S.Ct. Case No.: S259215

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

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

vs.

PROTECTIVE LIFE INSURANCE COMPANY
Defendant/Respondent.

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)

PETITIONERS' CONSOLIDATED ANSWER TO AMICUS CURIAE BRIEFS

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Pursuant to Rule of Court 8.520, subd. (f)(7), Plaintiffs/Appellants/Petitioners, BLAKELY McHUGH and TRYSTA M. HENSELMEIER (collectively "Petitioners"), hereby submit this Consolidated Answer to the Amicus Curiae briefs filed in support of Defendant/Respondent, PROTECTIVE LIFE INSURANCE COMPANY ("Protective Life"), by AMERICAN COUNCIL OF LIFE INSURERS ("ACLI") and THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA ("the Chamber").[1]

I.

INTRODUCTION

The two amicus briefs submitted by ACLI and the Chamber, respectively, attempt to prop-up Protective Life's straw argument that application of sections 10113.71 and 10113.72 to existing in force policies is necessarily a prohibited "retroactive" application of those statutes. In that sense, they are merely "me, too" briefs parroting many

[1] Unless otherwise indicated, all factual citations in this Consolidated Answer are to the official citation of the Court of Appeal's Opinion (*McHugh v. Protective Life Insurance* (2019) 40 Cal.App.5th 1166); the Appellant's Appendix, abbreviated as: ([volume] AA [page]); and the exhibits admitted in the underlying trial, abbreviated as: (Exh. [number].)

of the same misguided contentions previously advanced by Protective Life. But they ultimately add little, if any, relevant insight, *as Petitioners have never contended that applying those remedial statutes to existing in force policies constitutes a retroactive application of those statutes*. To the contrary, Petitioners have been clear that such an application of those statutes is *prospective* only, impacting only *future conduct* by insurers (*i.e.,* notices insurers must provide their policyholders *after* the statutes' passage), doing nothing to attach new or different legal consequences to past conduct. This is particularly so where the changes those statutes brought about were primarily *procedural* – adding new grace periods and related notice requirements which were required in some form previously under either contract or regulation – and applying those new requirements only to the *future* administration and attempted termination of policies issued by Protective Life and other insurers. Simply put, ACLI's and the Chamber's retroactivity arguments are nothing more than a circular presumption leading to a self-fulfilling conclusion. But because application of those statutes would *not* be retroactive but *prospective*

only, this Court should reject that argument for the numerous reasons Petitioners have analyzed in their merits briefing and reiterate below.

Further, ACLI and the Chamber similarly mimic Protective Life in that they also scrupulously avoid the *remedial purpose* of sections 10113.71 and 10113.72, as facing that purpose head-on would only further unravel their retroactivity arguments. To be sure, just like Protective Life, nowhere do its amici even attempt to explain why the Legislature, when confronted with the real world problem of existing "policyholders" inadvertently losing life insurance coverage after years of premiums payments, would enact remedial statutes which would bring no relief to the very class of vulnerable policyholders those statutes identify and were meant to protect. Further, ACLI and the Chamber also do not acknowledge that their proffered application of those statutes would assist new policyholders only, who do not have years of premium payments at risk, and who were never identified by the Legislature as requiring additional protections. In that regard, ACLI's and the Chamber's construction of sections 10113.71 and 10113.72 would actually make it harder on insurers to discern and follow *two different regimes for notice and grace periods* depending on

whether policies were issued to new or existing policyholders, a task far more burdensome than the universal approach the Legislature clearly intended by its enactment of sections 10113.71 and 10113.72.

Finally, ACLI and the Chamber maintain that the position of the Department of Insurance ("DOI") should be given deference by this Court, obliquely referring to unofficial communications by DOI staff. In doing so, they completely ignore not only Insurance Code section 12921.9 but this Court's prior decision in *Heckart v. A-J Self Storage, Inc.* (2018) 4 Cal.5th 749, 769. Consequently, the only official position the DOI has taken worthy of any deference concerning sections 10113.71 and 10113.72 was its "strong support" for their passage, lauding how those statutes "would provide important consumer protection for those who have purchased life insurance coverage, especially for seniors." But after those statutes became law, the DOI itself has remained silent, not staking out any other official position or filing an amicus submission with this or any other court concerning the interpretation or application of those statutes. Thus, ACLI's and the Chambers' arguments to the contrary are nothing but fanciful thinking.

II.

DISCUSSION

A. ACLI and the Chamber Merely Rehash Protective Life's False Presumption That Application of Sections 10113.71 and 10113.72 to Existing In Force Policies Implicates Principles of Retroactivity When, In Truth, the Application of Those Statutes Is *Prospective* Only.

As previewed above, both ACLI and the Chamber start with the self-serving presumption that sections 10113.71 and 10113.72 are necessarily "retroactive" if they apply to existing in force policies. From there, they rationalize circuitously that because there is insufficient indicia to demonstrate that the Legislature intended those statutes to have retroactive effect, they must apply to new policies only. But such a syllogistic argument requires the manufacturing of an attenuated rationale where none is needed. Instead, the more rational conclusion is that the Legislature did not indicate its intent for the statutes to apply retroactively because it correctly viewed that applying them to existing in force policies was as a *prospective application only*.

No new set of rules has been imposed by those statutes which changes the legal consequences of past conduct. (*California Trout, Inc. v. State Water Resources Control Bd.* (1989) 207 Cal.App.3d 585, 609

["The test of retroactivity is whether [a statute] operates retroactively to materially alter the legal significance of a prior event . . . ."].) But by applying sections 10113.71 and 10113.72 to all policies in force on January 1, 2013, no past conduct by Protective Life or any other insurer is implicated. Protective Life was free to lapse policies on shortened notice and grace periods prior to that date. It is only Protective Life's conduct *after* the passage of those statutes – of which it had ample notice – that is implicated by their application. Such an application is therefore entirely *prospective*, as mandating additional notices and a longer grace period for lapses after the effective date of those statutes does nothing to impact or change the legal consequences of conduct occurring before that time.

Moreover, as Petitioners previously explained, those statutes established primarily *procedural changes* – new grace periods and related notice requirements – which apply only to the *future* administration and attempted termination of policies by Protective Life. As this Court previously clarified, a statute "is not made retroactive merely because it draws upon facts existing prior to its enactment . . . . [Instead,] [t]he effect of such statutes is actually prospective in nature

since they relate to the procedure to be followed in the future." (*Tapia v. Superior Court* (1991) 53 Cal.3d 282, 288.) For that reason, "it is a misnomer to designate [such statutes] as having retrospective effect." (*Ibid.*)

No insurer has an inviolate right to administer in force policies in a specific way, or to terminate them only as it sees fit, and how they do so can always be regulated on a going forward basis. As the Legislature noted in adopting sections 10113.71 and 10113.72, those elements of policy administration and termination are already subject to some measure of regulation. (See 1 AA 615 [Senate Insurance Committee Hearing on AB 1747, noting how the "30 day grace period is set in regulation, but not in statute," and citing to 10 Cal.Code.Regs § 2534.3, which controls variable life policies].) If, in providing notices of termination in the past, Protective Life complied with those regulations or relevant policy provisions, it has nothing to fear by the subsequent enactment of sections 10113.71 and 10113.72; those statutes will do nothing to attach new or different legal consequences to those past acts.

Instead, the focus of those statutes is on how insurers like Protective Life will be permitted to administer and terminate policies *after* their passage. The life insurance industry participated in the passage of those statutes, and has had ample notice of the changes and new standards they impose on future policy administration. It will only be post-enactment actions taken by Protective Life and other carriers which will be judged under sections 10113.71 and 10113.72, as is the situation in this case.

Further, like Protective Life, ACLI continues to misplace reliance on *Ball v. Cal. State Auto. Assn. Inter-Ins. Bureau* (1962) 201 Cal.App.2d 85 and other uninsured motorist coverage cases. In *Ball*, the First District concluded that a statute's mandate – that all automobile liability policies must include uninsured motorist coverage – did not impose liability on the insurer for a previously issued policy which did not include that coverage. Of course, there are several obvious distinctions between this case and *Ball,* not the least of which is that the statute in question in *Ball added an entirely new line of coverage to automobile liability policies*. As such, retroactive imposition of that additional coverage into existing policies would fundamentally

change the bargain insurers previously made when they entered into those antecedent policies.

In contrast, in this case, *sections 10113.71 and 10113.72 do not alter or impose any new coverages*. Instead, they merely change notice and forfeiture requirements for the administration of those policies. There are significant differences between the substantive effect of mandating an additional line of coverage to existing policies, and mandating new notice and termination procedures for existing coverages. ACLI's reliance on *Ball* conveniently ignores those differences.

Second, the *Ball* court's reasoning was focused almost entirely on whether there was a "conflict" between the provisions of that new statute and the language of the existing policy. If that conflict existed, a specific provision in the policy would address and resolve it. (*Ball, supra,* 201 Cal.App.2d at 88-89.) No such "conflict" is at-issue here, and no specific provision in the McHugh policy is implicated to address and resolve that conflict. Thus, the *Ball* decision must be understood within the limited factual context it was decided and the tautological nature of the "conflict" issue framed by the First District resulting from those

particular facts. (*People v. Jennings* (2010) 50 Cal.4th 616, 684 [reinforcing that a decision is necessarily limited by the facts of the case being decided, notwithstanding the use of overly broad language by the court in stating the issue before it, or referenced in its holding or reasoning].)

Third, there was no analysis in *Ball* of the purpose of the statute in question, and no evidence developed of legislative intent. As Petitioners have made clear in their merits briefing, ample evidence exists in this case concerning the Legislature's intent in enacting sections 10113.71 and 10113.72: to ensure that policyholders in California (including seniors and disabled policyholders who had invested years of premiums) did not inadvertently forfeit that valuable coverage. Contrast that with the situation encountered in *Ball*, where no evidence was presented or developed to establish that the Legislature intended the additionally mandated uninsured coverage should be included or implied into in force policies in place at the time of that statute's enactment.

In sum, *Ball* is invariably distinguishable because it dealt with the substantive change of requiring a wholly different and additional coverage to be implied into existing policies, where sections 10113.71 and 10113.72 do no such thing. *Instead of changing coverages, they merely clarify procedural rules for the administration of existing coverages*, especially where insurers are already required to provide their policyholders with notices before cancellation.

To that extent, creating and sending form renewal and payment notices populated with policy owner and designee information is a *de minimis* obligation which is consistent with similar notice requirements already found in existing life insurance contracts. All sections 10113.71 and 10113.72 do is to harmonize those requirements to ensure they are consistently and strictly followed before insurers can cancel existing coverages. The prospective application of those requirements is a measured and valid exercise of the Legislature's police power in a "highly regulated industry" in which "further regulation can reasonably be anticipated." (*Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 830; see also Ins. Code § 41 ["All insurance in this State is governed by the provisions of this code"].)

Despite ACLI's and the Chamber's misleading retroactivity arguments, nothing in sections 10113.71 and 10113.72 stops Protective Life or any other insurer from lawfully exiting any insurance contract if policyowners fail to honor their payment obligations. With the prospective application of those statutes, an insurer need only provide a reasonable grace period and sufficient notice to cancel a policy, and is *not* otherwise required to extend coverages for which they are not paid. In sum, because those statutes accomplish the public policy objective of protecting vulnerable policyholders from inadvertently losing long-established life insurance coverage by *prospectively* requiring certain notice and termination procedures to be followed before existing policies can be cancelled in the future, neither ALCI nor the Chamber can reasonably contend that the are impermissibly "retroactive."

Finally, as Petitioners explained in greater detail in their merits briefing, even if there is any theoretical retroactive effect caused by the statutes in question, Protective Life has made no showing that such an effect substantially impairs its contractual rights. Yet it is well-settled that legislative impairment of contract rights is forbidden only if the impairment is "substantial" (*Allied Structural Steel Co. v. Spannaus*

(1978) 438 U.S. 234, 244) *and* lacks a legitimate and significant public purpose (*Hall v. Butte Home Health, Inc.* (1997) 60 Cal.App.4th 308, 321-322). Yet at no point in the proceedings below did Protective Life demonstrate anything resembling "substantial impairment" of any vested contractual rights. If Protective Life would have believed that application of sections 10113.71 and 10113.72 substantially impaired a vested contractual right, it would be reasonable to expect that it would have introduced either lay or expert testimony on that subject in the trial court. It did neither.

As such, amici's arguments about the purportedly retroactive impact of sections 10113.71 and 10113.72 are not only incorrect, they are completely theoretical, especially where creating and sending form notices populated with policy owner and designee information in compliance with those statutes is a *de minimis* obligation which, at most, could only have a marginal impact on preexisting contracts, especially where Protective Life and other insurers routinely send renewal and premium payment notices anyway. Simply put, because those statutes accomplish important public policy objectives in a manner that imposes little to no additional burden on insurers like

Protective Life, they are constitutional regardless of even hypothetical (and at most *minimal*) resulting contractual impairment. (*20th Century Ins. Co. v. Superior Court* (2001) 90 Cal.App.4th 1247, 1268-1274.)

B. ACLI and the Chamber Also Ignore the Benefits the Legislature Intended to Confer Not Only to Existing Policyholders, But Also to Insurers Which Will Now Have a Standardized and Certain Method For Noticing Their Policyholders of Payments Due and Potential Terminations.

As Petitioners previewed above and have reiterated consistently throughout their merits briefing, the overarching public policy embodied in the enactment of sections 10113.71 and 10113.72 was to prevent "existing policyholders" from losing life insurance coverage through inadvertence or inadequate notice before termination. The legislative history of sections 10113.71 and 10113.72 bears this out, noting how those statutes were passed to provide "consumer safeguards from which *people who have purchased life* insurance coverage (past tense), especially seniors, would benefit." (1 AA 610-611 [emph. added]; see *ibid.* [further describing those to be protected as "policyholders" who might inadvertently lose their existing life insurance coverage].)

Notably, such consumer protections for existing policyholders garnered no opposition from either ACLI or the Chamber, but instead had the support of numerous consumer and senior groups, and was "strongly supported" by the "California Department of Insurance." (See 1 AA 614-617; 1 AA 653-655 [where the DOI wrote two separate letters voicing its "strong support" for AB 1747 because it "would provide important consumer protection for those who have purchased life insurance coverage, especially for seniors," and would allow for policyholders to name designees consistent with the DOI's established regulatory preference].) Even the insurance industry itself, represented through the Association of California Life and Health Insurance Companies ("ACLHIC"), ultimately withdrew any opposition to AB 1747, agreeing that it shared the legislative goal of helping "policyholders keep their valuable life insurance coverage in place." (1 AA 637.)

Thus, because that legislation was unquestionably intended by the Legislature and understood by all stakeholders to protect "policyholders" (*i.e.,* those who already purchased policies) who "had faithfully paid their life insurance policies for years," and to prevent

them from inadvertently losing "existing life insurance coverage," it was the Legislature's design that sections 10113.71 and 10113.72 would be applicable to existing in force policies at the time that legislation was enacted. No language in the legislative history suggests otherwise, nor have ACLI or the Chamber been able to identify a contrary purpose of those statutes.

Instead, just like Protective Life, ALCI and the Chamber do not even attempt to reconcile their proposed application of sections 10113.71 and 10113.72 (to newly issued policies only) with the unequivocal public policy purpose which propelled the Legislature to enact those statutes in the first place. *To the contrary, they just ignore that purpose and invite this Court to do the same.* But to do so, this Court would have to conclude that after repeatedly lauding the goal of providing additional protection to all "policyholders" (especially the elderly and disabled) from inadvertent lapses, the Legislature instead intended to allow insurers to continue lapsing large swaths of annually renewing policies held by that same particularly vulnerable class of policyholders simply because those policies were issued before sections 10113.71 and 10113.72 were enacted. Such a misplaced application of

sections 10113.71 and 10113.72 would only further enable inadvertent forfeitures by the very class of persons those statutes were meant to protect, even if those policies continued in force for many years in the future.

In other words, senior and disabled policyholders who need the protections of those statutes the most (after paying years of premiums) would not receive their protection at all, while new policyholders who have invested the least amount of premiums would be fully protected under those statutes. Protective Life offers no explanation as to how such an absurd result can be reconciled with the overarching goals embodied in sections 10113.71 and 10113.72. This Court should not presume that the Legislature intended such an absurdity, but instead should be guided by the Legislature's unequivocal goal of protecting existing and vulnerable policyholders from inadvertent lapses. (*Pineda v. Bank of America, N.A.* (2010) 50 Cal.4th 1389, 1394 ["[W]e avoid a construction that would produce absurd consequences, which we presume the Legislature did not intend"].)

By applying those statutes to *both* existing in force policies and newly issued policies, the Legislature sought to avoid the confusion

which would be created by *two different and conflicting regimes* for policy grace periods, notices of termination, and designee schemes. While ACLI's and the Chambers' construction would call for those two conflicting regimes – with policies issued before January 1, 2013 controlled by one set of rules, and all policies issued thereafter controlled by a different set of rules – the uniform application of sections 10113.71 and 10113.72 to all life insurance policies, whenever issued, standardizes those notice and termination requirements across the industry. Consequently, both policyholders and insurers will benefit from such uniform standards, as disputes regarding whether appropriate notices were provided (and to whom) before termination can be effective will not be dependent on *when* a policy was issued, but will be the same for all life insurance policies in California. That is precisely the consistency the Legislature intended for both policyholders and insurers by its enactment of sections 10113.71 and 10113.72.

C. ACLI's and the Chambers' Reliance on Unofficial Communications from Department of Insurance Employees Do Not Represent Authorized or Official Positions of That Agency.

As did Protective Life, its supporting amici again echo the unjustified assertion that unofficial communications by DOI staff members concerning sections 10113.71 and 10113.72. somehow require this Court's deference. But as Petitioners previously detailed in their merits briefing, Insurance Code section 12921.9 makes clear that any letter or legal opinion issued by even high ranking DOI officials (*e.g.,* 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." (See Ins. Code § 12921.9.) Instead, if the DOI wishes to establish such guidelines, instructions, or standards, it must do so either as part of a adopted regulation filed with the Secretary of State, or as part of an agency guideline or standard: (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, subds. (b) & (c).) Any agency

interpretation is subject to those requirements unless it is "essentially rote, ministerial, or . . . repetitive of . . . the [law's] plain language." (*Morning Star Co. v. State Bd. of Equalization* (2006) 38 Cal.4th 324, 336-337.)

Again, the purpose of those intentionally rigorous requirements is to prevent "underground regulations," rules which only the government knows about. (*Kings Rehabilitation Center, Inc. v. Premo* (1999) 69 Cal.App.4th 215, 217.) Such "underground regulations," given their lack of both substantive and procedural review and development, do not represent the official position of any agency (including the DOI), but instead represent the non-binding opinions of agency staff. Recognizing that important distinction, this Court recently instructed in *Heckart, supra,* 4 Cal.5th at 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 only by staff members].)

As explained in the records filed in support of Petitioners' original Petition for Review (which this Court has already judicially noticed), the DOI has taken the very clear position that the testimony of certain DOI regarding the construction and application of sections 10113.71 and 10113.72 is legally irrelevant under section 12921.9 and this Court's *Heckart* opinion. Those judicially noticed materials also included a sworn declaration by Michael J. Levy, Deputy General Counsel for the DOI, confirming that any testimony by DOI staff members on that subject would only elicit their personal opinions and would not otherwise represent any official position taken by the DOI on the application of sections 10113.71 and 10113.72. (See Exh. A to the Request for Judicial Notice previously filed in support of Petitioners' Petition for Review, and granted by Order of this Court dated 01/29/20.)

Like Protective Life, its amici also never deal with *that* official position taken by the DOI. Instead, they blithefully maintain that the musings of DOI staff are still somehow worthy of this Court's consideration. But under section 12921.9 and *Heckart*, the opposite is

actually true. At bottom, the only official position the DOI has taken on the interpretation and application of sections 10113.71 and 10113.72 is to "strongly support" their passage, and since then, *no other position at all*. While Protective Life and its amici clearly would like to fill that vacuum with the unofficial and non-binding communications and opinions of DOI staff, section 12921.9 and *Heckart* do not permit them to do so.

III.

CONCLUSION

Sections 10113.71 and 10113.72 were added to the Insurance Code to prevent existing senior and disabled policyholders from inadvertently losing important life insurance coverage after years of investment in premium payments. ACLI and the Chamber ignore that overarching legislative purpose, while continuing to advance Protective Life's false retroactivity arguments. This Court should, as the Legislature intended, construe those statutes as applying prospectively and uniformly to the administration of all existing and new life insurance policies issued in California.

Respectfully submitted,

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DATED: 01/29/2021

Jon R. Williams

McHUGH, et al. v. PROTECTIVE LIFE INSURANCE
Supreme Court of the State of California
CA Supreme Court Case No.: S259215
Court of Appeal Case No.: D072863
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