IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. S259215

BLAKELY MCHUGH AND TRYSTA M. HENSELMEIER,
Plaintiffs, Appellant, and Petitioners,

v.

PROTECTIVE LIFE INSURANCE COMPANY,
Defendant and Respondent.

AFTER DECISION BY THE COURT OF APPEAL OF THE STATE OF CALIFORNIA,
FOURTH DISTRICT, DIVISION ONE, CASE NO. D072863

(ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO
THE HONORABLE JUDITH F. HAYES
CASE NO. 37-2014-00019212-CU-IC-CTL)

APPLICATION TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE AMERICAN COUNCIL OF LIFE INSURERS IN SUPPORT OF DEFENDANT AND RESPONDENT

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APPLICATION

Pursuant to Rule of Court 8.520, the American Council of Life Insurers ("ACLI") requests leave to file the attached brief amicus curiae in support of Respondent, Protective Life Insurance Company ("Protective Life"). As described in its statement of identity and interest, ACLI is a life insurance trade association that represents the interests of approximately 290 member companies operating in the United States and abroad. ACLI participated as amicus curiae before the Court of Appeal in this matter, is familiar with the issues and history of regulation relevant to this matter, and believes that the attached brief will aid the Court in its consideration of the issues presented in this case.

IDENTITY AND INTEREST OF AMICUS CURIAE

The ACLI is the largest life insurance trade association in the United States, representing the interests of approximately 290 member companies operating in the United States and abroad. ACLI member companies are among the leading providers of life insurance products. In the United States, these companies represent more than 90 percent of industry assets. In California alone, ACLI member companies provide 90% of total life insurance coverage.[1]

ACLI regularly advocates the interests of life insurers and their millions of policyholders and beneficiaries before federal and state legislators, state insurance commissioners, federal regulators,

[1] Pursuant to California Rule of Court 8.520(f)(4), ACLI confirms that no party's counsel authored this brief in whole or in part, and that no party, no party's counsel, and no other person contributed money intended to fund the brief's preparation or submission other than ACLI on behalf of its collective membership. Protective Life is a member of ACLI.

administration officials, and the courts. ACLI regularly files *amicus* briefs in cases, like this one, that involve issues of great importance to its members.

ACLI's members have a vital interest in preserving the stability and predictability required to offer life insurance products to consumers. Life insurance policies are long-term private contracts that can last for decades. The design and pricing of life insurance products entails projecting the performance of the products over years. This long-term planning assumes that the terms of the insurance contract remain constant throughout the duration of the contract. Petitioners advocate a statutory construction that presumes that the Legislature intends to rewrite existing life insurance contracts when it passes legislation that has a remedial purpose, without requiring the unequivocal evidence of intent required to overcome the long-standing presumption against retroactive application. Since most new statutes can be characterized as a "remedy" for some identified problem, Petitioner's position would adopt a default rule that favors rewriting existing contracts, even if the contracts comply with all legal requirements at the time they are issued. Subjecting life insurance contracts to legislative revision introduces unforeseen costs and frustrates the insurers' ability to project policy performance, where contract terms are subject to multiple revisions years or decades after they were issued.

Retroactive application of the statutory terms would also create uncertainty as to policies that have already been terminated in reliance on the express terms of the policies. Insurers have exercised the vested rights created by the contract terms governing termination of the policies. If the statutes here are applied retroactively, those rights would be rendered ineffective, unexpectedly reviving policies that were terminated years ago.

Limiting the application of the statutes at issue to policies "issued or delivered" after the effective date of the statute, however, avoids the

uncertainty and the likely constitutional issues that would arise from altering the terms of private contracts by statute. ACLI submits this application and brief in support of Protective Life's position because its members have a substantial interest in preserving their ability to rely on the terms of their contracts with policyholders.

BRIEF AMICUS CURIAE OF THE AMERICAN COUNCIL OF LIFE INSURERS IN SUPPORT OF RESPONDENT

I. INTRODUCTION AND SUMMARY OF ARGUMENT

ACLI submits this amicus brief in support of respondent Protective Life because a decision that confirms that mandatory policy language contained in the anti-lapse statutes at issue (Ins. Code §§ 10113.71-.72) applies only to insurance contracts issued after the effective date of the statutes will promote the certainty and predictability necessary for life insurers to design and offer life insurance products. Designing and pricing life insurance products entails projecting performance based on assumptions regarding future events and the specific terms of the contract. A rule that presumes the Legislature intends to insert new language in life insurance contracts or (as in this case) to mandate additional coverage not contained in the contracts creates uncertainty, where neither insurer nor insured can rely on the text of the insurance contract to define their rights for the duration of the contract.

Although petitioners characterize their position as a "prospective" application of the anti-lapse statutes, they advocate a result that would alter the terms of existing life insurance policies. Petitioners' position conflicts with long-standing case law (which the legislature is presumed to know) holding that a statute that imposes new requirements on policies "issued or delivered" in California applies only to policies issued after the effective date of the statute. Petitioners' interpretation also conflicts with the canon of

statutory construction in favor of avoiding constitutional questions. Life insurance policies are private contracts. A rule that favors the legislative redrafting of existing policy terms invites constitutional challenges based on impairment of contract. In this case, addition of an extended grace period and new conditions for terminating coverage would impair the contractual right to terminate coverage and require insurers to provide additional coverage beyond the terms agreed to in the policy contract. A construction that limits application to subsequently issued policies avoids questions of constitutionality and is consistent with prior construction by the courts and the Department of Insurance. The Court should therefore affirm the judgment in favor of Protective Life and hold that Insurance Code sections 10113.71-.72 do not apply to existing "in force" life insurance policies that were issued before the effective date of the statutes.

II. ARGUMENT

A. Petitioners' Arguments Concerning The Potential Limits Of Retroactive Legislation Disregard The Legislature's Decision To Achieve Its Goal Through The Creation Of Private Contract Rights.

Petitioners spend many pages discussing the hypothetical limits of the Legislature's authority to enact retroactive legislation, impact the rights and obligations under preexisting private contracts, and regulate insurance. Petitioners' arguments that the Legislature, if it so desired, might be able to pass a statute with broad retroactive application that rewrites existing contract terms have little bearing on the construction of the statutes the Legislature actually passed, however. Throughout their briefs, petitioners avoid the actual language of the statutes in favor of inaccurate paraphrasing and characterization, claiming that the statutes require that all policyholders receive a 60-day grace period and impose notice of termination requirements on all policies.

The statutes at issue do not provide broad statutory rights to all "policyholders," however. Instead, the Legislature implemented its intended remedy through the creation of new private contract rights between the insurer and insured. This approach is consistent with the practice of regulating insurance through requiring certain mandatory terms in the insurance contract. *See, e.g.* Ins. Code § 10113.5 (requiring incontestability clause in an individual life insurance policy "delivered or issued for delivery" in California); Ins. Code § 10160 (no life insurance policy shall be "delivered or issued for delivery" in California without mandatory nonforfeiture provisions). Indeed, the regulation cited by petitioners requiring the inclusion of a 30-day grace period in variable life insurance contracts lists twenty specific terms that a policy form must contain as a condition of approval by the Commissioner. 10 Cal. Code. Reg. § 2534.3(c)(1)-(20) (Specifying "Mandatory Policy Provisions" in every variable life insurance policy form filed for approval in California). As private contracts, insurance policies are subject to the same rules for contract formation, including mutual assent. *See K.C. Working Chem. Co. v Eureka-Security Fire & Marine Ins. Co.*, 82 Cal. App. 2d 121, 131 (1947)("A contract of insurance must be assented to by both parties either in person or by their agents.") By requiring specific terms in the policy (or in the application, which is deemed part of the policy), the Legislature ensures that there is mutual assent to the terms, thereby creating binding private obligations, at the inception of the contract. Because this process is premised on the mutual assent of both parties to the contract terms, it is by nature prospective.

Petitioners consistently describe the statutes as imposing statutory duties directly on all insurers, as opposed to requiring the inclusion of specific terms in contracts and applications. As a result, they never address how their position can be reconciled with the use of a well-established

regulatory mechanism that relies on the creation of contract rights through mutual assent.

B. Application of Ins. Code §§10113.71-72 To Policies Issued Before The Effective Date Would Be Retroactive Application, Because It Would Affect And Alter the Rights and Obligations Under Existing Contracts.

Petitioners attempt to avoid the burden of rebutting the presumption against retroactive application by arguing that application of the statutes to change the terms of existing insurance contracts nevertheless constitutes prospective application. Similar arguments have been rejected by this Court. *See Evangelatos v. Superior Court*, 44 Cal. 3d 1188, 1205-06 (1988)(application of Proposition 51 to trials conducted after effective date relating to injuries suffered before the effective date would constitute retroactive application); *Aetna Cas. & Surety Co. v. Ind. Acc. Com.*, 30 Cal. 2d 388, 391-92 (1947)(application of new workers' compensation benefits statute to proceedings involving injury suffered before effective date was retroactive application).

The issue of retroactivity does not turn on when a law is applied, but whether that application affects rights that existed before the effective date of the law. A retroactive statute is "one which affects rights, obligations, acts, transactions and conditions which are performed or exist prior to the adoption of the statute." *Aetna Cas. & Surety Co.*, 309 Cal. 2d at 391 (quoted in *Evangelatos*, 44 Cal. 3d at 1206). Petitioners' purportedly "prospective" application in this case would abrogate an existing contract right – the right to terminate coverage after a thirty day grace period – contained in a contract that complied with the law as of the date it was

issued. It would also impose further conditions on the termination of coverage through a notice requirement.[2]

Because the statutes operate through the insertion of mandatory policy terms, applying them to existing contracts would necessarily rewrite the terms of a private contract. Courts have long recognized that the insurer's right to contractually determine when coverage shall terminate is an essential right under the policy:

> "[T]he condition in a policy of life insurance that the policy shall cease if the stipulated premium shall not be paid on or before the day fixed is of the very essence and substance of the contract, against which even a court of equity cannot grant relief."

Morris v. New York Life Ins. Co., 6 Cal. App. 2d 30, 35 (1935)(quoting *Bergholm v. Peoria Life. Ins. Co.*, 284 U.S. 489, 492 (1932)). Reading section 10113.71 as inserting an extended grace period term into existing policies would bind insurers to coverage that was not agreed to in the insurance contract. A grace period requires the insurer to extend coverage for an additional period without receiving premium. During that period, the insurer takes on the risk of a claim and incurs the cost of continuing

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[2] Contrary to petitioners' brief, there was no statutorily required notice of termination or cancellation of most life insurance policies for failure to pay premiums prior to the enactment of the anti-lapse statutes. Under prior California law, a policy provision that coverage ended upon the expiration of the grace period was automatically effective, without the need for a notice of cancellation of termination. *Silva v. National Am. Life Ins. Co.*, 58 Cal. App. 3d 609, 614 (1976); *Scott v. Fed. Life Ins. Co.*, 200 Cal. App. 2d 384, 391 (1962). The regulation cited by petitioners applies prospectively to variable life insurance policies, a limited subset of products that involve securities and that do not include term policies like the one issued by Protective Life in this case. 10 Cal. Code. Reg. § 2534.3

coverage, including the cost of reinsurance and administrative costs. If the insured dies during the extended grace period, the insurer will be required to pay thousands or even millions of dollars based on coverage that it did not agree to provide. What petitioners may dismiss as de minimis becomes much more substantial once the unanticipated costs and coverage resulting from the rewriting of the policies are multiplied over the thousands of like insurance policies issued before the statutes' effective date.[3]

More broadly, a rule that "prospective" application permits the addition of new terms to existing contracts will impair the ability of life insurers to design and offer insurance products. Most life insurance policies are long-term products, in which the insurer has to rely on assumptions to project results years or decades in the future. Those assumptions are premised on the specific terms of the policies. If, as petitioners contend, existing contract terms may be altered or amended in the guise of "prospective" regulation, insurers will face the challenge of projecting the performance of contracts without being able to rely on the terms of those contracts. The uncertainty such a rule would create illustrates how petitioners' retroactive application would affect preexisting contract rights.

C. Prospective Application of Ins. Code §§ 10113.71-.72 Is Consistent With The Canon Favoring Construction That Avoids Constitutional Questions.

Petitioners' invitation to explore the limits of constitutionally permitted legislation also disregards the canon that statutes should be

[3] While petitioners depict a result where different contracts are subject to different rules depending on when they were issued "absurd," they are merely describing a typical situation that where a statute is applied prospectively. Petitioners also ignore that the reason the contracts have different rules is because the parties agreed to different terms. Enforcement of contracts according to their specific terms is hardly an absurd result.

interpreted "to avoid serious constitutional questions if such an interpretation is fairly possible." *People v. Buza*, 4 Cal. 5th 658, 682 (2018). Petitioners' construction requires the Court to examine the extent of the Legislature's ability to rewrite existing insurance contracts at any time by enacting a statute mandating that all policies issued or delivered in the state contain certain provisions or provide additional coverage. Petitioners point to nothing within the statutes to suggest that the Legislature was intending to test the constitutional bounds of its legislative power to legislate retroactively or to require the Court to take on that question. A construction that presumes that the new requirements apply only to policies issued subsequent to the effective date of the statute, on the other hand, avoids the constitutional questions that arise from retroactive application.

D. Petitioners Have Not Produced Clear Evidence Of Legislative Intent To Overcome The Presumption Against Retroactive Application.

Because petitioners' arguments rely on the erroneous premise that they are not advocating retroactive application, petitioners offer little to meet their substantial burden of rebutting the presumption against retroactive application. This Court has looked to the U.S. Supreme Court's formulation in describing the strength of the presumption: "*[A] retrospective operation will not be given to a statute which interferes with antecedent rights unless such be 'the unequivocal and inflexible import of the terms and the manifest intention of the legislature*.'" *Evangelatos*, 44 Cal. 3d at 1207 (quoting *United States v. Security Industrial Bank*, 459 U.S. 70, 79-80 (1982)(emphasis in original; internal citation omitted in original). Where, as here, the statute does not include an express retroactivity provision, it will not be applied retroactively "unless it is very clear from extrinsic sources that the Legislature or the voters must have intended a

retroactive application." *Id.* at 1209. Petitioners' claimed intent is not supported by the language used in the statutes, while what little support they offer to demonstrate legislative intent falls far short of the threshold of certainty required to rebut the presumption against retroactivity.

i. The Legislature Is Presumed To Have Known That It Selected Language Which The Courts Have Construed To Signify Prospective Operation.

Petitioners do not explain why, if the Legislature intended retroactive application, it elected to use terms like "issued and delivered," which have consistently been interpreted to signify prospective application. "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.*, 47 Cal. 3d 654, 675 (1988); *see also People v. Giordano*, 42 Cal. 4th 644, 659 (2007)("The Legislature is presumed to be aware of judicial decisions already in existence, and to have enacted or amended a statute in light thereof." [internal quotes and citations omitted]).

At the time the anti-lapse statutes were enacted, existing case law interpreting statutes that require new terms or coverage in insurance policies "issued or delivered" in California held uniformly that the statutes applied only to policies issued subsequent to the effective date of the statute. *See Ball v. Cal. State Auto Assoc. Inter-Insurance Bureau*, 201 Cal. App. 2d 85 (1962). In *Ball*, plaintiffs contended that their auto insurance policy, which was issued in December 1958, provided uninsured motorist coverage due to the enactment of the then-current version of the Uninsured Motorist Law (Ins. Code § 11580.2), which became effective in September 1959. The Uninsured Motorist Law required that no policy be "issued or

delivered" in the state without uninsured motorist coverage.[4] *Id.* at 85. The court held that 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." *Id.* at 87. A statute that states that policies "issued or delivered" in California must include specific provisions therefore does not affect policies in existence prior to the statute: "The 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 delivery. The later legislation *embraced only policies thereafter issued or delivered*: it did not purport to affect existing contracts [.]" *Id.* at 88 (emphasis added).[5]

Subsequent decisions construing the Uninsured Motorist Law have reached the same result. In *Lewis v. Fidelity & Cas. Co.*, 207 Cal. App. 2d 160 (1962), the Court of Appeal agreed that the statute did not apply to policies issued before the effective date. *Id.* at 163. *See also Voris v. Pac. Indem. Co.*, 213 Cal. App. 2d 29, 31 (1963) ("The statute enters as an implied term into each policy or rider subsequently issued..."); *Eliopulos v. North River Ins. Co.*, 219 Cal. App. 2d 845, 850 (1963)(same). As petitioners point out, the relevant decisions were issued decades ago and

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[4] Although the Uninsured Motorist Law phrased the mandatory coverage requirement as a prohibition ("no policy shall be issued or delivered"), and the statutes at issue here phrase the mandatory language as an affirmative requirement ("Each life insurance policy issued or delivered"), courts have treated the terms as synonymous. *See Lumberman's Mut. Cas. Co. v. Wyman*, 64 Cal. App. 3d 252, 255 (1976) (Uninsured Motorist Law "provides, in effect, that each automobile bodily liability policy issued or delivered in California shall provide [uninsured motorist coverage]" (emphasis added); *Kirby v. Ohio Cas. Ins. Co.*, 232 Cal. App. 2d 9, 11 (1965)(same).

[5] The relevant version of the Uninsured Motorist Law did not include an express term that limited application to subsequently issued contracts. *See* Stats. 1959, ch. 817.

have not been modified by subsequent cases. It is therefore reasonable to presume the Legislature was aware of this long-standing construction when it chose to use the term "issued or delivered" in the lapse notice statutes. Limiting the application of sections 10113.71 and 10113.72 to policies issued subsequent to the effective date of the statutes is therefore consistent with existing authority and the presumed intent of the Legislature.

The Legislature used terms associated with prospective application in a field where prospective regulation through mandatory contract provisions is common. In this context it is reasonable to expect that the Legislature would have included an express retroactivity provision if it in fact intended the anti-lapse statutes to apply retroactively. *See Aetna Cas. & Sur. Co.*, 30 Cal. 2d at 396 ("it must be assumed that the Legislature was acquainted with the settled rules of statutory interpretation, and that it would have expressly provided for retroactive operation of the amendment if it had so intended"). Where the Legislature is aware of the context of the legislation and the issues it is intended to remedy, the omission of an express retroactivity provision supports a strong inference in favor of prospective application. *See Bullard v. California State Auto. Assn.*, 129 Cal. App. 4th 211, 219 (2005).

ii. Petitioners' Other Purported Evidence Of Legislative Intent Has Been Rejected By The Courts.

This Court has already rejected the types of support petitioners offer to establish retroactive intent. Statements regarding the drafter's subjective intent are insufficient to establish retroactive intent because they have no bearing on how other legislators would have reasonably read the statute. *See In re Marriage of Bouquet*, 16 Cal. 3d 583, 589-90 (1976). Nor can petitioners establish retroactive intent by claiming the statutes have a "remedial purpose":

> "Most statutory changes are, of course, intended to improve a preexisting situation and to bring about a fairer state of affairs, and if such an objective were itself sufficient to demonstrate a clear legislative intent to apply a statute retroactively, almost all statutory provisions and initiative measures would apply retroactively rather than prospectively."

Evangelatos, 44 Cal. 3d at 1213. The presumption against retroactivity recognizes that the remedial intent of a statute, absent a clear expression of intent otherwise, must still be balanced against the "reasonable expectations of those who have changed their position in reliance on the old law." *Id.* at 1214.

iii. The Term "Policyholders" Is Not Unequivocal Evidence That The Legislature Intended Retroactive Application Of The Statutes.

Petitioners rely on the use of the term "policyholders" in legislative history to demonstrate retroactive intent, arguing that "policyholders" must have meant "existing policyholders" for the statute to have any effect. The fact that petitioners felt the need to add the modifier "existing" to the term "policyholder" throughout their briefs is telling evidence that "policyholder," standing alone, does not provide unequivocal support for retroactive application. The same language is consistent with prospective application, in which the statutes will provide additional protections to "policyholders" who purchase policies after the effective date.

Petitioners also claim that prospective application will prevent the statutes' goal of protecting policyholders. That argument grows less compelling every day, now that the statutes have been in effect for seven years. While the statutes apply to any policies issued to all purchasers, focusing on sales to senior citizens does not bolster petitioners' position.

While petitioners assume that "new" policyholders and "senior" policyholders are mutually exclusive, seniors frequently purchase insurance after age 65. A 2017 survey reported by LIMRA reveals that seniors purchase 19 % of new permanent life insurance products. LIMRA, "The Purchase Funnel: Who Buys What and Why" (2017).[6] While petitioners may believe a broader remedy was warranted in this case, the statute that was passed by the Legislature is far from ineffective.

E. The Department Of Insurance's Construction Of Ins. Code §§ 10113.71-.72 Is Entitled To Substantial Weight.

While the language of the statute and the presumption against retroactive application suffice to establish that the anti-lapse statutes should only apply prospectively, the Court of Appeal appropriately considered the Department of Insurance's interpretation of the statutes in reaching its decision. Since the Department of Insurance is charged with administering and enforcing statutes regulating the contents of life insurance policies, its interpretation should be given great weight. *See Yamaha Corp. of Am. v. State Bd. of Equalization*, 19 Cal. 4th 1, 12 (1998). The Court may also consider the validity of the Department's reasoning and its consistency with prior pronouncements. *Id.* at 14-15. The Department's position is reasoned and consistent with existing decisions limiting the effect of statutes that apply to policies "issued or delivered" in the state to policies that are issued subsequent to the statute, as well as its own prior statements on the issue. The Department's interpretation is also consistent with its own practices of regulation through requiring specific provisions as a condition of issuing new policies in the state, as opposed to directing changes to the terms of preexisting contracts. The Court should therefore assign substantial weight

[6] LIMRA is an organization that, among other functions, provides industry and market research for the life insurance and financial services industries.

to the Department's construction as it determines whether the statutes at issue apply only to subsequently issued life insurance policies.

III. CONCLUSION

For the above reasons and the reasons stated in the briefs of respondent The Protective Life Insurance Company, ACLI joins in the respondent's request that the Court rule that affirm the judgment of the Court of Appeal.

DATED: November 30, 2020.

ALSTON & BIRD LLP

By /s/ Thomas A. Evans
THOMAS EVANS

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CERTIFICATE OF COMPLIANCE

I hereby certify that, in reliance upon the word count feature of the software used to create the document, the foregoing Brief Amicus Curiae contains 4,188 words, including footnotes, and exclusive of those materials not required to be counted under Rule 8.520(c)(3).

Dated: November 30, 2020

Respectfully submitted,

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STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **McHUGH v. PROTECTIVE LIFE INSURANCE**
Case Number: **S259215**
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