S259215

**S.Ct. Case No.:**

# IN THE SUPREME COURT

# OF THE STATE OF CALIFORNIA

**BLAKELY McHUGH, *et al.***
Plaintiffs/Appellants/Petitioners,

**vs.**

**PROTECTIVE LIFE INSURANCE COMPANY**
Defendant/Respondent.

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After Decision by the Court of Appeal
Fourth Appellate District, Div. One (D072863)
(Superior Court of San Diego County, Hon. Judith F. Hayes
37-2014-00019212-CU-IC-CTL)

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## PETITION FOR REVIEW

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## PETITION FOR REVIEW

To the Honorable Chief Justice and the Associate Justices of the Supreme Court:

Plaintiffs/Appellants/Petitioners, BLAKELY McHUGH and TRYSTA M. HENSELMEIER (collectively "Petitioners") hereby petition this Court for review of the published decision of the Court of Appeal, Fourth Appellate District, Division One (per Justices O'Rourke, Huffman, Aaron) issued on October 9, 2019, affirming the trial court's Judgment in favor of Defendant/Respondent, PROTECTIVE LIFE INSURANCE COMPANY ("Protective Life") in the underlying life insurance coverage dispute (attached hereto as "Appendix A.")[1]

[1] All record citations in this Petition are supported by reference to the attached Court of Appeal's October 9, 2019 Slip Opinion, abbreviated as: (Opn. at [page]); to the Appellant's Appendix, abbreviated as: ([volume] AA [page]); and to the Request for Judicial Notice, filed concurrently with this Petition, abbreviated as: (RJN [page]).

## I.

## ISSUES PRESENTED

1. Were the provisions of Insurance Code sections 10113.71 and 10113.72 intended by the Legislature to apply, in whole or in part, to life insurance policies in force as of those statutes' enactment on January 1, 2013, regardless of the original date of issuance of those in force policies?

2. May the lower courts rely upon private opinions of Department of Insurance staff counsel, contrary to Insurance Code section 12921.9, Government Code section 11340.5, and this Court's recent decision in *Heckart v. A-J Self Storage, Inc.* (2018) 4 Cal.5th 749?

## II.

## WHY REVIEW SHOULD BE GRANTED

In 2011, the State of California recognized a serious problem with senior and disabled insurance policyholders unintentionally losing important life insurance coverage due to inadvertent failures to pay policy premiums. Often decades of premium investments in those policies were lost when a single payment was missed and those policies

were terminated as a result of the mental or physical decline of those elderly or disabled policyholders.

To address those issues, in 2012 the Legislature codified what was existing but not legally mandated protections requiring at least 30-days' notice of a pending lapse before an insurer could legally terminate a life insurance policy. The Legislature further mandated that all "issued and delivered" life insurance policies must adhere to at least a 60-day grace period for premium payments, irrespective of the period otherwise designated in those policies. And finally, to provide seniors and disabled policyholders with added protection against inadvertent lapses, the Legislature required that every policyholder would be entitled to designate a secondary individual or entity to receive notice of any pending lapse for non-payment.

Addressing all of those issues, Assembly Bill 1747 (2011-2012 Reg. Sess.) added sections 10113.71 and 10113.72 to the Insurance Code on January 1, 2013. (See Legislative History of AB 1747 at 1 AA 580-694 [explaining how that remedial legislation was needed to provide consumer safeguards for people who have purchased life insurance coverage, especially seniors].) Those sections further embodied public

policy by placing the affirmative burden on insurers to provide proper notice of termination in light of those enlarged grace periods and notice requirements, with the penalty that non-conforming notices will be considered "ineffective." (1 AA 644.)

Notably, that remedial legislation was supported by the insurance industry and signed into law without any indication from the Department of Insurance ("DOI") that those statutes would not go into effect immediately and apply to all existing in force policies in California. Indeed, to the extent that the Legislature expressly enacted those statutes to protect existing senior and disabled policyholders from inadvertently losing decades of premium investments in those policies, it was reasonable to conclude that legislation would apply to existing in force policies.

However, after the passage of those statutes, some insurers (including Protective Life) began to advance the argument that those statutes (and in particular, their provisions extending grace and notice periods) were not intended to apply to existing in force policies issued before January 1, 2013. The DOI did not take any position on the application of the statutes, either way. Rather in response to off-the-

record phone inquiries, DOI staff counsel purportedly opined that those statutes do not apply to existing policies, even though they also indicated that their responses would not be put in writing and should not be considered a formal rule, bulletin, or guideline issued by the DOI. Obviously, such an interpretation of those statutes would invite a critical conflict. Indeed, it would mean that nearly all life insurance policies in existence before January 2013 are immune from the requirements of sections 10113.71 and 10113.72, even as those policies continue in force for decades into the future and the additional notice and grace period provisions required by those statutes would become even more important to protecting aging policyholders.

*The underlying case embodies that exact conflict.* The trial court found that sections 10113.71 and 10113.72 applied to an in force life insurance policy which Petitioner's decedent, William McHugh ("McHugh"), had purchased eight years prior to those statutes' enactment, paying significant premiums to Protective Life over that time period. The Court of Appeal, however, reached the opposite conclusion, finding that sections 10113.71 and 10113.72 applied only to new policies issued after January 1, 2013 and therefore did not prevent

the inadvertent lapse of McHugh's policy. The Court of Appeal did so improperly relying on unofficial communications and notices issued by DOI staff to the insurance industry, none of which represented the official position of the DOI on that important issue. That published decision now holds that the protections provided by sections 10113.71 and 10113.72 only inure to the benefit of new policyholders, contrary to the Legislature's express desire to protect existing elderly and disabled life insurance policyholders from inadvertent policy lapses.

Concurrently, other courts have construed sections 10113.71 and 10113.72 and have reached decisions squarely in conflict with the Court of Appeal's decision in this case. Indeed, as many insurance coverage actions are filed in federal court, at least one federal district court (*Bentley v. United of Omaha*, Case No. CV 15-7870-DMG (AJWx) (C.D. Cal.)) applied California law to conclude that sections 10113.71 and 10113.72 applied to policies issued before January 1st, 2013, irrespective of when they were originally issued. Further, Judge Gee in *Bentley* specifically considered and refused to follow the Court of Appeal's decision in this case, concluding that it did not reflect how this Court would likely construe those same statutes. In doing so, Judge

Gee also disagreed with the Court of Appeal's conclusion that application of those statutes to previously issued policies would necessarily be "retroactive" or would otherwise unconstitutionally impair those policies. Finally, Judge Gee in *Bentley* correctly refused to consider any materials from the DOI, including the SERFF Notices relied upon by the Court of Appeal. With only the issue of attorneys' fees for the prevailing plaintiffs left to be determined in *Bentley*, judgment in that case will soon be entered, meaning that same question will then likely make its way before the Ninth Circuit Court of Appeals.

Given the obvious disagreement in those holdings concerning the applicability of the exact same statutes – and the split of authority developing in the state and federal courts applying the same California law – this Court's intervention is required now to construe those statutes and to resolve that conflict. Similarly, this Court's guidance is further required on the related issue of whether the lower courts can properly rely upon unauthorized positions and communications by DOI staff regarding the construction of those statutes. Literally millions of life insurance policies previously issued in California hang in the balance, with elderly and disabled policyholders particularly susceptible

to the uncertainty those conflicting decisions impose on important life insurance coverage. For many of those policyholders who have paid decades of premiums, life insurance benefits are the only financial legacy they will leave to their families. This Court should grant review now to resolve those important questions and to ensure that life insurance benefits are not inadvertently forfeited by those particularly vulnerable class of policyholders, as the Legislature clearly intended.

## III.

## RELEVANT FACTUAL AND PROCEDURAL HISTORY

### A. Background.

The underlying case involves the controverted loss of $1,000,000 of life insurance benefits to Petitioner, Blakely McHugh ("Blakely"), the surviving daughter of McHugh and the sole beneficiary designated under the term life insurance policy McHugh held with Protective Life at the time of his death. (Exh. 25; 1 AA 106-131.) Petitioner, Trysta M. Henselmeier, was named as a nominal plaintiff as she is the representative of McHugh's estate, but presented no separate claim for damages on the estate's behalf. (1 AA 79; 3 AA 1369.)

## B. Relevant Provisions Contained in McHugh's Life Insurance Policy with Protective Life.

In March of 2005, McHugh was issued a $1,000,000 term life insurance policy by Chase Insurance Company. (Exh. 25; 1 AA 106-131.)[2] That policy was delivered on or about March 8, 2005, along with a contemporaneous acknowledgment that the policy was "in force." (*Ibid*.) That policy further indicated that coverage ran from January 9, 2005, with an annual premium having been previously paid by McHugh at about that same time. (*Ibid*.)

The relevant provisions of that policy were that it was a 10-year term life policy, ending in 2015, after which it could be continued with a higher premium payment. (*Ibid*.) While premium payments were due every year on the 9th of January, payment could be made under the terms of that policy within a 31-day "grace period" without any termination of coverage. (1 AA 117.) Consequently, payment was considered timely as long as it was received within 31 days from the annual due date of January 9, and if it was not received during that

[2] Chase was later acquired by Protective Life, which assumed all of Chase's obligations under the policy in question.

grace period (or by February 9), the policy lapsed and coverage ceased. (1 AA 117 ["If the premium remains unpaid at the end of the grace period, coverage will cease"].) On the other hand, under the terms of that same policy, if the insured died during the grace period, coverage continued, with any unpaid premiums later deducted from the policy proceeds. (*Ibid*.)

### C. The Mandatory Change in the Policy's Grace Period Imposed by the Insurance Code.

By January of 2007, McHugh's policy with Protective Life passed the two-year maturity period in which a claim for benefits could have been contested for any reason. (1 AA 105.) McHugh paid all premiums due yearly in the amount of $310 through January of 2012, making his policy "in force" until 31 days after January 9, 2013 (including the policy's grace period).

In the interim, as explained above, in 2012 the Legislature enacted Insurance Code sections 10113.71 and 10113.72. Those changes to the Insurance Code, effective January 1, 2013, provided McHugh with an extension of the policy's grace period, from 31 days to 60 days, during which he could pay his premium without the policy

lapsing or being subject to any requirement of reinstatement. (Ins. Code §§ 10113.71, subd. (a).)[3] Those changes also provided McHugh with the right to receive a 30-day written notice sent "after" a premium was due and was unpaid and "prior to the effective date of termination if termination is for nonpayment of premium." (§§ 10113.71, subd. (b)(3) and 10113.72, subd. (c).) Further, those new provisions also gave McHugh the annual right to designate another person to also receive all notices concerning payment of policy premiums, pending lapse, and termination, so as to lessen the risk of an involuntary lapse. (§ 10113.72, subd. (b).)

### D. Protective Life's Premature and Unlawful Termination of McHugh's Policy.

In December 20, 2012, Protective Life sent McHugh a notice reminding him that his premium would be due on January 9, 2013. (Exh. 117; 3 AA 1628.) At the time Protective Life sent that notice, there was no premium that was yet due or which remained unpaid.

[3] All further statutory references are to the Insurance Code unless otherwise indicated.

That notice further indicated that the policy would lapse on February 9, 2013 if a premium was not received. (*Ibid.*)

Thereafter, on January 9, 2013, Protective Life mailed an Annual Report to McHugh, advising him of his policy's status. (Exh. 15.) However, that January 9, 2013 Annual Statement did *not* advise McHugh of the new 60-day grace period applicable to his policy, nor did it inform him of the newly enacted right to 30-day's notice before termination of his policy, or his related right to designate someone else to receive premium notices. (*Ibid.*)

On January 28, 2013, Protective Life mailed to McHugh a "Second Notice of Payment Due," which indicated that no premium payment was yet received and which incorrectly (in light of the newly enacted Insurance Code provisions extending that grace period to 60-days) advised McHugh that if payment was not received by February 9, 2013, the policy would lapse. (Exh. 118; 3 AA 1690.) Based upon Protective Life's assertion in that notice that coverage would lapse on February 9, 2013, that notice gave McHugh only 10 days' written notice before termination of the policy for nonpayment, which also violated the mandatory 30-day pre-termination notice required by those same newly

enacted provisions of the Insurance Code. (§ 10113.71, subd. (b).) Additionally, that notice did not advise McHugh of any other upcoming dates, including that the actual last day to timely make a premium payment was 60-days from January 9, 2013, or March 10, 2013. (Exh. 118.)

On February 9, 2013, Protective Life lapsed and terminated coverage under the policy for nonpayment. Thereafter, on February 18, 2013 (again, well before the end of the 60-day grace period then in effect), Protective Life sent McHugh a further notice advising him that the policy had lapsed and that coverage had ceased. (Exh. 119; 3 AA 1692.) At about the same time that February 18, 2013 notice was sent by Protective Life, McHugh suffered a serious fall which, from that point until his death, caused him continuing physical pain and discomfort, including a related surgery on April 1, 2013. (7 RT 1382, 1398-1399.)

### E. McHugh's Death and Protective Life's Denial of Petitioners' Claims for the Policy Benefits.

McHugh died on June 13, 2013. Following McHugh's death, Petitioner Henselmeier contacted Protective Life to inquire about the

status of the policy and to inquire whether a claim could be made. (7 AA 1415-1418.) She was advised by Protective Life that the policy had lapsed, and that no benefits were available. (*Ibid*.) Ultimately, Petitioners filed suit on June 13, 2014, within one year of McHugh's death. (1 AA 24.)

## F. Proceedings in the Trial Court.

Prior to trial, the parties brought cross-motions for summary judgment regarding the application of sections 10113.71 and 10113.72 to McHugh's policy. (See, *e.g.*, 1 AA 436-465.) In ruling on those motions, the trial court concluded that both of those statutes applied, and that such an application was prospective only and not "retroactive." (2 AA 1167-1168.) The trial court also concluded that the legislative intent of those statutes was to protect senior policyholders, and that to decline to apply those statutes to existing policies would thwart the obvious remedial purpose of those statutes. (Opn. at 3.) The trial court, on two occasions, also rejected consideration or use of any materials from the DOI as violative of Government Code section 11340.5.

Consistent with those rulings on summary judgment, at the outset of trial Petitioners urged the trial court to decide purely legal issues surrounding Protective Life's noncompliance with both the terms of the insurance contract and relevant provisions of the Insurance Code. (3 AA 1400-1408, 1489-1497.) Petitioners also alternatively asked the lower court that if those issues were to be presented to the jury, it should pre-instruct the jury that Protective Life must "strictly comply" with the mandatory requirements of sections 10113.71 and 10113.72 before it could terminate McHugh's policy and effectuate a forfeiture of policy benefits. (3 AA 1444-1462.) Finally, Petitioners revived those same arguments in a Motion for Directed Verdict, again asserting that the application of sections 10113.71 and 10113.72 was an issue of law for the trial court to decide, and that no evidence demonstrated that Protective Life strictly complied with those sections when it applied the wrong grace period and prematurely lapsed and terminated McHugh's policy. (3 AA 1469-1479.)

Ultimately, the jury found on Petitioners' breach of contract claim that: (1) Protective Life and McHugh entered into a contract for insurance; (2) McHugh failed to do what that policy required him to do

but was excused from having to do "all, or substantially all, of the significant things the contract required him to do"; (3) all conditions that were required for Protective Life's performance occurred and were not excused; and (4) Protective Life did something that the contract prohibited it from doing. (4 AA 2173-2174.) However, the jury inconsistently then found that Petitioners were not harmed by Protective Life's "failure." (*Ibid*.)

After entry of Judgment in Protective Life's favor, Petitioners renewed their same arguments in a Motion for Judgment Notwithstanding the Verdict ("JNOV") and in a Motion for New Trial. (3 AA 1601-1610, 1631-1886.) Protective Life then opposed those motions (4 AA 1910-2097) and the Petitioners replied. (4 AA 2101-2159.) Ultimately, the lower court denied those motions without elaboration or explanation in its final order. (4 AA 2164.) McHugh's timely appeal from the Judgment and denial from both the denial of their JNOV motion then followed. (4 AA 2179.)

## G. The Court of Appeal's Opinion.

On appeal, Petitioners maintained that the application of sections 10113.71 and 10113.72 presented an issue of law which should have never been placed before a jury, but instead entitled them to judgment in their favor. They further asserted that if that issue required a jury's determination, the trial court erred by refusing their proffered instruction to the jury that it must "strictly construe" provisions of the Insurance Code against forfeiture. Petitioners further contended that the jury should have never been instructed on McHugh's duty to "mitigate" his damages by seeking "reinstatement" of his already in force policy and thereby permitting Protective Life to do what its policy prohibited it from doing.

Notwithstanding the trial court's summary judgment ruling, finding that sections 10113.71 and 10113.72 applied to McHugh's policy, Protective Life did not subsequently challenge that ruling via cross-appeal. Instead, it merely requested that as an alternative basis for affirming the lower court's Judgment, the Court of Appeal (pursuant to Code Civ. Proc. § 906) should find that ruling was erroneous and that those statutes only applied to policies issued after their enactment.

Protective Life further contended that any other application of sections 10113.71 and 10113.72 would be impermissibly "retroactive." Finally, Protective Life invited the Court of Appeal to rely upon "SERRF Notices" issued by the DOI regarding acceptable "policy forms" in order to demonstrate that at least some unidentified DOI staff believed that of sections 10113.71 and 10113.72 applied only to policies issued after January 1, 2013.

Rather than address Petitioners' multiple appellate challenges, the Court of Appeal instead accepted Protective Life's invitation and disposed of the entire appeal based upon its construction of sections 10113.71 and 10113.72, finding they only controlled policies issued after January 1, 2013, and therefore did not apply to McHugh's policy. (Opn. at 4, fn. 4.) It did so purporting to defer to the DOI's "agency expertise" in the interpretation of those statutes, citing to those SERRF Notices as evidence that the DOI had concluded that sections 10113.71 and 10113.72 only apply to policies issued after January 1, 2013. (See, *e.g.,* Opn. at 5-8.) Somewhat ironically, the Court of Appeal cited to the previously mentioned *Bentley* federal district court decision to support its view of the significance of those SERFF Notices (see Opn. at 5-6),

even though *Bentley* previously rejected the same argument raised by the insurer in that case and found instead that those SERRF Notices did *not* represent an official position taken by the DOI concerning the interpretation and application of those same statutes. (*Bentley v. United of Omaha Life Ins. Co.* (C.D. Cal. 2019) 371 F.Supp.3d 723, 727 n.1, 728.)

More importantly, the Court of Appeal's use of those SERFF Notices and references to private opinions, both as evidence of official positions taken by the DOI, completely disregarded Insurance Code section 12921.9. That code section makes clear that even public letters or legal opinions signed by the Insurance Commissioner or the Chief Counsel of the Department of Insurance issued "in response to an inquiry from an insured or other person or entity" that discuss either generally or in connection with a specific fact situation the application of the Insurance Code "shall not be construed as establishing an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, rule, or regulation." Instead, Government Code § 11340.5 (specifically cross-referenced by Ins. Code § 12921.9) mandates that any "guideline, criterion, bulletin, manual, instruction, order,

standard of general application, or other rule" cannot be issued, utilized, enforced, or attempted to be enforced by any state agency (including the DOI) unless it is first has been adopted as a regulation and filed with the Secretary of State. (Govt. Code § 11340.5, subd. (b).) Alternatively, section 113405 requires that such an agency guideline or criterion be: (1) sent to the Secretary of State; (2) made known to the agency, the Governor, and the Legislature; (3) published in the California Regulatory Notice Register within 15 days of the date of issuance; and (4) made available to the public and the courts. (Govt. Code § 11340.5, subd. (c).)

This is precisely why this Court recently held in *Heckart v. A-J Self Storage, Inc.* (2018) 4 Cal.5th 749, 769 fn. 9, that "instructions" issued by DOI staff only do not reflect "'careful consideration by senior agency officials' but rather reflect an interpretation prepared 'in an advice letter by a single staff member . . . .'" (*Id.,* citing *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 13 [similarly confirming that an interpretation of a statute contained in a regulation adopted after public notice and

comment is more deserving of deference than one contained in an advice letter prepared by staff members].)

The Court of Appeal, however, made no attempt to demonstrate that those SERRF Notices (or any other informal hearsay statements made by DOI staff) met the rigors of a "regulation adopted after public notice" as required by Insurance Code section 12921.9, Government Code section 11340.5, nor did it even address this Court's similar directions in *Heckart*. Citing those SERFF Notices, the Court of Appeal instead insisted that its construction of sections 10113.71 and 10113.72 was "consistent" with the DOI's "administrative construction" of those statutes (Opn. at 14), even though the DOI has never taken an official position on the interpretation or application of those statutes, either way.

Finally, the Court of Appeal was forced to concede that its construction of those statutes was "at odds" with their author's intent. (Opn. at 14-15.) Indeed, the Court of Appeal acknowledged that the relevant legislative history confirmed that author intended those statutes to apply to all in force life insurance policies, whenever issued. (*Ibid.* [quoting that history which made clear that

["[a]ccording to the author, the bill provides consumer safeguards from which people who have purchased life insurance coverage, especially seniors, would benefit"].) But the Court of Appeal then attempted to draw a pedantic distinction between what the author of those statutes intended, and what the Legislature writ large must have intended instead by the language it used in those statutes, a perfectly circular argument which only acted to confirm the Court's earlier "plain meaning" construction of those statutes. (*Ibid*.)

Based upon foregoing, the Court of Appeal concluded that sections 10113.71 and 10113.72 apply only to policies issued after January 1, 2013, and affirmed the lower court's Judgment on that alternative basis. (Opn. at 15-16.)

## IV.

## DISCUSSION

### A. This Court Should Grant Review to Resolve a Critical Conflict Created by the Court of Appeal's Opinion.

This Court's intervention is required now to address and resolve a critical conflict created by the Court of Appeal's Opinion. As previewed at the outset of this Petition, that Opinion directly conflicts with a prior

determination made by the federal district court in *Bentley,* which held that sections 10113.71 and 10113.72 apply to all life insurance policies in force at the date of their enactment. (*Bentley, supra,* 371 F.Supp.3d at 734.) *Bentley* did so reasoning that such a construction was consistent with the Legislature's remedial purpose in enacting those statutes in the first place: to provide existing senior and disabled policyholders with enhanced protections against inadvertent lapses and the loss of important coverages and years of premium investments in those policies. (*Ibid*.)

Notably, even though the *Bentley* court had reached those conclusions *before* the Court of Appeal issued its Opinion in this case, the Court of Appeal made no attempt to distinguish *Bentley* or to otherwise challenge its reasoning, although the Court of Appeal was clearly aware of *Bentley*. (See Opn. at 5-6, citing to *Bentley*.) On the other hand, when confronted with the Court of Appeal's Opinion before final judgment was entered, Judge Gee in *Bentley* refused to follow or be influenced by the reasoning of the Court of Appeal's Opinion and further concluded that its reasoning would not be followed by this Court. Thus, with *Bentley* and the Court of Appeal's Opinion, there now

exists at least two decisions (both construing the same California law) which irreconcilably interpret sections 10113.71 and 10113.72, presenting the very type of conflict this Court should now review and resolve. (Rule of Court 8.500, subd. (b)(1).) That *Bentley* will now likely be appealed by the defendant-insurer to the Ninth Circuit Court of Appeal only deepens that conflict and accelerates the need for this Court's substantive review.

But *Bentley* is not the only case in the federal district courts to conflict with the Court of Appeal's Opinion. In fact, there are several similar cases working their way through the federal system which hinge upon the interpretation and application of sections 10113.71 and 10113.72 under California law. For example, in *Moriarty v. Am. Gen. Life Ins. Co.*, Case No. 17-cv-01709 BTM-BGS (S.D. Cal.), currently pending before the district court are cross-motions for summary judgment and a motion for class certification, all awaiting ruling, and all involving the proper interpretation and application of sections 10113.71 and 10113.72. Similarly, in *Pitt v. General American Life Ins. Co.*, Case No. 4:18-cv-06609-YGR (N.D. Cal.), before the federal district court are claims similar to McHugh's currently awaiting decisions on

pending motions to dismiss, again based upon competing arguments concerning the appropriate construction of sections 10113.71 and 10113.72. Further, in *Shaff v. Farmers New World Life Ins. Co.*, Case No. LA cv17:03610 JAK (Ex) (C.D. Cal.), another appeal has recently been taken to the Ninth Circuit Court of Appeals by the plaintiff-policyholder challenging the district court's grant of summary judgment in favor of the defendant-insurer. That ruling was apparently based upon the district court's interpretation of section 10113.71 and its belief that statute could not have "retroactive effect" to policies issued before January 1, 2013. The various courts currently handling those cases (as well as the involved litigants), would benefit greatly from this Court's intervention and clarification of the proper interpretation and application of sections 10113.71 and 10113.72. Without that guidance, they are left to operate in the present environment in which the Court of Appeal and *Bentley* have taken decidedly contrary positions on those critical issues.

In addition to that conflict, a uniform and expeditious resolution of those issues presents a question of widespread public importance in California, with continuing coverage for millions of life insurance

policies literally hanging in the balance. With each passing day, senior and disabled policyholders – the very vulnerable class of insureds sections 10113.71 and 10113.72 were enacted to protect – are at risk of inadvertently losing important life insurance coverage based upon conflicting interpretations of those statutes taken by insurers. Moreover, where it remains undisturbed, the Court of Appeal's interpretation of those statutes imposes *two different notice and grace periods* depending on when policies are first issued (before or after January 1, 2013.) Consequently, two different and conflicting sets of rules would govern life insurance policies in California, creating widespread confusion among consumers likely to heighten the potential for inadvertent lapses by uniformed policyholders. The resulting unpredictability will only spawn further litigation as claims are controverted or otherwise denied, completely at odds with the stability and certainty sections 10113.71 and 10113.72 were meant to promote. This Court's intervention is required now to quell that rising controversy and to provide stability to both insurers and policyholders concerning their respective obligations under sections 10113.71 and 10113.72.

## B. This Court Should Further Clarify That the Lower Courts May Not Rely Upon Private Opinions of Department of Insurance Staff, Contrary to the Mandates of Insurance Code Section 12921.9, Government Code Section 11340.5, and This Court's Recent Decision in *Heckart*.

Although, as explained above, section 12921.9 of the Insurance Code makes clear that any letter or legal opinion issued by the DOI Commissioner or DOI Chief Counsel "shall not be construed as establishing an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, rule, or regulation." Yet the Court of Appeal's Opinion in this case is premised on giving DOI "SERRF Notices" the dignity and power of a DOI-sanctioned "standard of general application" which section 12921.9, subd. (b) expressly prohibits.

This demonstrates how the lower courts remain fundamentally confused regarding the limited and proper use of those SERFF Notices, which do not constitute official positions taken by the DOI itself concerning the interpretation and application of the statutes in question. Indeed, notwithstanding this Court's recent admonitions in *Heckart,* 4 Cal.5th at 769 fn. 9, that "instructions" issued by DOI staff should *not* be misconstrued as the position taken by senior DOI

officials, confusion regarding the proper use of those SERFF Notices persists. Directly at odds with the Court of Appeal's Opinion, Judge Gee in *Bentley* correctly concluded that those same SERFF Notices issued by the DOI do not interpret sections 10113.71 and 10113.72, are not intended to represent an official position or interpretation of those statutes by the DOI, and are meant instead only to provide sample policy forms for the industry's adaptation. (*Bentley, supra*, 371 F.Supp.3d 723, 727-728.) The *Bentley* court's position on that same issue directly conflicts with the Court of Appeal's Opinion, further underscoring the need for this Court's intervention and clarification.

Finally, the Court of Appeal's Opinion, equating those SERFF Notices with the DOI's "administrative construction" of sections 10113.71 and 10113.72, *is provably false*. Specifically, in the above-mentioned *Moriarty* action currently pending in federal district court (S.D. Cal.), the insurer-defendants subpoenaed the deposition testimony of certain DOI senior officials to solicit their testimony regarding the construction and application of sections 10113.71 and 10113.72. Through the Attorney General's Office, the DOI moved to quash that subpoena, asserting under Insurance Code section 12921.9, subd. (b)

and this Court's further guidance in *Heckart*, that the opinions of any DOI staff could *not* represent an official position taken on the interpretation or application of those statutes and that therefore their deposition testimony on those issues would be irrelevant and entitled to no legal weight whatsoever. (RJN at 7-31.) In support of that Motion to Quash, Michael J. Levy, Deputy General Counsel for the DOI, submitted a sworn declaration further confirming that any of the testimony sought by those deposition subpoenas would only result in eliciting the personal opinions of DOI staff members which would not otherwise represent any official position of the DOI taken on the application of sections 10113.71 and 10113.72. (RJN at 27-29.) Notably, Mr. Levy cited to both section 12921.9 and this Court's *Heckart* opinion in support of that position. (RJN at 29.)

The plaintiff-insured in *Moriarty* joined in the DOI's Motion to Quash, explaining to the district court how the insurer in this case (Protective Life) previously attempted to conduct that same discovery of DOI staff members to bolster its argument about the significance of those SERFF Notices. (RJN at 33-44.) Included in that opposition were relevant excerpts of the deposition testimony of

John Mangan, an officer with the insurance industry association, The American Council of Life Insurers ("ACLI"), previously taken in the *Moriarty* action. (RJN at 39-44.) In those excerpts, Mr. Mangan not only explained the nature of those SERFF Notices, but also conceded that they do *not* represent an official position taken by the DOI concerning the construction or application of sections 10113.71 and 10113.72. (RJN at 41-44.) Thus, it is fair to say that the only "official position" taken by the DOI regarding those statutes is that *it has taken no official position at all on their interpretation or application to policies in force on January 1, 2013*, through the issuance of those SERFF Notices or otherwise.

Yet as should be clear to this Court, insurers are highly motivated to equate those SERFF Notices and other informal communications with DOI staff with DOI official sanction, as doing so provides them with a "back-channel" for eliciting even unofficial responses and notice that the industry can then use to persuade the lower courts that their proffered interpretation of sections 10113.71 and 10113.72 have DOI approval. That is precisely what happened in this case, with the Court of Appeal taking that bait by repeatedly citing its "deferential"

interpretation of those statutes, purporting to follow the DOI's "administrative construction" as expressed through those SERFF Notices and other unofficial communications. Such a misguided practice by the lower courts – directly contrary to the DOI's position taken in judicially noticeable sworn affidavits – should not be allowed to persist and spread. This Court's intervention is needed now to provide clarity to the application of section 12921.9 in those exact circumstances, and to maintain consistency and predictability when no official position has actually been taken by the DOI pursuant to that statute. It is also necessary to prevent staff at DOI from "informally" setting DOI policy when they are not otherwise authorized to do so.

## V.

## CONCLUSION

A conflict now exists on the proper construction and application of sections 10113.71 and 10113.72, imperiling life insurance coverage for literally millions of Californians. As the Court of Appeal's Opinion on those issues has already been rejected by at least one federal district court applying the same California law, this Court's intervention is required now to address and resolve that conflict, and to uphold the Legislature's goal of protecting elderly and disabled policyholders from inadvertent termination of that important life insurance coverage. Accordingly, Petitioners respectfully requests this Court to grant this Petition for Review.

Respectfully submitted,

**WINTERS & ASSOCIATES**
Jack B. Winters, Jr., Esq.
Georg M. Capielo, Esq.

**WILLIAMS IAGMIN LLP**

DATED: Nov. 18, 2019

Jon R. Williams, Esq.
Attorneys for Plaintiffs/Appellants/
Petitioners, BLAKELY McHUGH and
TRYSTA M. HENSELMEIER

**CERTIFICATE OF COMPLIANCE PURSUANT TO THE CALIFORNIA RULES OF COURT, RULE 8.204(c)**

Pursuant to the California Rule of Court, Rule 8.204(c), I certify that the foregoing petition is proportionally spaced, has a typeface of 14 points, is double-line spaced, and based upon the word count feature contained in the word processing program used to produce that brief (Microsoft Word 2015), contains 6,286 words.

DATED: Nov. 18, 2019

Jon R. Williams

# ATTACHMENT A

Filed 10/9/19

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

| | |
|---|---|
| BLAKELY MCHUGH et al.,<br><br>Plaintiffs and Appellants,<br><br>v.<br><br>PROTECTIVE LIFE INSURANCE,<br><br>Defendant and Respondent. | D072863<br><br>(Super. Ct. No. 37-2014-00019212-CU-IC-CTL) |

APPEAL from a judgment of the Superior Court of San Diego County, Judith F. Hayes, Judge. Affirmed.

Winters & Associates and Jack B. Winters, Jr., Georg M. Capielo, Sarah D. Ball; Williams Iagmin and Jon R. Williams for Plaintiffs and Appellants.

Law Offices of Daniel D. Murphy and Daniel D. Murphy for California Advocates for Nursing Home Reform, Inc., as Amicus Curiae on behalf of Plaintiffs and Appellants.

Grignon Law Firm and Margaret M. Grignon; Maynard Cooper & Gale and C. Andrew Kitchen, Alexandra V. Drury, John C. Neiman, Jr.; Noonan Lance Boyer & Banach and David J. Noonan for Defendant and Respondent.

Alston & Bird and Thomas A. Evans for American Council of Life Insurers, as Amicus Curiae on behalf of Defendant and Respondent.

This appeal raises one fundamental issue: whether Insurance Code sections 10113.71 and 10113.72[1] ("the statutes"), which came into effect on January 1, 2013, apply to term life insurance policies issued before the statutes' effective date. In 2005, Protective Life Insurance Company (Protective Life) issued William Patrick McHugh a 60-year term life policy (the policy) that provided for a 31-day grace period before it could be terminated for failure to pay the premium.[2] McHugh failed to pay the premium

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1 Undesignated statutory references are to the Insurance Code. Assembly Bill No. 1747 created the statutes. Section 10113.71 states: "(a) Each life insurance policy issued or delivered in this state shall contain a provision for a grace period of not less than 60 days from the premium due date. The 60-day grace period shall not run concurrently with the period of paid coverage. The provision shall provide that the policy shall remain in force during the grace period. [¶] (b)(1) A notice of pending lapse and termination of a life insurance policy shall not be effective unless mailed by the insurer to the named policy owner, a designee named pursuant to Section 10113.72 for an individual life insurance policy, and a known assignee or other person having an interest in the individual life insurance policy, at least 30 days prior to the effective date of termination if termination is for nonpayment of premium. [¶] (2) This subdivision shall not apply to nonrenewal. [¶ ] (3) Notice shall be given to the policy owner *and to the designee* by first-class United States mail within 30 days after a premium is due and unpaid. However, notices made to assignees pursuant to this section may be done electronically with the consent of the assignee. [¶] (c) For purposes of this section, a life insurance policy includes, but is not limited to, an individual life insurance policy and a group life insurance policy, except where otherwise provided." (Italics added.)

Section 10113.72 states: "(a) An individual life insurance policy shall not be issued or delivered in this state until the *applicant* has been given the right to designate at least one person, in addition to the *applicant*, to receive notice of lapse or termination of a policy for nonpayment of premium. The insurer shall provide each *applicant* with a form to make the designation. That form shall provide the opportunity for the *applicant* to submit the name, address, and telephone number of at least one person, in addition to the *applicant*, who is to receive notice of lapse or termination of the policy for nonpayment of premium." (Italics added.)

2 Chase Insurance Life Company issued McHugh the policy on March 1, 2005, and Protective Life subsequently purchased Chase Insurance.

due on January 9, 2013, and his policy lapsed 31 days later. McHugh passed away in June 2013.

Thereafter, Mchugh's daughter, Blakely McHugh, the designated beneficiary under the policy, and Trysta M. Henselmeier (appellants)[3] sued Protective Life for breach of contract and breach of the implied covenant of good faith and fair dealing, claiming Protective Life failed to comply with the statutes' requirement that it provide a 60-day grace period before it terminated the policy for nonpayment of premium.

The parties filed various trial court motions, and Protective Life, relying largely on interpretations of the Department of Insurance (the Department) argued that the statutes do not apply retroactively to McHugh's policy and the claim. The court rejected Protective Life's arguments and ruled that the statutes applied to the claim. The matter proceeded to jury trial and Protective Life prevailed. Appellants appeal from both a special verdict in favor of Protective Life and an order denying their motion for judgment notwithstanding the verdict (JNOV).

Pursuant to Code of Civil Procedure section 906, Protective Life requests that we affirm the verdict on the additional ground that the statutes do not apply to the policy and the trial court erred by ruling to the contrary when it denied Protective Life's motion for a directed verdict. Appellants oppose the request, claiming that Protective Life should have filed an appeal. We grant Protective Life's request. "It is a general rule a

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3 To avoid confusion, we refer to Blakely by her first name. Henselmeier is Blakely's mother, McHugh's successor-in interest, and a contingent beneficiary under the policy.

respondent who has not appealed from the judgment may not urge error on appeal. [Citation.] A limited exception to this rule is provided by Code of Civil Procedure section 906, which states in pertinent part: 'The respondent . . . may, without appealing from [the] judgment, request the reviewing court to and it may review any of the foregoing [described orders or rulings] for the purpose of determining whether or not the appellant was prejudiced by the error or errors upon which he relies for reversal or modification of the judgment from which the appeal is taken.' 'The purpose of the statutory exception is to allow a respondent to assert a legal theory which may result in affirmance of the judgment.' " (*Hutchinson v. City of Sacramento* (1993) 17 Cal.App.4th 791, 798.)

We affirm the judgment on the additional ground that, as a matter of law, the court erred by denying Protective Life's motion for a directed verdict. As we discuss below, the statutes apply only to policies issued or delivered after January 1, 2013, and not to McHugh's policy. Accordingly, we need not address the other contentions appellants raise[4] because they are all premised on the erroneous assumption that sections 10113.71 and 10113.72 apply retroactively to the policy and claim.

DISCUSSION

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4 Appellants contend the court erroneously (1) declined to decide as a matter of law whether Protective Life complied with sections 10113.71 and 10113.72 and provided McHugh with a 60-day grace period; and instead erroneously permitted the jury to decide that issue; (2) declined to instruct the jury that Protective Life was required to "strictly comply" with the new statutes; and (3) instructed the jury that McHugh had a duty to mitigate his damages. They further contend the instructional errors were prejudicial because the verdict was inconsistent.

The Insurance Code states the Insurance Commissioner "shall perform all duties imposed upon him or her by the provisions of this code and other laws regulating the business of insurance in [California], and shall enforce the execution of those provisions and laws." (§ 12921.1, subd. (a).) Furthermore, insurance companies must submit "[a]ll policies, certificates of insurance, notices of proposed insurance, applications for insurance, endorsements and riders delivered or issued for delivery in [California] and the schedules of premium rates pertaining thereto . . . [to] the commissioner." (§ 779.8.) In short, insurance is a regulated industry. The Department is charged with ensuring that all policies issued in the State of California contain every provision required by law.

In discharging its statutory duties, the Department concluded sections 10113.71 and 10113.72 apply only to insurance policies issued after January 1, 2013. The Department published its determination in a document titled, "SERFF Instructions for Complying with [Assembly Bill No.] 1747," which states, "All life insurance policies issued or delivered in California on or after [January 1, 2013] must contain a grace period of at least 60 days." SERFF (System for Electronic Rate and Form Filing) is an internet-based system that enables insurance companies such as Protective Life to submit rate and form filings to the Department for approval of insurance products and changes to existing products. The Department mandates the use of SERFF and provides regulatory guidance to insurers through SERFF, including guidance for compliance with the statutes. The court in *Bentley v. United of Omaha Life Insurance Co.* (C.D. Cal. Sept. 14, 2016, No.

2:15-cv-07870) 2016 WL 7443190[5] explained that the SERFF instructions are "available on the SERFF website where the [Department], a governmental agency, places instructions for any insurance company seeking [Department] approval."

Senior Department personnel consistently communicated the Department's position in response to inquiries from representatives of the insurance industry seeking advice about the statutes' applicability. For example, in a March 2013 letter, the Department's Assistant Chief Counsel of the Policy Approval Bureau, Leslie Tick, stated: "In general, new laws take effect on a going forward basis so that everyone knows what the law is when they enter into an agreement, such as an insurance policy. If the statutes had retroactive effect they would effect [*sic*] actions which have already occurred, and which were lawful at the time, making them retroactively unlawful. Parties to a contract would have no certainty as to the terms of their agreement if the Legislature could change those terms retroactively. [¶] Generally a policy is 'issued or delivered' just once—when it is new. A statutes [*sic*] would have to say 'and renewed' in order to apply to renewals, because presumably those renewed policies were issued or delivered before the Jan[uary] 1, 2013 effective date. [¶] For these reasons the statutory changes brought by [Assembly Bill No. 1747], apply on a going forward basis—that is, the changes apply to policies issued or delivered on or after [January 1, 2013]. [Assembly Bill No. 1747] does not

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5 "It does not violate the California Rules of Court to cite an unpublished federal opinion. [Citations.] They may be persuasive, although not binding, authority." (*Western Heritage Ins. Co. v. Frances Todd, Inc.* (2019) 33 Cal.App.5th 976, 990.)

require insurers to extend the grace period for policies that are already in force and does not require insurers to extend the grace period when policies that were issued prior to [January 1, 2013], are renewed."

In a December 2012 e-mail to an insurance company's representative, Department attorney Nancy Hom stated, "The requirements of [Assembly Bill No. 1747] are not retroactive. The bill applies to policies issued or delivered on or after January 1, 2013, not before." Also, in a July 2016 e-mail, attorney Tick informed an inquiring attorney that the Department had issued a SERFF instruction on this issue when the legislation was newly enacted, and added that Assembly Bill No. 1747 "applies to new policies issued on or after [January 1, 2013, but] not to policies renewed on or after [January 1, 2013]."

The California Supreme Court recently reminded us of the weight to accord to an agency's interpretation of law: " 'Deference to administrative interpretations always is "situational" and depends on "a complex of factors" [citation], but where the agency has special expertise and its decision is carefully considered by senior agency officials, that decision is entitled to correspondingly greater weight.' " (*Christensen v. Lightbourne* (2019) 7 Cal.5th 761, 771.) Courts "accord[] great weight and respect to the administrative construction" of a statute by the agency entrusted with enforcing it. (*Yamaha Corp. v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 12.) That is particularly so when the statute addresses "technical" matters within the agency's "expertise." (*Ibid.*)

We are required to give deference to the Department's interpretation, as long as it is reasonable and consistent with the language of the statutes. (*Southern California Edison Co. v. Peevey* (2003) 31 Cal. 4th 781, 796.) " ' "Our fundamental task . . ." ' . . . ' "is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute." ' " (*People v. Pennington* (2017) 3 Cal.5th 786, 795.) We focus first on " 'the statute's actual words, the "most reliable indicator" of legislative intent, "assigning them their usual and ordinary meanings." ' " (*Ibid*.) We view the statutory language in context, and do not determine its meaning " 'from a single word or sentence.' " (*Ibid.*) "[A]pparent 'ambiguities often may be resolved by examining the context in which the language appears and adopting the construction which best serves to harmonize the statute internally and with related statutes.' " (*Ibid*.)

If the statutory text "is unambiguous and provides a clear answer, we need go no further." (*Microsoft Corp. v. Franchise Tax Bd.* (2006) 39 Cal.4th 750, 758; see *Stockton Citizens for Sensible Planning v. City of Stockton* (2012) 210 Cal.App.4th 1484, 1491.) However, if the statutory language is unclear, a court may resort to other interpretive aids, including the statute's legislative history and " ' "the wider historical circumstances of its enactment." ' " (*Carmack v. Reynolds* (2017) 2 Cal.5th 844, 850.) Courts may also consider the purpose of the statute, the evils to be remedied, and the public policy sought to be achieved. (*Fluor Corp. v. Superior Court* (2015) 61 Cal.4th 1175, 1198; see *City of San Jose v. Superior Court* (2017) 2 Cal.5th 608, 616-617.) We review de novo questions of statutory interpretation. (*Christensen v. Lightbourne, supra,* 7 Cal.5th at p. 771.)

Assembly Bill No. 1747 contained three related sections that were retained in the final legislation: First, it added section 10113.71, requiring that every term life insurance policy "issued or delivered" in California contain a provision giving the insured a grace period of at least 60 days from the premium due date, and requiring that the insurer notify the insured and his or her "designee named pursuant to Section 10113.72" if termination of the policy is for nonpayment of premium. (Assem. Bill No. 1747 (2011-2012 Reg. Sess.) § 1.) Second, it added section 10113.72, mandating that every life insurance policy "issued or delivered" in California grant the "applicant" the right to designate at least one other person to receive notice of lapse or termination of a policy for nonpayment of premium. (Assem. Bill No. 1747 (2011-2012 Reg. Sess.) § 2.) Third, it amended section 10173.2 to provide that "[w]hen a policy of life insurance is, *after the effective date of this section*," assigned in writing as security for an indebtedness, the insurer shall, upon receiving written notice of name and address of the assignee, mail to the assignee a written notice "not less than 30 days prior to the final lapse of the policy." (Assem. Bill No. 1747 (2011-2012 Reg. Sess.) § 3.) (Italics added.)

In evaluating whether the statues apply retroactively, we bear in mind that "a statute may be applied retroactively only if it contains express language of retroactivity *or* if other sources provide a clear and unavoidable implication that the Legislature intended retroactive application." (*Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 844.) "The quest for legislative intent is not unbounded: '[I]t still remains true, as it always has, that there can be no intent in a statute not expressed in its words, and there can be no intent upon the part of the framers of such a statute which does not

find expression in their words.' [Citations.] . . . 'Words may not be inserted in a statute under the guise of interpretation.' " (*City of Sacramento v. Pub. Employees' Ret. Sys.* (1994) 22 Cal.App.4th 786, 793-794.)

Assembly Bill No. 1747's provisions indicate the new law applies only to term life insurance policies issued or delivered after January 1, 2013. Specifically, section 10113.72, subdivision (a) states the policy "shall not be issued or delivered" until the "applicant has been given the right to designate at least one person, in addition to the applicant, to receive notice of lapse of termination of a policy for nonpayment of premium." This provision clearly does not apply to policies issued before the statute's effective date because an existing policyholder is not—and by definition cannot be—an "applicant." A federal district court has similarly noted that "a plain reading of" the language " 'policies *shall not be issued until*' " in this subdivision contemplates "no retroactive application." (*Avazian v. Genworth Life & Annuity Ins.* (C.D. Cal. Dec. 4, 2017 No. 2:17-cv-06459) [2017 WL 6025330], *2 fn. 2, quoting Ins. Code, § 10113.72, subd. (a), italics added.) Appellants conceded at trial that this provision did not apply to McHugh because he was not an "applicant" on January 1, 2013.

Section 10113.71, subdivision (b)(1) provides: "A notice of pending lapse and termination of a life insurance policy shall not be effective unless mailed by the insurer to the named policy owner, a designee named pursuant to Section 10113.72 for an individual life insurance policy, and a known assignee or other person having an interest in the individual life insurance policy, at least 30 days prior to the effective date of termination if termination is for nonpayment of premium." The use of the term

"designee" indicates a notice of pending lapse and termination only applies to term life insurance policies issued after January 1, 2013 because the "right to . . . designate" exists only in policies issued after that date.

The statutes were enacted at the same time and involved the same subject matter. "[C]ourts may conclude that the Legislature would not intend one subsection of a subdivision of a statute to operate in a manner 'markedly dissimilar' from other provisions in the same list or subdivision." (*Grafton Partners L.P. v. Super. Ct.* (2005) 36 Cal. 4th 944, 960.)[6]

Sections 10113.71, subdivision (a)(1) and 10113.72, subdivision (a)(1), refer to term life insurance policies "issued or delivered," a term that in California case law imports prospective application: "The terms 'issued' and 'delivered' must refer to the original issuance and delivery of the policy; they are fixed as to time and do not stretch into infinity." (*Ball v. California State Auto. Assn. Inter-Ins. Bureau* (1962) 201 Cal.App.2d 85, 87 [addressing uninsured motorist law].) Therefore, as this policy was issued and delivered to McHugh in 2005, it could not incorporate the statutory amendments that became effective in 2013. Here, as in *Ball,* "[t]he specific act of issuance and delivery predated the legislative provision and cannot conceivably operate to bring within its meaning later legislation which was enacted after such issuance and

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6 As noted, Assembly Bill No. 1747 amended section 10173.2 to provide a 30-day deadline that applies to assignments of insurance policies entered into "after" the statute's effective date. We also conclude that, by its own terms, this section requires prospective application.

delivery. The later legislation embraced only policies thereafter issued or delivered; it did not purport to affect existing contracts, and, indeed . . . 'could not, *of its own force,* affect' [the] existing policy, 'under the Federal and California Constitutions.' " (*Ball, supra,* at p. 88.) Strictly speaking, term life insurance policies are issued only once.

"When the Legislature enacts language that has received definitive judicial construction, we presume that the Legislature was aware of the relevant judicial decisions and intended to adopt that construction." (*Foley v. Interactive Data Corp.* (1988) 47 Cal. 3d 654, 675.) Here, we presume the Legislature was aware of the customary interpretation of the phrase "issued or delivered."

We are not persuaded by appellants' argument based on section 10113.71's use of the words "each policy," which imports inclusiveness, and "shall," which signifies something mandatory, that there are "no limitations, qualifiers, or exemptions to those statutes' mandates, or any other indication that they apply only to newly issued insurance policies." This argument takes those words out of context and ignores the term "issued or delivered." There is no dispute that the word "shall" is ordinarily " 'used in laws, regulations, or directives to express what is mandatory.' " (*Austin v. Dept. of Motor Vehicles* (1988) 203 Cal.App.3d 305, 309.) But appellants' argument begs the question whether the 60-day grace period is mandatory in all term life insurance policies whenever

issued or only in those policies issued after January 1, 2013. For the reasons stated above, we conclude the latter interpretation is the correct one.[7]

The Legislature knows how to specify that statutory changes apply to insurance policies then in effect. It could have simply stated it applied to all policies "in force." For example, section 10235.95 states it applies to all "policies in force, regardless of their dates of issuance." We thus infer that the Legislature purposefully elected not to use such language of retroactivity in sections 10113.71 and 10113.72.

The California Supreme Court has held: "It is well[-]settled that insurance policies are governed by the statutory and decisional law in force at the time the policy is issued. 'Such provisions are read into each policy issued thereunder, and become a part of the contract with full binding effect upon each party.' [Citations.] Based upon the theory that 'a statute should be given the least retroactive effect that its language reasonably permits' [citation], this rule is followed even though there has been a subsequent amendment or repeal of the statute incorporated into the policy." (*Interinsurance Exch. of Auto. Club of S. Cal. v. Ohio Cas. Ins. Co.* (1962) 58 Cal.2d 142, 149.) Here, McHugh's policy is governed by the regulations in effect when it was issued in 2005, and the subsequently enacted sections 10113.71 and 10113.72 are not incorporated into the policy. "As the United States Supreme Court has consistently stressed, the presumption that legislation operates prospectively rather than retroactively

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[7] Another ground for rejecting appellants' argument is that the word "each" in section 10113.71, subdivision (a) was added by amendment effective January 1, 2014, after McHugh's death and the purported breach of contract. The language in effect at the time of the purported breach of contract should govern the claim.

is rooted in constitutional principles: 'In a free, dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions. [¶] It is therefore not surprising that the antiretroactivity principle finds expression in several provisions of our Constitution. The Ex Post Facto Clause flatly prohibits retroactive application of penal legislation . . . . The Fifth Amendment's Takings Clause[, and] [t]he Due Process Clause also protect[] the interests in fair notice and repose that may be compromised by retroactive legislation; a justification sufficient to validate a statute's prospective application under the [Due Process] Clause 'may not suffice' to warrant its retroactive application." (*Myers v. Philip Morris, supra,* 28 Cal.4th at p. 841, quoting *Landgraf v. USI Film Products* (1994) 511 U.S. 244, 265-266.)

For the reasons stated above, we conclude the Department's interpretation that the statutes apply only to term life insurance policies issued after January 1, 2013, is reasonable and correct. We therefore "accord[] great weight and respect to the administrative construction" of a statute by the agency entrusted with enforcing it (*Yamaha Corp. v. State Bd. of Equalization, supra,* 19 Cal.4th at p. 12), particularly because that interpretation is, as here, "contemporaneous with legislative enactment of the statute." (*Ibid.*)

In reaching our conclusion, we acknowledge that we are somewhat at odds with the amicus brief filed by the California Advocates for Nursing Home Reform, Inc. Amicus curiae contends Assembly Bill No. 1747's author's intent was that the statutes apply to all term life insurance policies whenever issued. This could be one

interpretation of the author's intent, which is stated in a summary of the bill at the third reading in the Assembly: "According to the author, the bill provides consumer safeguards from which people who have purchased life insurance coverage, especially seniors, would benefit." (Assem. Bill No. 1747, 3d reading May 9, 2012, (2011-2012 Reg. Sess.) p. 2.) However, we need not resolve that question, because our task is not to determine the author's intent but the intent of the Legislature. Legislative intent and the intent of the author are not necessarily the same. It is clear from the legislative history that the author's intent—in many respects—was not followed by the Legislature as there were many deletions from and amendments to the original bill. It is noteworthy that the amicus brief fails to analyze any of the statutory language or address the case law governing when statutes will be deemed to apply retroactively. We see no reason to ignore the wording of the statutes as enacted based solely on the author's purported intent. Amicus curiae also claims special authority because it "was very active in the crafting of [Assembly Bill No. 1747]." But the legislative history also shows the involvement and support of the Department in the passage of Assembly Bill No. 1747. The amicus brief fails to address any of the constitutional concerns raised by the Department and why we should ignore the Department's interpretation.

## DISPOSITION

The judgment is affirmed. Each party is to bear its own costs on appeal.

O'ROURKE, J.

WE CONCUR:

HUFFMAN, Acting P. J.

AARON, J.

***McHUGH, et al. v. PROTECTIVE LIFE INSURANCE***
**Supreme Court of the State of California**
**CA Supreme Court Case No.: S_____**
**Court of Appeal Case No.: D072863**
**San Diego County Superior Court Case No.: 37-2014-00019212-CU-IC-CTL**

**PROOF OF SERVICE**
**When Not All Case Participants are Registered for the Electronic Filing System (EFS) TrueFiling Portal**

I am employed in the county of San Diego, State of California. I am over the age of 18 and not a party to the within action; my business address is 666 State Street, San Diego, California 92101.

I, the undersigned, hereby certify that I electronically filed the foregoing with the Clerk of the Court for the California Supreme Court by using the appellate EFS system on **November 18, 2019**.

**1) PETITION FOR REVIEW**

Participants in the case who are registered EFS users will be served by the appellate EFS system.

I further certify that some of the participants in the case are not registered for the Electronic Filing System (EFS) TrueFiling Portal. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-EFS participants:

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| C. Andrew Kitchen, Esq.<br>Alexandra V. Drury, Esq.<br>Maynard Cooper & Gale PC<br>600 Montgomery Street, Suite 2600<br>San Francisco, CA 94111 | |
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| John Neiman, Esq.<br>Maynard Cooper & Gale PC<br>1901 Sixth Avenue North<br>2400 Regions Harbert Plaza<br>Birmingham, AL 35203 | *Defendant/Respondent:*<br>*Protective Life Insurance*<br><br>**Via TrueFiling** |
| Daniel D. Murphy, Esq.<br>Stadtmuller House<br>819 Eddy Street<br>San Francisco, CA 94109 | *Amicus curiae for Appellant:*<br>*California Advocates for Nursing Home Reform*<br>**Via TrueFiling** |
| Thomas A. Evans, Esq.<br>Alston & Bird LLP<br>560 Mission Street, Suite 2100<br>San Francisco, CA 94105 | *Amicus curiae for Respondent:*<br>*American Council of Life Insurers*<br><br>**Via TrueFiling** |
| Hon. Judith F. Hayes<br>San Diego Superior Court<br>330 West Broadway<br>San Diego, CA 92101 | *Superior Court*<br><br>**Via mail delivery** |
| Court of Appeal of the State of California<br>4th Appellate District, Division 1<br>750 B Street, Suite 300<br>San Diego, CA 92101 | *Appellate Court*<br><br>**Via TrueFiling** |

Dated: **November 18, 2019** Signature: 

Chenin M. Andreoli

**STATE OF CALIFORNIA**
Supreme Court of California

# *PROOF OF SERVICE*

**STATE OF CALIFORNIA**
Supreme Court of California

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Case Number: **TEMP-RDR7K0G1**
Lower Court Case Number:

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Title(s) of papers e-served:

| Filing Type | Document Title |
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| PETITION FOR REVIEW | D072863_Petition for Review_McHugh et al |
| ADDITIONAL DOCUMENTS | D072863_Request for Judicial Notice_McHugh et al |

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This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

11/18/2019

Date

/s/Chenin Andreoli

Signature

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