Case No. S246541

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY,
Defendant-Petitioner,

v.

SANFORD J. WISHNEV,
Plaintiff-Respondent.

After Order Certifying Question, U.S. Court of Appeals, Ninth Circuit, No. 16-16037; On Appeal from U.S. District Court, Northern District of California, Hon. Edward M. Chen, No. 3:15-cv-03797-EMC

Service on California Attorney General and Contra Costa County District Attorney Required by Business & Professions Code § 17209

APPLICATION FOR LEAVE TO FILE AMICUS BRIEF AND AMICUS BRIEF REGARDING CERTIFIED QUESTIONS

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APPLICATION TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-PETITIONER THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY

Metropolitan Life Insurance Company ("MetLife") applies for leave to file the attached brief as amicus curiae in support of Defendant-Petitioner The Northwestern Mutual Life Insurance Company ("Northwestern Mutual").

MetLife has been an incorporated admitted insurer in California since 1908. MetLife has approximately 275,000 life insurance policies in-force in the state of California and more than 30,000 outstanding policy loans issued to California residents.

MetLife is a defendant in a related action, *Martin v. Metropolitan Life Insurance Company* (N.D. Cal. 2016) 179 F. Supp.3d 948, No. 3:16-cv-00484-RS ("*Martin*"), also on appeal to the Ninth Circuit, alleging that MetLife, like Northwestern Mutual, violated California's Usury Law, Cal. Civ. Code section 1916-2 ("the Usury Law"), because it charged compound interest on policy loans without a signed writing from the policyholder consenting to such interest. In the *Martin* case, however, the District Court dismissed Plaintiff-Appellants' claims after finding that MetLife was exempt from application of the Usury Law, including its compound interest provisions, and further, that although not subject to the Usury Law, MetLife's compound interest disclosures in its policy forms nonetheless complied with the Usury Law requirements.

MetLife has an interest in this Court's resolution of the two certified questions because this Court's decision will effectively resolve Plaintiff-Appellants' appeal in *Martin* and will affect MetLife's practices with respect to its more than 30,000 outstanding California policy loans. The Court's decision also will impact MetLife's extension of new loans in connection with the 275,000 policies that are now in-force in California.

MetLife is familiar with the issues and believes that it can assist the Court by providing an additional perspective on the issues, including insurers' understanding of the law, insurers' policy loan practices, and the impact of this ruling with respect to insurers' existing policies and policy loans issued to California policyholders.

As set forth in the attached amicus brief, MetLife urges this Court to reject the reasoning of the *Wishnev* lower court opinion (*Wishnev v. Nw. Mut. Life Ins. Co.* (N.D. Cal. 2016) 162 F.Supp.3d 930) and to reach a conclusion as to the two certified questions consistent with the *Martin* district court opinion. In the event that the Court rules in favor of Wishnev and against California insurers, MetLife requests that the Court declare that its ruling applies prospectively only and not to outstanding policies and policy loans.

No party or counsel of any party to the *Wishnev* action has authored MetLife's proposed *amicus curiae* brief in whole or in part. Nor has any party or counsel for any party made a monetary contribution intended to fund the preparation or submission of the brief.

Respectfully submitted,

By: /s/ Carol Lynn Thompson
Carol Lynn Thompson

Attorneys for Amicus Curiae
METROPOLITAN LIFE INSURANCE COMPANY

I.

IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to California Rules of Court, rule 8.520(f)(3), Metropolitan Life Insurance Company ("MetLife"), submits this amicus brief in support of the position of Defendant-Petitioner, The Northwestern Mutual Life Insurance Company ("Northwestern Mutual"), with respect to the two questions certified by the Ninth Circuit in this matter.

MetLife has been an incorporated admitted insurer in California since 1908. MetLife has approximately 275,000 life insurance policies in-force in the state of California and more than 30,000 outstanding policy loans issued to California residents.

MetLife is a defendant in a related action, *Martin v. Metropolitan Life Insurance Company* (N.D. Cal. 2016) 179 F. Supp. 3d 948 ("*Martin*"), also on appeal to the Ninth Circuit, alleging that MetLife, like Northwestern Mutual, violated California's Usury Law, Cal. Civ. Code section 1916-2 ("the Usury Law"), because it charged compound interest on policy loans without a signed writing from the policyholder consenting to such interest. In the *Martin* case, however, the District Court dismissed Plaintiff-Appellants' claims after finding that MetLife was exempt from application of the Usury Law, including its compound interest provisions, and further, that although not subject to the Usury Law, MetLife's compound interest disclosures in its policy forms nonetheless complied with the Usury Law requirements.

MetLife has an interest in this Court's resolution of the two certified questions because this Court's decision will effectively resolve Plaintiff-Appellants' appeal in *Martin* and will affect MetLife's practices with respect to its more than 30,000 outstanding California policy loans. The Court's decision also will impact MetLife's extension of new loans in

connection with the approximately 275,000 life insurance policies issued by MetLife that are now in-force in California.

II.

INTRODUCTION.

MetLife urges this Court to reject the reasoning of the *Wishnev* lower court opinion (*Wishnev v. Nw. Mut. Life Ins. Co.* (N.D. Cal. 2016) 162 F.Supp.3d 930) and to reach a resolution of the two certified questions consistent with the *Martin* district court opinion.

First, as the District Court held in *Martin*, the 1934 Amendment to the California Constitution vests in the Legislature the exclusive authority to set maximum rates and to "in any manner fix, regulate or limit, the fees, bonuses, commissions, discounts or other compensation" that exempt lenders charge borrowers. (Cal. Const., art. XV, § 1(3).) As the Court further found, this delegation of authority necessarily includes the right to set, limit or otherwise regulate compound interest charges. Respondent's Answer Brief unpersuasively argues that compound interest is not among the charges subject to regulation by the Legislature and ineffectually attempts to reconcile continued regulation under the Usury Law with this broad delegation. Because continued imposition of the Usury Law compound interest disclosure requirements is inconsistent with the Amendment's exclusive delegation to the Legislature of the authority to regulate exempt lenders' interest charges, the *Martin* court correctly concluded that the two cannot have concurrent operation and the Usury Law is therefore superseded as to exempt lenders.

Second, the *Martin* court properly found that under longstanding California insurance law, including section 10113 of the Insurance Code and well-established case law, the policy and the application together constitute the agreement between the insurer and the policyholder. As a matter of standard insurance industry practice, policyholders are required to

sign the application so that the insurance contract – consisting of both the application and policy form – is thus a signed written agreement. The *Martin* court therefore found that MetLife – while not subject to the Usury Law – in any event satisfied the Usury Law's requirement of signed written consent to the charging of compound interest. In arguing that insurers' standard contracting practices do not satisfy the Usury Law requirements, Respondent's Answer Brief unsuccessfully attempts to invent a requirement that there be a separate signed consent specifically to the charging of compound interest that does not exist in the text of section 1916-2.

Finally, MetLife submits that if this Court finds that insurers are subject to the Usury Law and must obtain a separate signed written consent to charge compound interest, such requirement should apply prospectively only to policies issued and loans made after the Court issues its decision. Insurers have for many decades reasonably believed that their contracting practices complied with all applicable laws and that they were lawfully charging compound interest in connection with policy loans. Moreover, requiring insurers to obtain a separate signed written consent to the policy loan compound interest provision for in-force policies and outstanding policy loans would cause undue hardship.

III.

ARGUMENT

A. This Court Should Resolve the Certified Questions In Favor of the Insurers' Position and Consistent with The District Court Opinion in *Martin*.

In the *Martin* case in which MetLife is the Defendant-Appellee, the District Court resolved the two certified questions in favor of MetLife in dismissing the Plaintiff-Appellants' claims and rejected the reasoning of the *Wishnev* decision. The Court should follow the same approach here by ruling in favor of the insurers in resolving the two certified questions.

First, the *Martin* court held properly that both the text and the legislative history of the 1934 Constitutional Amendment ("the Amendment") compelled the conclusion that exempt lenders were no longer subject to the Usury Law and its compound interest requirements. (*supra*, 179 F.Supp.3d at p. 954.) The Amendment grants broad authority to the Legislature to "in any manner fix, regulate, or limit, the fees, bonuses, commissions, discounts or other compensation" that exempt lenders may charge borrowers. (Cal. Const., art. XV, § 1(3).) The Court held that this broad regulatory delegation necessarily includes the authority to regulate compound interest. (*Id.* at pp. 954-55.)

In so holding, the District Court found that the Legislature's authority to regulate all charges received by exempt lenders was intended to prevent such lenders from "circumventing the limits on interest" by imposing other "charges whereby the borrower is required to pay more than the [maximum rate]." (*Martin, supra*, 179 F.Supp.3d at p. 954 [citing *Carter v. Seaboard Fin. Co.* (1949) 33 Cal.2d 564, 579].) Because compound interest is a tool that lenders may employ to circumvent the interest rate cap, the District Court found that it falls squarely within the Legislature's authority to "in any manner" regulate "other compensation" under the Amendment. (*Id.* at p. 955.) "This construction gives teeth to the maximum interest rates the legislature undeniably has authority to set because it permits the legislature to regulate a charge—compound interest—that can circumvent the limits." (*Ibid.*) The District Court found that Plaintiff-Appellants' contrary position—that the Amendment grants the Legislature authority to set rates and control charges in all respects other than compound interest—"isolates that tool for special treatment without justification and accordingly is unpersuasive." (*Ibid.*)

The District Court also found that the purpose of the Amendment was to enable the Legislature to classify certain lenders differently from

others "as to permissible rates of interest and other charges." (*Martin, supra*, 179 F.Supp.3d at p. 955 [emphasis in original].) The need to classify lenders differently arose because of the Initiative's "inflexible, inadequate and unworkable provisions." (*Id.*, at p. 954 [quoting *Carter*, 33 Cal.2d at 579].) Thus, the District Court rejected Plaintiff-Appellants' construction of the Amendment because it would impermissibly "impose the compound interest consent requirement across every industry uniformly, including those that were exempt and non-exempt ... [and] the one-size-fits-all approach contravenes the amendment's purpose." (*Id.* at pp. 955-56.) Indeed, this concern is particularly apt in the insurance context because insurance products and policy forms are heavily regulated given the issues specific to insurance.

By its terms, the Amendment expressly supersedes any conflicting laws. (Cal. Const., art. XV, § 1(6).) The District Court concluded that the Amendment's broad grant to the Legislature of the authority to regulate all interest and other charges by exempt lenders is irreconcilable with the Usury Law's "rigid requirement for all lenders wishing to charge compound interest" and the two "cannot have concurrent operation." (*Id.* at p. 955 [citing *Penziner v. W. Am. Fin. Co.* (1937) 10 Cal.2d 160 at 176 [74 P.2d 252]].) Accordingly, the Usury Law's compound interest requirements were superseded by the Amendment as to exempt lenders.

With respect to the second certified question, the *Martin* court held appropriately that even though not subject to the Usury Law, MetLife had in any event complied with the compound interest disclosure requirements in section 1916-2. As the District Court explained, Plaintiff-Appellants conceded that MetLife's policy forms clearly disclosed the compounding of interest, noting that the written disclosure provisions in Plaintiff-Appellants' policies "appear plain on their face and [Appellants] do not argue to the contrary." (*Martin, supra*, 179 F.Supp.3d at p. 957.) Likewise

in this matter, Respondents do not contest that the compound interest charge was clearly disclosed in the policies. (Respondent's Answer Brief at 54-61.) Plaintiff-Appellants also conceded that they signed their policy applications. The *Martin* court held—as this Court should here—that the policy forms together with the signed applications constitute the relevant agreement pursuant to the terms of the policies themselves and Insurance Code section 10113. (*supra*, 179 F.Supp.3d at p. 957.) The District Court therefore held that MetLife complied with the Usury Law's requirement that the lender have a signed written agreement with the borrower disclosing the compound interest term to charge compound interest.

In ruling in MetLife's favor on the second certified question, the District Court also noted that MetLife issued the policy forms to Plaintiff-Appellants on or before the issue date, that one of the Plaintiff-Appellant's policy forms contained a "free look" provision which enabled her to void the policy within ten days, and that both Appellants took out their loans more than a decade after receiving the policy forms and notice of the compound interest term. (*Martin, supra*, 179 F.Supp.3d at p. 957.) Thus, Plaintiff-Appellants were fully apprised that compound interest would be assessed long before the policy loans were issued.

In sum, the *Martin* opinion provides a cogent analysis of the two certified questions and why those questions should be resolved in favor of insurers, and the district court's reasoning in *Wishnev* should be rejected. The Opening and Reply briefs filed by Northwestern Mutual further and persuasively explain the many reasons why Respondents' arguments in their Answer Brief do not provide a basis for a different conclusion.

B. In the Event this Court Finds Against the Insurers, the Court Should Only Apply Any Changes to Settled Insurance Contracting Practices Prospectively.

While MetLife believes that this Court should resolve the certified questions consistent with the *Martin* district court opinion—as well as the decisions in *Lujan v. New York Life Ins. Co.* (N.D. Cal. Aug. 9, 2016, No. 4:16-cv-00913-JSW) 2016 WL 4483870 and *Washburn v. Prudential Ins. Co. of Am.* (N.D. Cal. 2015) 158 F.Supp.3d 888—and reject the reasoning of the *Wishnev* opinion, in the event that the Court finds that insurers are subject to the Usury Law's compound interest requirements and those requirements are not satisfied by the standard signed insurance contract, MetLife submits that such a ruling should be applied prospectively only to new policies and new policy loans. Such a ruling would change a settled rule that insurers have reasonably relied on and would disrupt long established industry practices.[1] Moreover, in light of the insurance industry's reliance on these well-established practices that multiple courts have found to be lawful, insurers would be prejudiced in now seeking to remedy the compound interest disclosures for outstanding policy loans or policy forms, nor is it reasonable to impose the Usury Law's penalties against insurers for outstanding policy loans with accrued interest charges.

First, retroactive application of an adverse decision would alter settled law established for decades by California statutory and case law. (*Williams & Fickett v. Cty. of Fresno* (2017) 2 Cal.5th 1258, 1282; see also *Grobeson v. City of Los Angeles* (2010) 190 Cal.App.4th 778, 796.) California insurance law has long permitted insurers to form fully-integrated agreements with policyholders, and obtain assent to all terms in

[1] Northwestern Mutual's Opening and Reply briefs set forth at length the legal bases for applying the Court's ruling on a prospective basis. (See Opening Brief at 40-49 and Reply Brief at 31-36.)

the policy, by delivering the policy with the signed application attached. (See Ins. Code, § 10113 [added by Stats. 1935, ch. 245]; *Boyer v. U.S. Fid. & Guar. Co.* (1929) 206 Cal. 273, 276-77 ["The policy and the application therefore constitute the contract"]; see also *Burr v. Equitable Life Ins. Co. of Iowa* (9th Cir. 1936) 84 F.2d 781, 782 [recognizing that the application and policy are "a single insurance contract"]; *New England Mut. Life Ins. Co. v. Lauffer* (S.D.Cal. 1963) 215 F.Supp. 91, 97 ["The insurance policies with the applications attached are construed together as they constitute one contract"].)

For this reason, an adverse decision would disrupt long accepted and widely relied on business practices. For decades, insurers have relied on this settled law to form contracts with policyholders, including agreements for the charging of compound interest. Insurers understood that the policy form together with the signed application constituted an integrated agreement in compliance with Insurance Code section 10113 and related case law. Signing the application and subsequently receiving the policy form has been the standard insurance industry practice by which a policyholder agrees to all of the provisions of a life insurance contract in California and all other states. As the *Martin* court observed, this "approach to contracting . . . is ubiquitous in the insurance field today." (*Martin, supra*, 179 F.Supp.3d at p. 957.) An adverse ruling calling into question this contracting process would jeopardize other terms of the insurance contract which similarly require the consent of the policyholder.

Insurers reasonably relied on this well-established law and widely accepted industry practice in assessing compound interest in connection with policy loans. (*Camper v. Workers' Comp. Appeals Bd.* (1992) 3 Cal.4th 679, 688.) The reasonableness of the insurers' reliance and practices is amply illustrated by the fact that three district courts found the insurers' conduct to be lawful and consistent with the requirements of the

Usury Law. (*Martin, supra*, 179 F.Supp. 3d at p. 957; *Lujan, supra*, 2016 WL 4483870 at *7; *Washburn, supra,* 158 F.Supp.3d at p. 896.) Subjecting insurers to the sanctions contained in the Usury Law—invalidating the interest provisions for existing policy loans and imposing treble damages in the amount of past interest paid by policyholders, Civ. Code section 1916-2(b)—would be unfair in these circumstances and raise concerns about the administration of justice. (*Doe v. San Diego-Imperial Council* (2015) 239 Cal.App.4th 81, 90.)

Second, as a matter of public policy, even if insurers were found not to have complied with the signature requirement of the Usury Law, policyholders were fully apprised of the compound interest provision prior to taking out policy loans. Policy loans cannot be obtained until premiums have been paid over a period of time and cash value has accumulated. In other words, a policyholder can take out a policy loan only after the policy form containing the compound interest disclosure is received. In the instance of the Plaintiff-Appellants in the *Martin* case, their MetLife policies were issued in 1965 and 1992, and they took out their policies loans almost a decade later in 1975 and 2001 respectively. And, for all policies issued by MetLife and other insurers after 1990, policyholders had a statutory "free look" period during which they had an opportunity to review and reject the policy with no charge. (See Ins. Code, § 10127.9.)

Third, retroactive application would cause undue hardship as insurers may not practicably be able to remedy the purported failure to obtain a separate signed written consent with respect to in-force policies and outstanding policy loans. Many of MetLife's 275,000 in-force life insurance policies, including those of the Plaintiff-Appellants in *Martin*, were issued decades ago. MetLife and other insurers would be prejudiced

if they now sought to obtain a separate consent form at this late date for already agreed terms of the policies.[2]

IV.

CONCLUSION

For the foregoing reasons and those set forth in Northwestern Mutual's Opening and Reply Briefs, this Court should answer the Certified Questions by finding that exempt lenders are not subject to the Usury Law's compound interest requirements, and by finding that an insurance agreement in any event meets the requirement of section 1916-2 if it is comprised of an application signed by the borrower attached to a policy form disclosing that compound interest will be charged. In the event that the Court declines to answer these questions in favor of exempt lenders and insurers, it should provide that its decision and the changes it mandates to settled insurance practices shall apply prospectively only to new policies and new policy loans.

Dated: August 31, 2018

SIDLEY AUSTIN LLP

By: /s/ Carol Lynn Thompson
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[2] The majority of MetLife's policy loans accrue interest because the policyholders do not regularly pay outstanding interest amounts until the loan balance is paid off, so that invalidating the interest provision under the Usury Law as to outstanding policy loans will effectively result in the extension of interest-free credit for the majority of such policy loans and cause serious hardship to MetLife and other similarly situated insurers.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the text of the Application and Amicus Brief contains 3,285 words as counted by Microsoft Word.

Dated: September 5, 2018

SIDLEY AUSTIN LLP

By: /s/ Carol Lynn Thompson
Carol Lynn Thompson

Attorneys for Amicus Curiae
METROPOLITAN LIFE INSURANCE COMPANY

PROOF OF SERVICE

STATE OF CALIFORNIA)
) SS
COUNTY OF SAN FRANCISCO)

I am employed in the County of San Francisco, State of California. I am over the age of 18 years and not a party to the within action. My business address is 555 California Street Suite 2000, San Francisco, CA 94104.

On September 5, 2018, I served the foregoing document(s) described as **APPLICATION FOR LEAVE TO FILE AMICUS BRIEF AND AMICUS BRIEF REGARDING CERTIFIED QUESTIONS** on all interested parties in this action as follows:

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☒ (VIA U.S. MAIL) I served the foregoing document(s) by U.S. Mail, as follows: I placed true copies of the document(s) in a sealed envelope addressed to each interested party as shown above. I placed each such envelope with postage thereon fully prepaid, for collection and mailing at Sidley Austin LLP, San Francisco, California. I am readily familiar with Sidley Austin LLP's practice for collection and processing of correspondence for mailing with the United States Postal Service. Under that practice, the correspondence would be deposited in the United States Postal Service on that same day in the ordinary course of business.

☒ (VIA E-MAIL AND ELECTRONIC TRANSMISSION) I caused the foregoing document(s) to be sent to the person(s) at the e-mail address(es) listed above via the Court's electronic filing system. I did not receive, within reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 5, 2018, at San Francisco, California.

/s/ Carol Lynn Thompson
Carol Lynn Thompson