Fla. 3d DCA 1983) (holding that a liability policy is governed by the law in effect at the time the policy is issued, not the law in effect at the time a claim arises); *Hausler v. State Farm Mut. Auto. Ins. Co.*, 374 So. 2d 1037, 1038 (Fla. 2d DCA 1979) (holding that the date of the accident does not determine the law that is applicable to a dispute).

35 So. 3d at 876.

In *Florida Ins. Guar. Ass'n, Inc. v. Devon Neighborhood Ass'n, Inc.*, the supreme court also found that the time the policy issued was the relevant time for retroactive application in the context of

commercial residential insurance. 67 So. 3d 187, 197 (Fla. 2011) (holding that "the 2005 amendments may not be applied retroactively to the 2004 policy of insurance in this case").

Although life insurance policies are different from automobile and residential insurance policies, the rationale in *Menendez* and *Devon Neighborhood*—that an insurance policy is completed when it is executed in reliance on current laws—is equally applicable. Thus, the transaction is completed at execution in compliance with current laws and any subsequent incidents are governed by the policy, absent a valid retroactive statutory amendment. There is logic to the contention that a life insurance policy could not be completed until the insured dies and the insurer pays proceeds, as the Department argues. But that logic would also indicate that an auto insurance policy is not completed until the term expires (or, an accident results in a claim and settlement). *Menendez*, in contrast, explicitly looked at the date of execution.

5. Specific statutory requirements

a. Search and Contact Obligations

The majority claims the Act's search and contact requirements are not dissimilar to those of FDUPA prior to the Act. However, the only "due diligence requirements" prior to the Act concerned property presumed unclaimed (i.e., after the dormancy period expired) and years after the insurer became aware of the death or the insured reached the limiting age. The Act imposes search requirements on all policies where the dormancy period has not been triggered. The Act requires insurers to search the DMF for all policies in effect at any time after 1992, which the insurers contend is a prohibitive period of time, to identify the small percentage where they did not receive knowledge or proof of death.

Additionally, retroactive effect is barred if the law "imposes or creates a new obligation or duty in connection with a previous transaction *or consideration*[.]" *Maronda*, 127 So. 3d at 1272 (emphasis added). All premiums are set when the policy is issued and cannot be increased afterwards. Additionally, the Act specifically prohibited insurers from charging insureds (or beneficiaries, etc.) "any fees or costs associated with any search,

verification, claim, or delivery of funds conducted pursuant to this section"—i.e., the Act's new requirements. § 717.107(11), Fla. Stat. I find that the Act's imposition of new obligations is in connection with previous consideration—all policies where premiums were set based on pre-Act obligations—and may not be applied retroactively.

b. Escheat Obligations

Prior to the Act, FDUPA stated that funds become due and payable (i.e., the dormancy trigger) "as established from the records of the insurance company holding or owing the funds," unless one of the exceptions (e.g., if the "company knows that the insured or annuitant has died") applies. § 717.107(1)&(3), Fla. Stat. (2015). Life insurance contracts were and are statutorily required to provide that "when a policy becomes a claim by the death of the insured, settlement shall be made upon receipt of due proof of death and surrender of the policy." § 627.461, Fla. Stat. Finding the Department's argument to the contrary "clearly erroneous," this Court concluded the following in *Thrivent Fin. for Lutherans v. State, Dep't of Fin. Servs.*, 145 So. 3d 178, 181 (Fla. 1st DCA 2014):

> Life insurance funds become "due and payable" under subsection 717.107(1) at the time the insurer receives proof of death and surrender of the policy as contemplated by section 627.461; or, funds become "due and payable" under subsection 717.107(3) when the insurer knows that the insured has died, or when the insured attained or would have attained the limiting age.

145 So. 3d at 182.

The Act changed this dormancy trigger from knowledge or proof of death to "the date of death of the insured," thus property would automatically be presumed unclaimed five years after an insured's death. § 717.107(1), Fla. Stat. Retroactive application of this accelerated escheat obligation is impermissible because it applies to all policies that issued, and deaths that occurred, before the Act's enactment. The Act clearly accelerates insurers' escheat obligations, requiring them to escheat funds immediately after the Act even if they were not previously aware of an insured's death

years ago. For these reasons, I would hold that *Menendez* bars the Act's application to any policies issued before the Act's enactment. *See Menendez*, 35 So. 3d at 877-78.

c. Penalties

This Court may also affirm on the additional ground that the Act unlawfully imposes new penalties retroactively, an issue the trial court felt was unnecessary to address.[6] The parties do not appear to dispute that the Act imposes new penalties by penalizing previously lawful conduct (inaction). The Department argues the new penalties are lawful retroactively because they provide a five-year grace period for compliance and a good-faith exception (e.g., an insurer lawfully disposed of records). *See City of Miami v. St. Joe Paper Co.*, 364 So. 2d 439, 444 (Fla. 1978) ("[R]etroactive statutes have been almost universally declared constitutional when a reasonable time was given to protect property interests by complying with the new requirements. Thus, the constitutional objection that retroactive application of a statute results in a deprivation of due process is obviated where the statute gives owners of old claims still enforceable at the time of the statutory enactment a reasonable time to take certain steps to preserve their interests.").

"[C]onstitutional due process rights protect individuals from the retroactive application of a substantive law that . . . imposes new penalties." *Maronda*, 127 So. 3d at 1272. The Act's grace period precludes penalties, fines, or additional interest "due to the failure to report and remit" unclaimed property to the state so long as reporting and remittance is done within five years. Ch. 2016-219, § 2, Laws of Fla.; § 717.107, Fla. Stat. The insurers make three arguments as to penalties.

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[6] I disagree with the majority that the insurers must mount a later as-applied challenge to test the constitutionality of the penalty provision. Again, the insurers challenge only the retroactive application, which is explicitly permitted by section 2 of the Act. To the extent the penalties are applied to existing insurance policies, they are applied retroactively and a permissible part of this facial challenge.

First, the insurers argue that the grace period itself is inadequate. While it may delay penalties for reporting and remittance, it does not do so for the search and escheat obligations.

Second, the insurers argue that these new penalties are especially problematic considering that FDUPA only requires insurers to retain records for five years after property becomes reportable, and therefore they were under no duty to retain the records they are now required to search. § 717.1311, Fla. Stat.; *see also Temple-Inland, Inc. v. Cook*, 192 F. Supp. 3d 527, 545 (D. Del. 2016) (holding that the state could not, for a number of alternative reasons, require a company to escheat funds that it was not required to retain records for).

Third, the insurers argue that the presence of a grace period is insufficient. The Department relies on *St. Joe Paper Co.*, but the supreme court in that case allowed a statute of limitations (to claim title to property) to apply retroactively because the claim-owners still had an opportunity to preserve their rights after the act's enactment. 364 So. 2d at 442-44. Here, the grace period is not to allow the preservation of rights, but to get into compliance before facing new penalties for previously lawful conduct. Unlike in *St. Joe Paper Co.*, after the grace period, new penalties would be imposed for pre-amendment transactions. *See Childers v. Dep't of Envtl. Prot.*, 696 So. 2d 962, 964 (Fla. 1st DCA 1997) ("Statutes stating new grounds for administrative fines . . . or for license revocation or suspension should not be given retroactive effect.").

These reasons are sufficient to conclude that the Act imposes new obligations on previous transactions and imposes new penalties, and thus may not be applied retroactively.

For the foregoing reasons, I would hold that chapter 2016-219, Laws of Florida, cannot apply retroactively to policies executed prior to the Act, and would affirm the trial court's order reaching that conclusion.

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