Date: May 28, 2015
To: Unclaimed Benefits Model Drafting Subgroup
From: Jason Levine, Policy Initiatives Advisor
Subject: NCOIL Unclaimed Life Insurance Benefits Model Act - Retrospective vs. Prospective Application

Wisconsin is submitting this memo to the Drafting Subgroup to correct what may be a false impression created by the chart supplied by NCOIL entitled “NCOIL Unclaimed Life Insurance Benefits Model Act – Comparison of NCOIL-Based Laws.”

A row in the chart designated “retrospective” lists as “retrospective” eight states that have adopted the NCOIL model whose enacted version of the Model Act is, in fact, silent on retrospective vs. prospective application. These eight states are Idaho, Iowa, Kentucky, Maryland, Montana, Nevada, New York, Rhode Island, Tennessee and Vermont.

In particular, we call the Subgroup’s attention to the listing of Kentucky as retrospective. Shortly before the Kentucky statute became effective on January 1, 2013, United Insurance Co. of America brought a declaratory judgment action in Kentucky state court challenging the application of the statute to life insurance policies issued before that date. In response, the Kentucky department sought a ruling that the statute could be retroactively applied. In United Insurance Co. of America v. Commonwealth Dept. of Insurance, the Court of Appeals of Kentucky held that the statute could only be applied prospectively. In accordance with the general common law rule, the court stated that Kentucky law provides that no statute may be construed to be retroactive unless that intent is either explicitly stated in the statute or that such an intent is apparent from the statute’s language. The court found that there was no such explicit language in the NCOIL Model Act and no such intent was apparent from its language. The court further held that the statute was not exempt from general rule against retroactive application as a “remedial” act, because the requirements it imposed on the insurer were substantial:

“By itself, this provision (the DMF search requirement) does not alter the operation of any condition precedent to performance. Nevertheless, it is a substantial obligation. Moreover [the statute] provides that insurers must surrender death benefits or retained asset accounts three years after identification of a potential match to the DMF. The insurer’s identification of a match commences the time for payment or discharge of the insurer’s obligations even in the absence of a filed claim or proof of death. Although this may be a valid exercise of the state’s regulatory authority, it is a substantive and not a remedial alteration of the contractual relationship between insurers and insureds.”
Wisconsin, of course, does not express any view on how individual states interpret and apply their own statutes. We also note that New York is a member of the Drafting Subgroup and can certainly, if it chooses to do so, relate how it has interpreted its version of the NCOIL Model Act. However, it does need to be stressed that the fact that a given state’s version of the Model Act is silent on the matter does not automatically mean that the statute has retroactive application.

Wisconsin respectfully requests that a new line be added to the NCOIL spreadsheet that is before this Subgroup, which would recognize the states Model Act as silent on the issue of retroactive vs. prospective application of the Act. To be clear, the spreadsheet should identify states that have adopted a retroactive approach, prospective approach and an approach that is silent on the aforementioned approaches.