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Insurers' Successful Challenge to 2016 Amendments to Florida's Unclaimed Property Act Reversed on Appeal

June 10, 2020

On June 3, 2020, Florida's First District Court of Appeal issued a 2–1 decision in *Patronis v. United Insurance Company of America*, reversing a 2018 trial court decision in which life insurance companies had successfully challenged the **retroactive application** of three 2016 amendments to the Florida Disposition of Unclaimed Property Act.

The three challenged amendments, colloquially referred to as the "search," "contact," and "escheat" amendments:

- Require insurers to perform Death Master File (DMF) searches for all policies dating back to 1992. Specifically, the amendments removed statutory language that allowed insurers to rely on their own records to determine their obligations under a life insurance policy and instead imposed a duty on insurers to use the DMF, at least annually, to compare DMF death records against holders of their life insurance policies and annuities.
- Upon discovering that an insured is listed in the DMF, require that the insurer, within the ensuing 120 days, undertake various tasks to confirm the insured's death, to determine whether benefits may be due, and to make efforts to locate beneficiaries.
- Change 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 proof of the insured's death in its records.

The life insurers asserted that all three amendments were **facially unconstitutional** under the due process clause of Florida's Constitution because of their retroactive effect.

Although it recognized that the constitutionality of these amendments was a "debatable" question, the First District concluded that because the amendments are consistent with the remedial purpose of Florida's unclaimed property laws, the amendments' retroactive application is generally permissible. The court went on to consider whether the amendments violate due process because they are substantive and impose new legal duties and obligations on insurers. Finding that these new obligations were "generally" consistent with the duties the insurers already had under the act, the court concluded that they were not facially unconstitutional.

The court recognized that an insurer may, in certain instances, be able to show that the search and contact amendments, as applied to preexisting insurance policies, pose an unconstitutional hardship, but declined to consider whether the amendments could be unconstitutional as applied because the insurers challenged only their facial constitutionality. The court further declined to consider the insurers' additional argument that the new penalties imposed by the amendments render the statute facially unconstitutional, pointing to the difficulty of doing so on an undeveloped record. The First District went on to elaborate that "[t]hough 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."

In a comprehensive dissenting opinion, Judge Winokur stated that the First District is bound by precedent from the Florida Supreme Court that held that the application of new requirements to existing insurance policies violates an insurer's constitutional rights. The dissent disagreed that the amendments are remedial because they were enacted to "formally rectify industry practices harmful to consumers." Noting that all new laws intend to rectify a perceived problem, Judge Winokur emphasized that Florida law requires more: "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," citing to other Florida Supreme Court decisions. He then identified multiple ways in which the act's search, contact, and escheat obligations impair insurers' vested rights and impose new requirements on insurers as well as how all three amendments unlawfully impose new penalties on insurers retroactively.

The First District's decision is not yet final. Until June 18, 2020, the insurers have the option of moving for rehearing or rehearing en banc, or requesting the court certify a question of great public importance. Regardless of whether they file a post-decision motion in the First District, they also may seek review in the Florida Supreme Court. Because the decision expressly declares a state statute valid, the Florida Supreme Court has discretionary jurisdiction to review this decision, if the parties seek such review. Art. V, § 3(b)(3), Fla. Const.

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