Case No. S259215

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

RESPONDENT'S ANSWER TO PETITION TO REVIEW

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ANSWER TO PETITION FOR REVIEW

Plaintiffs' petition need not detain this Court for long. A federal trial court could not create a split of authority warranting this Court's review, and Plaintiffs have not accurately represented what that federal trial court decided in any event. This appeal is the wrong vehicle to review this question because a jury found that Protective was not liable even if this statute applied retroactively. And the Court of Appeal's non-retroactive reading of the statute, confirming that Protective did nothing wrong, was compelled by the statute's text and California precedents. The Courts of Appeal can further refine the law as more cases arise in the future, so review of this Opinion is not needed.

1. Courts are not split on the question presented

Plaintiffs have no basis for their argument that "[t]his Court's intervention is required now to address and resolve a critical conflict created by the Court of Appeal's Opinion." (Pet. 27.) Plaintiffs cite no other state-court holding on the issue, and the Court of Appeal's Opinion is the first and only appellate decision on the matter. The pending federal trial-court litigation to which Plaintiffs point does not create a split. On questions of California law, "'[w]here there is no convincing evidence that the state supreme court would decide differently, a federal court is obligated to follow the decisions of the state's intermediate appellate courts.' [Citation.]" (*Vestar Dev. II, LLC v. Gen. Dynamics Corp.* (9th Cir. 2001) 249 F.3d 958, 960.)

To that end, Plaintiffs make a serious mistake when they assert that the Court of Appeal's Opinion is "irreconcilabl[e]" with an order entered by U.S. District Judge Dolly M. Gee that, Plaintiffs contend, "refused to follow or be influenced by the reasoning of the Court of Appeal's Opinion and further concluded that its reasoning would not be followed by this Court." (Pet. 28-29.) That is not what Judge Gee did. Judge Gee issued the summary-judgment order cited by Plaintiffs on February 21, 2019, prior to the Court of Appeal's October 9, 2019 Opinion. (See Pet. 28, citing *Bentley v. United of Omaha Life Ins.* (C.D. Cal. 2019) 371 F.Supp.3d 723.) Plaintiffs had cited Judge Gee's February 21, 2019 summary-judgment order in their briefs in the Court of Appeal. The Court of Appeal was well aware of the *Bentley* litigation, and cited an earlier order from Judge Gee in its Opinion. (Opn. 5-6, citing *Bentley v. United of Omaha Life Ins.* (C.D. Cal. Sept. 14, 2016, No. 2:15-cv-07870) 2016 WL 7443190.) So Judge Gee's February 21, 2019 summary-judgment order could not possibly have "refused to follow," as Plaintiffs contend, the Court of Appeal's subsequent October 9, 2019 Opinion or "concluded that its reasoning would not be followed by this Court." (Pet. 28.)

To the contrary, the only order Judge Gee entered in the *Bentley* litigation discussing the Court of Appeal's October 9, 2019 Opinion—an order on October 21, 2019, denying the defendant's request to stay the case—did not say that the Court of Appeal's interpretation of the statute was wrong or that this

Court would not agree with it. (In Chambers – Order Denying Deft's *Ex Parte* Appl. to Stay Case, *Bentley v. United of Omaha Life Ins.* (C.D. Cal. Oct. 21, 2019, No. CV 15-7870-DMG (AJWx)) Doc.196, attached as Exhibit A to Protective's pending Motion for Judicial Notice.) She instead concluded that the facts of her case were distinguishable from the facts before the Court of Appeal. That was so, she wrote, because the policies in her case had clauses saying they "renewed" each year. (*Id.* at 2.) She reasoned that those clauses made the statute applicable to those policies because under California law, "'[e]ach renewal [of an insurance policy] incorporates any changes in the law that occurred prior to the renewal.'" (*Ibid.,* quoting *Stephan v. Unum Life Ins.* (9th Cir. 2012) 697 F.3d 917, 927-928.) She noted that the Protective policy "never renewed," such that the Court of Appeal had no occasion to address this "renewal principle." (*Ibid.*)

Plaintiffs' counsel previously acknowledged this reality. In another pending federal case, they filed a brief attaching Judge Gee's October 21, 2019 order denying the stay and represented that this post-Opinion order "distinguished *McHugh*" on the basis that "the *McHugh* court did *not* consider the well-settled renewal principle, as the policy in *McHugh* did not renew prior to its cancellation for non-payment." (Plaintiff's Notice Suppl. Auth. at 2, *Pitt v. MetLife, Inc.* (N.D. Cal. Nov. 1, 2019, No. 4:18-cv-06609-YGR) Doc. 99, attached as Exhibit B to Protective's pending Motion for Judicial Notice.) Their representations in

that brief are inconsistent with their representations here. Protective has contemporaneously filed a motion asking this Court to take judicial notice of that brief and Judge Gee's October 21, 2019 order denying the stay.

2. This case is the wrong vehicle for this question's review

Review is especially unwarranted because Protective won this case at trial despite the trial court's erroneous ruling that the statute applied. The trial court allowed Plaintiffs to try their case on the premise—which Protective disputed—that the statute retroactively altered Protective's policy, such that it incorporated the statute's new requirements. (RA 4-7.) The jury found that even on that premise, Protective still was not liable on these facts. (4 AA 2099-2100.) This alternative and independent basis for the judgment stands as another reason to deny Plaintiffs' request for review.

The verdict is unassailable. Trial testimony established that Protective effectively provided its insureds an "additional grace period" of 31 days, beyond the 31-day period their policies already provided, to cure any failure to pay their premiums. (*See* 8 RT 1540-1554, 1586-1587.) As a result, Protective gave the insured in this case more notice and a longer grace period than the statute requires. (*See* 8 RT 1540-1554, 1586-1587.) Other testimony showed that the insured told Protective he knew he had "neglected to pay" his premium, and that although Protective sent him an application to reinstate his coverage, he never returned it. (2 AA 867:13-14, 867-68; 8 RT 1534:3-6, 1538:17-21.) The

jury thus rightly concluded that even if the statute applied, Protective was not liable—it had not failed to do anything the statute required, and the insured otherwise had not been harmed. (4 AA 2099-2100.) The evidence supporting that verdict belies Plaintiffs' suggestion that the insured "inadvertently" lost coverage due to lack of notice. (Pet. 31.) And this alternative basis for the judgment makes this case an exceedingly poor vehicle for this Court to review the statutory issue.

3. Further percolation in the lower courts will confirm the Court of Appeal's interpretation

Denying review will have the added benefit of allowing lower courts to develop consensus around the Court of Appeal's reading of this statute, which was correct and sound. The Court of Appeal's decision was compelled by—and future decisions in the lower courts can expound upon—two central considerations: (1) the language the Legislature used in this statute and (2) the California precedents establishing what this language means. (Opn. 5-15.) In particular, by imposing the new requirements on policies "issued or delivered" in California, the Legislature chose familiar drafting language that has long been used to signify, in insurance statutes, prospective-only effect. (Ins. Code, § 10113.71, subd. (a); Ins. Code, § 10113.72, subd. (a).)

As the Court of Appeal noted, "'well[-]settled'" precedent in this State presumes that "'insurance policies are governed by the statutory and decisional

law in force at the time the policy is issued" and that any new statute imposing requirements on insurance policies will be "given the least retroactive effect that its language reasonably permits.'" (Opn. 13, quoting *Interinsurance Exch. of Auto. Club of S. Cal. v. Ohio Cas. Ins. Co.* (1962) 58 Cal.2d 142, 149.) Equally settled precedent holds, as the Court of Appeal also noted, that "'[t]he terms "issued" and "delivered,"'" when used in a statute requiring certain provisions to be appear in policies "issued" and "delivered" in California, "'must refer to the original issuance and delivery of the policy; they are fixed as to time and do not stretch into infinity.'" (Opn. 11, quoting *Ball v. Cal. State Auto. Assn. Inter-Ins. Bureau* (1962) 201 Cal.App.2d 85, 87 (*Ball*).)

As the Court of Appeal observed, these precedents can only mean that this statute establishes terms insurers must incorporate into policies they "issue" or "deliver" *after* the statute's effective date, and does not retroactively alter already-issued insurance contracts. The statute uses the precise language these precedents identify as non-retroactive, specifying that its new provisions need to appear in policies when they are "issued or delivered." (Ins. Code, § 10113.71, subd. (a); Ins. Code, § 10113.72, subd. (a).) That language, as Justice Tobriner reasoned in a precedent that has stood for more than half a century, establish what insurers must do as of "the original issuance and delivery of the policy," rather than "stretch[ing] into infinity." (*Ball*, *supra*, 201 Cal.App.2d at p. 87.)

Plaintiffs have distorted what the Court of Appeal said on these fronts. The Court of Appeal did not simply "defer," without bringing its own judgment to bear, to the prospective-only interpretations that various Department of Insurance officials have offered. (Pet. 23.) The Court of Appeal instead noted, in faithfully applying this Court's recent agency-deference precedents, that these interpretations were, in the Court of Appeal's words, "correct." (Opn. 7, 13, 14, citing *Christensen v. Lightbourne* (2019) 7 Cal.5th 761, 771 [noting that "[d]eference to administrative interpretations always is 'situational' and depends on 'a complex of factors'"].) The Court of Appeal likewise did not "concede" that its interpretation was "'at odds' with" the intent of the bill's "author[]." (Pet. 26.) The Court of Appeal instead "acknowledge[d]" that its Opinion was "somewhat at odds" with an "amicus brief" that had focused on legislative history but failed to "analyze any of the statutory language or address the case law governing when statutes will be deemed to apply retroactively." (Opn. 14-15.) As the Petition for Review shows, that legislative history is indeterminate: it did not say, one way or the other, whether the bill was retroactive. (Pet. 26-27, quoting legislative history.) The lower courts can iron out the details about these interpretive issues, and they do not warrant this Court's intervention.

CONCLUSION

This Court should deny Plaintiffs' petition.

Respectfully submitted,

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s/ John C. Neiman, Jr.
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Counsel for Defendant and Respondent Protective Life Insurance Company

CERTIFICATION OF COMPLIANCE

Pursuant to California Rule of Court Rule 8.204(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 1,688 words, including footnotes.

DATED: December 6, 2019

Respectfully submitted,

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

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