Case No. S259215

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

BLAKELY MCHUGH AND TRYSTA M. HENSELMEIER
Plaintiffs and Appellants,
vs.
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 M. HAYES
CASE NO. 37-2014-00019212-CU-IC-CTL)

RESPONDENT'S ANSWER TO INVITED AMICUS CURIAE BRIEF OF INSURANCE COMMISSIONER OF STATE OF CALIFORNIA

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SERFF	National Association of Insurance Commissioners' System for Electronic Rates & Forms Filing

I.

LEGAL ARGUMENT

The Commissioner's decision to not proffer his own interpretation of Assembly Bill 1747 will not affect this case's outcome. The Commissioner is right when he says that "traditional rules of statutory construction" will determine what the statute means. (Commissioner Br. 1.) Protective has demonstrated that the only conclusion to be drawn from these rules is that Assembly Bill 1747 incorporated its new requirements into insurance policies that were issued and delivered after the statute's effective date, not before. (ABOM 28-53.) Protective also has shown that these traditional rules of statutory construction point so decidedly toward this result that they would have required it even if Department of Insurance staff had *not* uniformly reached the same conclusion, contemporaneously with the statute's enactment and thereafter. (ABOM 54-61.) The Court of Appeal, moreover, applied these interpretive rules and held that, in its own independent view, "Assembly Bill No. 1747's provisions indicate the new law applies only to term life insurance policies issued or delivered after January 1, 2013." (Opn. 10.) So the precise weight given to these officials' interpretations will not matter in the end, and it will be inconsequential, as a practical matter, that the Commissioner himself has personally "elect[ed] not to comment." (Commissioner Br. 1.)

But the Commissioner is being too modest when he suggests that he and the other public servants who work in his office have "no additional unique insight" to offer the Court on this

score. (Commissioner Br. 1.) Just six days before the Commissioner filed his brief in this case, this Court reiterated that his interpretations of the Insurance Code are entitled to "weight and respect insofar as contextual factors suggest that the interpretation rests on institutional expertise giving the Commissioner a ' "comparative interpretive advantage" ' and that the interpretation is ' "probably correct. " ' " (*Villanueva v. Fid. Nat'l Title Co.* (March 18, 2021, No. S252035) __ Cal.5th __ [2021 WL 1031874], *8, quoting *Yamaha Corp. v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 12.) So although "questions of statutory interpretation are ultimately for this court to decide," the Commissioner's construction of Insurance Code provisions can help "reinforce" the Court's own "conclusion[s]" in cases like the one at hand. (*Ibid.*)

That traditional respect for executive-branch interpretations should play a role in this case—despite the Commissioner's decision to pass up the Court's invitation to speak to the matter, and indeed precisely *because* the Commissioner, in his brief, has not refuted the consistent construction other officers in his Department have given the statute over the years. The Legislature granted the Commissioner authority to "enforce the execution of" all "laws regulating the business of insurance in this state." (Ins. Code, § 12921, subd. (a).) The Commissioner exercises this authority through his staff, and his brief acknowledges that the officials to whom he delegates this responsibility "routinely" communicate with the public "to facilitate compliance" and to "be helpful." (Commissioner Br. 3.) So if the Commissioner believed that these officers' public communications over the last eight-

and-a-half years had undermined rights Assembly Bill 1747 had conferred on policyholders, he would have had a duty to say so, in his Court-invited brief and otherwise.

But he has not done so, and his silence speaks volumes. He has not contended that these officials misapprehended the law when they informed industry groups, during a 2012 meeting with three Department divisions prior to Assembly Bill 1747's effective date, that the statute's new requirements would " 'only apply to those policies issued or delivered on or after January 1, 2013.' " (ABOM 21, quoting 2 AA 828.) He has not claimed that these officials misinterpreted the statute when they issued the Department's SERFF instruction, telling insurers that the new obligation to include a " 'grace period of at least 60 days' " applied to " '[a]ll life insurance policies issued or delivered in California on or after 1/1/2013.' " (ABOM 22, quoting RA 110.) He has not asserted that his Consumer Services and Market Conduct Branch was derelict in its duties when its Senior Insurance Compliance Officer declined to take " 'corrective action to achieve compliance' " on a policyholder's 2015 complaint that an insurer had not provided a " 'notice of lapse pursuant to Assembly Bill 1747' " for a policy issued before the statute's effective date, explaining that " '[t]he Department's position is that California Insurance Code Section 10113.71 applies only to policies issued on or after January 1, 2013.' " (ABOM 23; Protective MJN, Exh. E, p.1.)

Just as important, the Commissioner has cast no doubt—in his Court-invited brief or otherwise—on the reasoning these officials gave when explaining why they were enforcing Assembly

Bill 1747 in this way. He has not denied that, as the Assistant Chief Counsel for his Policy Approval Bureau explained, California law requires a clear statement from the Legislature if new changes to the Insurance Code are to be incorporated into old policies: " 'In general,' " as she put it, " '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.' " (ABOM 60, quoting RA 108.) He has not rejected her insight that California law follows this black-letter principle out of concerns of fairness to policyholders and insurers alike: " 'Parties to a contract would have no certainty as to the terms of their agreement,' " as she put it, " 'if the Legislature could change those terms retroactively.' " (ABOM 60, quoting RA 108.) Nor has he in any way disputed her observation that, far from containing any express statement that the new requirements would be incorporated into already-issued-and-delivered policies, the "issued or delivered" language in Insurance Code sections 10113.71 and 10113.72 affirmatively demonstrates the Legislature's prospective-only intent: " 'Generally,' " as she put it, " 'a policy is "issued or delivered" just once—when it is new.' " (ABOM 60, quoting RA 108.)

The Commissioner's silence about these things is all the more significant because this case is about a retroactivity issue with which Department officials have significant experience and expertise. Among the traditional rules of statutory construction that are crucial to this case is the presumption, long applied in

the insurance context, that old policies do not incorporate new requirements " 'unless the Legislature has expressly so declared.' " (*Interinsurance Exch. of Auto. Club of S. Cal. v. Ohio Cas. Ins. Co.* (1962) 58 Cal.2d 142, 148, 149, quoting *DiGenova v. State Bd. of Educ.* (1962) 57 Cal.2d 167, 174.) Just as this Court expects the Legislature to "expressly so declare" if it wants to import new Insurance Code provisions into already-issued-and-delivered policies (*ibid.*), this Court also should expect the Commissioner to expressly so declare when he understands that the Legislature had such a retroactive intent with respect to a particular statute. Yet the Commissioner has not made any pronouncement along those lines about Assembly Bill 1747—not contemporaneously with its enactment, not in the eight-and-a-half years since, and not now, in response to the Court's direct invitation to offer his perspective on the matter.

The Commissioner's announcement that he will instead say nothing new about the statute cements the conclusion that this case is unlike this Court's decision three years ago in *Heckart v. A-J Self Storage*, which afforded "little weight" to prior interpretations of Insurance Code provisions offered by a "single staff member" from the Department. (*Heckart v. A-J Self Storage, Inc.* (2018) 4 Cal.5th 749, 769, fn.9.) In that case, the Commissioner had filed a brief that opined on the question that was before the Court, in a manner that was different from the construction the single staff member previously had offered. Now, in this case, the Commissioner has passed on the opportunity to put forward a construction of his own. He has done so against the backdrop of a

long record of consistent interpretations and enforcement not by a single staff member, but by multiple senior officials, and multiple divisions, within his Department. The situation is not at all the same as *Heckart*, and this Court should not ignore the way these divisions and officers have exercised their duty to faithfully execute this law.

No one is saying that these officials' actions should override the other key interpretive considerations. Contrary to what Plaintiffs and, now, the Commissioner have suggested, that is not what the Court of Appeal said or did. Although the Court of Appeal spoke of the "deference" it understood it was "required" to afford these interpretations (Opn. 8), it is not as if the Court of Appeal found this statute ambiguous, threw its hands up in the air, and let these agency officials answer the question for it. The Court of Appeal instead brought its own judgment to bear. It considered the text, the legislative history, California precedents on the presumption against retroactivity, and the other pertinent interpretive circumstances. It independently concluded that "Assembly Bill No. 1747's provisions indicate the new law applies only to term life insurance policies issued or delivered after January 1, 2013." (Opn. 10.) It explained that it was "not persuaded by [Plaintiffs'] argument." (Opn. 12.) It stated that the Department officials' interpretation was not only "reasonable" but, in its view, "correct." (Opn. 13, 14.)

This Court should do the same. The record provides no reason to believe that the Department officials who have implemented Assembly Bill 1747 since its 2012 passage have acted out

of any motive other than their good-faith desire to uphold the law. They are career, senior professionals, many of them lawyers, who have served across multiple administrations, and whose familiarity with the ins-and-outs of insurance law has given them insight. They have provided the public with important guidance, on which insurers have justifiably relied when making compliance decisions and terminating policies for premium nonpayment in the last eight-and-a-half years. Even without the benefit of these administrative interpretations, Assembly Bill 1747's proper construction would be the same, in light of the "traditional rules of statutory construction" to which the Commissioner now adverts. (Commissioner Br. 1.) But the consistent decisions these Department officials have made deserve respect, and they reinforce the conclusions to which these traditional rules of statutory construction already point.

II.

CONCLUSION

This Court should affirm the Court of Appeal's judgment.

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE

Pursuant to California Rule of Court Rule 8.204, subdivision (c), the undersigned counsel for Protective Life Insurance Company certifies that, as calculated by the Microsoft Word 2016 software program, this brief contains a total of 1,718 words, including footnotes.

DATED: April 13, 2021

Respectfully submitted,

s/ John C. Neiman, Jr.
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DATED: April 13, 2021

s/ John C. Neiman, Jr.
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STATE OF CALIFORNIA
Supreme Court of California

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