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' RESPONSE TO AMICUS CURIAE SUBMISSION BY THE DEPARTMENT OF INSURANCE

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Plaintiffs/Appellants/Petitioners, BLAKELY McHUGH and TRYSTA M. HENSELMEIER (collectively "Petitioners"), hereby submit this Response to the Amicus Curiae brief recently filed by the CALIFORNIA DEPARTMENT OF INSURANCE ("DOI"), rejecting the legal arguments previously advanced in this matter by Defendant/Respondent, PROTECTIVE LIFE INSURANCE COMPANY ("Protective Life"), and its affiliated amici, AMERICAN COUNCIL OF LIFE INSURERS ("ACLI") and THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA ("the Chamber").[1]

[1] Unless otherwise indicated, all factual citations in this supplemental brief are to the official citation of the Court of Appeal's Opinion (*McHugh v. Protective Life Insurance* (2019) 40 Cal.App.5th 1166); the DOI's amicus letter, submitted to the Court on March 24, 2021, abbreviated as: (DOI Ltr. at p. [page]); the Appellant's Appendix, abbreviated as: ([volume] AA [page]); and the exhibits admitted in the underlying trial, abbreviated as: (Exh. [number].)

I.

INTRODUCTION

Recognizing the inherent weakness of its statutory construction argument, Protective Life and its affiliated industry amici have advanced two alternative grounds to insist that sections 10113.71 and 10113.72 do not apply to in force life insurance policies in existence when those statutes were enacted. Specifically, Protective Life has asserted that the DOI previously engaged in "interpretative analysis" of those statutes through informal staff communications with the insurance industry. Similarly, Protective Life has maintained that so-called "SERRF Notices," issued by the DOI concerning new policy forms, also amount to a preferred agency interpretation of the application of those statutes.

Of course, those alternative arguments – pressed vigorously by Protective Life and its amici in the lower courts and later in this Court – were intended only to distract from the overarching remedial purpose of those statutes, enacted by the Legislature to protect *existing policyholders* from inadvertent policy lapses and forfeitures. Although the trial court was unconvinced by Protective Life's arguments, its

misdirection later found purchase at the Court of Appeal, when Protective Life convinced that court to afford great "deference" to the DOI staff's purported "agency construction" of sections 10113.71 and 10113.72, and to affirm the lower court's judgment on that alternative basis.

But then the DOI filed its amicus letter with this Court and clarified its position.

In doing so, the DOI unequivocally stated that it has *not* engaged in any prior agency interpretation of sections 10113.71 and 10113.72. To the end, the DOI detailed how any informal communications by DOI staff with industry representatives concerning the application of those statutes do *not* represent the official position of the DOI, and are therefore entitled to no weight under the standards previously articulated by this Court in *Heckart v. A-J Self Storage, Inc.* (2018) 4 Cal.5th 749, 769. The DOI further confirmed that its SERRF Notice instructions on policy forms are also *not* intended to serve as a formal legal opinion, and that in its Commissioner's view, those notices are "not of significant value to the court in interpreting the statutory provisions at issue." In short, the DOI flatly described how the Court of

Appeal had erred when it relied upon those two sources of information to glean a purported official DOI interpretation of the application of those statutes which, in reality, *never existed*.

Given how vigorously Protective Life pressed those arguments at the Court of Appeal, that court could be forgiven for accepting them without the benefit of having the official position of the DOI before it. *Not so with this Court*. Although Protective Life and its amici have similarly advanced those same arguments in *every brief they have filed since*, this Court should now decisively decline their invitation to be similarly misled by a wholly manufactured "agency interpretation" of those statutes. Instead, the Court should look to the clear remedial purpose of those statutes – a purpose previously bolstered in *two letters of support from the DOI at the time those statutes were being passed by the Legislature* – to conclude that sections 10113.71 and 10113.72 apply to all in force life insurance policies on January 1, 2013, including the McHugh policy in question.

II.

DISCUSSION

A. The DOI's Recent Amicus Submission Flatly Rejects Protective Life's Preferred "Agency Interpretation" Arguments.

Protective Life's legal position in this case has always been a *three-legged stool*. Two of those legs have now been *sawed-off* by the DOI's recent amicus letter; the third is teetering on collapse.

The first leg of that stool is Protective Life's argument that informal opinions purportedly communicated by DOI staff in response to insurance industry inquiries represent the DOI's "official interpretative analysis" of sections 10113.71 and 10113.72. While that argument has always been dubious in light of the contrary guidance previously articulated by this Court in *Heckart*, Protective Life and its amici remained undeterred. Indeed, Protective Life first convinced the Court of Appeal to rely on that argument to incorrectly conclude that "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." (*McHugh, supra,* 40 Cal.App.5th at 1172.) On that basis, the Court of

Appeal felt compelled "to give deference to the Department's interpretation" based, in part, on those unofficial staff communications. (*Id*. at 1173.)

Having previously convinced the Court of Appeal of a DOI-endorsed "agency interpretation" that never existed, Protective Life subsequently doubled-down on that same argument in this Court. It first asked this Court to judicially notice those informal staff communications, attaching *four* of them to its Motion for Judicial Notice, while asserting without qualification that they "reflect the Department's position on the statutory question this Court must decide." (See Protective Life's Motion for Judicial Notice at pp. 9-11.) Protective Life further argued that this Court should rely on those staff communications, just the Court of Appeal. (*Ibid.*) In doing so, Protective Life ridiculed Petitioners' steadfast position to the contrary: that those staff communications did not warrant any deference because they "do not reflect the agency's 'official position.'" (*Ibid.*)

Protective Life did the same thing with the other leg of its stool, similarly requesting this Court to take judicial notice of the DOI's "SERFF Instruction" concerning AB 1747. (See Protective Life's Motion

for Judicial Notice at pp. 4-9.) In pursuing judicial notice of that SERFF instruction, Protective Life insisted that it "set forth the position of the government agency" on the application of sections 10113.71 and 10113.72 as the agency which "provides insurers guidance on how to comply with the Insurance Code." (*Id.* at 5-9.) It further explained how the Court of Appeal heavily relied on that SERFF Notice, viewing it as "regulatory guidance" to insurers . . . including guidance for compliance with the statutes." (*McHugh, supra,* 40 Cal.App.5th at 1172.) And it again criticized Petitioners' position that the SERFF Notice "do not constitute the agency's 'official position' as to Assembly Bill's effect." (See Protective Life's Motion for Judicial Notice at p. 8.)

On that basis, Protective Life insisted in its Answering Brief that Petitioners "get almost everything about the SERFF instructions wrong" because Petitioners maintain that those SERFF instructions do *not* constitute an official DOI position on the application of sections 10113.71 and 10113.72. Instead, Protective Life insisted those SERFF instructions "set out the Department's acknowledged position" on the application of those statutes. Pushing the hyperbole even further, Protective Life mused that its assertion that the SERFF instructions

embody the DOI's "official position" was not only "probably correct," but was "eminently so." On that basis, it urged this Court to rely on that SERFF Notice (as did the Court of Appeal) as a broad articulation of the DOI's "official position" concerning its interpretation and application of sections 10113.71 and 10113.72.

Protective Life's industry-affiliated amici predictably followed suit, with the ACLI insisting that the DOI's purported interpretation of sections 10113.71 and 10113.72 "should be given great weight," and that "the Court of Appeal appropriately considered the Department of Insurance's interpretation of the statutes in reaching its decision." Similarly, the Chamber argued that because the DOI "consistently communicated" its preferred construction of those statutes, this Court should affirm the Court of Appeal's exercise of deference to that "agency interpretation."

But as the DOI's amicus submission to this Court would later confirm, *that legal strategy by Protective Life and its amici had no basis in fact*. In stark terms, the DOI has now explained what Petitioners have maintained all along: (1) that any informal communications between DOI staff and industry representatives "do not represent the

official, formal opinion of the Department," consistent with the guidance previously provided by this Court in *Heckart;* and (2) the DOI's SERFF instructions, are "not intended to serve as a formal legal opinion of the Department" and are "not of significant value to the court in interpreting the statutory provisions at issue." (DOI Ltr. at p. 3.) As the DOI's Commissioner further made clear, it was "error" for the Court of Appeal to have concluded otherwise. (DOI Ltr. at 1.)

Consequently, *in a stark three pages, the DOI has completely obliterated large swaths of Protective Life's and its amici's briefing*, submitted both to the Court of Appeal and to this Court. Of course, there was a reason that Protective Life relied so heavily upon its "agency interpretation" arguments because there is nothing in the legislative history of sections 10113.71 and 10113.72 to otherwise support its position. Further, unlike virtually any other section of the Insurance Code imposing new mandates, those statutes do not include "grandfathering" provisions limiting their application, although the Legislature certainly knew how to impose those limits had it wished to

do so.[2] Even a charitable evaluation of the Court of Appeal's decision in this case suggests that court was apparently reaching for a rationale (*any* rationale) to arrive at a result it acknowledged was contrary to the intent of the authors of sections 10113.71 and 10113.72. (*McHugh, supra,* 40 Cal.App.5th at 1177-1178.) Protective Life provided that rationale with its wholly manufactured "agency interpretation" arguments, which ultimately persuaded the Court of Appeal, but which has been roundly debunked now by the DOI's amicus letter submitted before this Court. Thus, the first two legs of Protective Life's stool should be discarded by this Court.

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[2] See, *e.g.,* Ins. Code § 10113.5 ["This section shall not apply to individual life insurance policies delivered or issued on or before December 31, 1973"]; Ins. Code § 10128.4 ["this article shall apply to all policies issued, delivered, amended, or renewed in this state after January 1, 1977"]; Ins. Code § 10233.25 ["no long term care policy or certificate that is issued, amended, renewed, or delivered on and after January 1, 2002, shall contain a provision . . ."]; Ins. Code § 10127.9 ["every policy of individual life insurance which is initially delivered or issued for delivery in this state on and after January 1, 1990, shall have . . ."].

B. Protective Life's Alternative Statutory Construction Argument Cannot Be Reconciled with the Overarching Remedial Purpose of the Statutes – a Purpose for Which the DOI Previously Voiced Its "Strong Support."

Although the DOI demonstrated admirable restraint by suggesting that it is appropriate for this Court alone to interpret sections 10113.71 and 10113.72 based upon the parties' briefing, the DOI has not been completely silent on the remedial purpose of those statutes. As Petitioners' previously detailed in their merits briefing, at the time those statutes were being proposed as part of AB 1747, the DOI wrote *two separate letters* voicing its "strong support" for that legislation 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. (See 1 AA 614-617; 1 AA 653-655.) Those letters of support for the purpose of that legislation echoed other portions of the relevant legislative history, which similarly emphasized how those newly proposed statutes would 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, those proposed consumer protections for existing policyholders garnered no opposition from either ACLI or the Chamber. Instead, 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.) Consequently, all stakeholders (including the DOI and insurance industry representatives) understood that sections 10113.71 and 10113.72 were intended by the Legislature 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." Indeed, it was a surprise to no one involved in the passage of AB 1747 that the Legislature's design was 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, and Protective Life and its

amici have consistently been unable to identify a contrary purpose of those statutes.

Consequently, with Protective Life's two primary "agency interpretation" arguments rejected by the DOI's recent amicus submission, this Court should now interpret those statutes consistent with their *overarching remedial purpose*: to prevent "existing policyholders" from losing life insurance coverage through inadvertence or inadequate notice before termination. As Protective Life and its amici 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, that last leg of Protective Life's stool also cannot stand.

Indeed, that last argument by Protective Life asks this Court 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. Under that interpretation of the statutes, 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 does not even attempt to explain how such an absurd result can be reconciled with the overarching goals embodied in sections 10113.71 and 10113.72. Again, 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"].)

Further, 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 Protective Life's and its amici's proffered 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, just as the Legislature intended, both policyholders and insurers benefit from such uniform standards, as disputes regarding whether appropriate notices were provided (and to whom) before termination should not be dependent on *when* a policy was issued, but *should be the same for all in force 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.

Finally, the practical effect of such an interpretation of those statutes bears further mention. Such a construction *promotes certainty in the insuring arrangement and appropriately places the burden on the more sophisticated insurer to provide adequate notice before a termination of a policy can be effective*. In that sense, nothing in sections 10113.71 and 10113.72 prevents Protective Life or any other insurer from lawfully exiting any insurance contract if policyowners fail to honor their payment obligations. All those statutes do is require that adequate notice be provided first, and where that notice is not provided, any purported cancellation is a legal nullity, leaving the policy in question in force. (See § 11013.71, subd. (b) [expressly making "ineffective" nonconforming notices]; see also *Mackey v. Bristol West Ins. Services of CA, Inc.* (2003) 105 Cal.App.4th 1247, 1258 [confirming that "[t]ermination of coverage can only be accomplished by strict compliance with the terms of any statutory provisions applicable to cancellation," and that absent strict compliance in notices of cancellation, those notices are deemed "void" and "the policy remains in effect even if the premiums are not paid"]; *Kotlar v. Hartford Fire Ins. Co.* (2000) 83 Cal.App.4th 1116, 1121-1122 [failure to provide proper notice of

cancellation nullified the cancellation, leaving the policy's coverage in place].)

That is precisely what happened in this case. Because Protective Life eschewed the application of sections 10113.71 and 10113.72 to McHugh's policy, it never provided legally conforming notice before cancelling that policy. Consequently, McHugh's life insurance policy remained in force at the time of his death, entitling Petitioners to recover that policy's benefits from Protective Life. (Ins. Code § 10111.) For the short period of time McHugh's policy remained in force (given the absence of a valid termination), but for which premiums were unpaid (Jan. 2013 to June 2013), Protective Life would be entitled to deduct those unpaid premiums from its payment of the policy proceeds to Petitioners. (1 AA 117.) Consequently, where this Court correctly construes and applies sections 11013.71 and 11013.72, and Protective Life is thereby required to pay Petitioners the policy proceeds of that in force policy, Protective Life still receives the full benefits it bargained for under that insuring agreement – policy premiums for that covered period.

III.

CONCLUSION

The DOI's recent amicus submission to this Court lays bare the fallacy of Protective Life's two "agency interpretation" arguments, undermining those chief contentions and the foundational basis for the Court of Appeal's Opinion. Protective Life's remaining statutory interpretation argument is similarly exposed, as it cannot be reconciled with the remedial purpose of sections 11013.71 and 11013.72, for which the DOI also voiced its "strong support." Accordingly, this Court should clarify that sections 10113.71 and 10113.72 apply to all existing policies in force at the time of their enactment, including McHugh's Protective Life insurance policy in question.

Respectfully submitted,

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DATED: 04/13/2021

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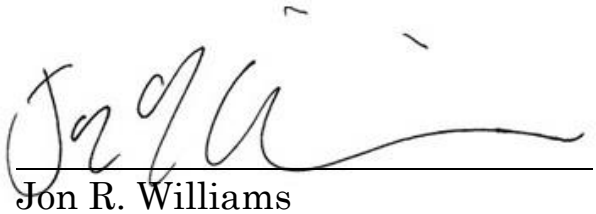

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McHUGH, et al. v. PROTECTIVE LIFE INSURANCE
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CA Supreme Court Case No.: S259215
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