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March 24, 2021

**BY E-FILE**

The Honorable Chief Justice Tani G. Cantil-Sakauye  
and Honorable Associate Justices  
Supreme Court of California  
350 McAllister Street  
San Francisco, California 94102

RE: *McHugh, et al. v. Protective Life Insurance Company* (Case No. S259215)  
Brief of the Insurance Commissioner of the State of California, Invited Amicus Curiae

Dear Chief Justice and Associate Justices:

Ricardo Lara, the Insurance Commissioner of the State of California, appreciates the opportunity to comment as amicus curiae in response to this Court's February 24, 2021 invitation. The issues presented for this Court's review are: (1) were the provisions of Insurance Code sections 10113.71 and 10113.72 [statutes requiring 60-day grace periods and the ability to name an additional recipient of a lapse or termination notice for life insurance] intended by the Legislature to apply, in whole or in part, to life insurance policies in force as of January 1, 2013, regardless of the original date of issuance of those policies, and (2) did the lower courts in this case properly rely upon informal statements of Department of Insurance staff counsel?

The Commissioner elects not to comment on the first question presented, having determined that in the particular circumstances of this case, the California Department of Insurance ("Department") has no additional unique insight into the proper interpretation of the cited provisions beyond what is available to the Court using traditional rules of statutory construction. The Commissioner thus leaves the interpretation of the provisions to the Court, based on the full briefing of the parties.

Turning to the second issue, to the extent that the Court of Appeal deferred to the informal express and implied statements of the Department and of Department staff in interpreting the retroactivity of the provisions at issue, that was error.

The Court of Appeal here misunderstood the agency's role, stating, incorrectly, that "[t]he Department is charged with ensuring that all policies issued in the State of California contain every provision required by law." (*McHugh v. Protective Life Ins. Co.* (2019) 40

Cal.App.5th 1166, 1171.)<sup>1</sup> Further, it stated as a general proposition that “[c]ourts ‘accord[ ] great weight and respect to the administrative construction’ of a statute by the agency entrusted with enforcing it.” (*McHugh, supra*, 40 Cal.App.5th at p. 1173, quoting *Yamaha Corp. v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 12.) Citing this Court’s precedent, it concluded that it was “*required* to give deference to the Department’s interpretation, as long as it is reasonable and consistent with the language of the statutes.” (*McHugh, supra*, 40 Cal.App.5th at p. 1173, italics added.)

In fact, while agency interpretations are entitled to weight, “[h]ow *much* weight to accord the agency’s construction depends on the context, a term encompassing both the nature of the statutory issue and characteristics of the agency.” (*Assn. of Cal. Ins. Cos. v. Jones* (2017) 2 Cal.5th 376, 390, original italics.) In the context of Department actions, at the weightier end of the deference spectrum are its regulations, promulgated in a fully informed, public process where the agency explains its reasoning in an administrative rulemaking record. (See, e.g., *id.* at p. 393.) Formal legal opinions of the Department (see Ins. Code, § 12921.9), similarly, should have a significant role in informing a court’s statutory analysis. In addition, the Department’s interpretations of insurance law, set out in Department party and amicus briefs, may be particularly helpful to the courts. (See *Villanueva v. Fidelity Nat. Title Co.* (March 18, 2021, No. S252035) \_\_ Cal.5th \_\_ [WL 2021 WL 1031874], \*8-\*9.) The Department’s court-filed interpretations warrant “due weight and respect”; indeed, “considerable respect” is in order where the Department’s court-filed interpretation reflects the agency’s institutional expertise and its comparative interpretive advantage, and is consistent and longstanding. (*Villanueva v. Fidelity Nat. Title Co.* (March 18, 2021, No. S252035) \_\_ Cal.5th \_\_ [WL 2021 WL 1031874], \*8.) Informal views of individual Department staff members, in contrast, reside at the opposite end of the spectrum, and often provide little assistance to a court in carrying out its independent duty to say what the law means. (See *Heckart v. A-J Self Storage, Inc.* (2018) 4 Cal.5th 749, 769.)

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<sup>1</sup> While insurance is a highly regulated industry, the Commissioner’s authority to regulate varies by type of coverage. California law does not require all insurance policies to be filed with the Commissioner or approved by him. The court mistakenly cited Insurance Code section 779.8, which governs the highly regulated line of credit insurance (i.e., credit life and credit disability), for its incorrect conclusion that the Department “is charged with ensuring that all policies issued in the State of California contain every provision required by law.” (*McHugh, supra*, 40 Cal.App.5th at p. 1171.) Section 779.8 does not apply to life insurance. Moreover, not all individual term life policies are required to be filed with the Commissioner for review. (Ins. Code, §10165.) The Commissioner has no prior approval authority over policies such as the plaintiff’s individual term life policy. (Ins. Code, §10163.35(b).) The court in the same paragraph cites Insurance Code section 12921.1, subdivision (a), which appears to be an error, as that section pertains to establishing the consumer complaint program. The proper citation is Insurance Code section 12921, subdivision (a), which simply gives the Commissioner general enforcement authority. (*Schwartz v. Poizner* (2010) 187 Cal.App.4th 592, 597.)

The informal express and implied statements about the relevant provisions' retroactivity cited below and attributed to the Department are not of the type that require great weight. The Court of Appeal relied in part on its determination that Department legal staff "consistently communicated the Department's position [of non-retroactivity] in response to inquiries from representatives of the insurance industry seeking advice about the statutes' applicability." (*McHugh, supra*, 40 Cal.App.5th at p. 1172.) While Department staff routinely communicate with insurance licensees to facilitate compliance with insurance laws and endeavor to be helpful, these informal communications do not represent the official, formal opinion of the Department. The Court has addressed similar communications by Department employees to insurance representatives in *Heckart*, and the Commissioner views the communications at issue in *McHugh* as warranting the same, minimal weight as that applied by the Court in that case.

Finally, the Court of Appeal mistakenly concluded that the Department "mandates" the use of the System for Electronic Rate and Form Filing (SERFF). Although virtually all form filings are made through SERFF, use of SERFF is voluntary. Neither California law nor the Department require the use of SERFF. The Court of Appeal cited a statement contained in the Department's SERFF instructions providing that "[a]ll life insurance policies issued or delivered in California on or after [January 1, 2013] must contain a grace period of at least 60 days." (*McHugh, supra*, 40 Cal.App.5th at p. 1172.) As correctly described by the Court of Appeal, "SERFF is an Internet-based product of the National Association of Insurance Commissioners (NAIC) which is used by insurance companies to electronically submit insurance rate and policy forms to state departments of insurance for review and approval of new products as well as rate or other changes to existing products." (*Ibid.*) While a SERFF instruction, like the one at issue here, may include a brief description of the relevant statutes, it is not intended to serve as a formal legal opinion of the Department. In the Commissioner's view, the SERFF instruction here is not of significant value to the court in interpreting the statutory provisions at issue.

The Commissioner and the Department appreciate the opportunity provide this amicus brief to the Court.

Sincerely yours,



LUCY F. WANG  
Deputy Attorney General

For MATTHEW RODRIGUEZ  
Acting Attorney General

*Attorneys for Ricardo Lara, Insurance Commissioner  
of the State of California*

**DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S.  
MAIL**

Case Name:       **McHugh v. Protective Life Ins. Co.**  
Case No.:         **S259215**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

On March 24, 2021, I electronically served the attached **LETTER TO THE HONORABLE CHIEF JUSTICE TANI G. CANTIL-SAKAUYE and ASSOCIATE JUSTICES RE INVITED AMICUS CURIAE** by transmitting a true copy via this Court's TrueFiling system. Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on March 24, 2021, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Court Clerk  
Court of Appeal  
Fourth Appellate District  
Division One  
750 B Street, Suite 300  
San Diego, CA 92101

Court Clerk  
San Diego Superior Court  
Hall of Justice  
330 W Broadway  
San Diego, CA 92101

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on March 24, 2021, at San Francisco, California.

Michelle Co Seng

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Declarant



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Signature