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)

REPLY IN SUPPORT OF PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES
(continued)

Page

Statutes, Codes & Rules

Other

Plaintiffs/Appellants/Petitioners, BLAKELY McHUGH and TRYSTA M. HENSELMEIER (collectively "Petitioners"), hereby file this Reply in further support of their Petition asking this Court to review the published decision of the Court of Appeal, Fourth Appellate District, Division One, issued on October 9, 2019, affirming the trial court's Judgment in favor of Defendant/Respondent, PROTECTIVE LIFE INSURANCE COMPANY ("Protective Life").

I.

INTRODUCTION

In their Petition for Review, Petitions ask this Court to consider whether the provisions of Insurance Code sections 10113.71 and 10113.72 apply to life insurance policies in force as of those statutes' enactment on January 1, 2013, regardless of the original date of issuance of those in force policies. They also seek this Court's review to clarify whether the lower courts (like the Court of Appeal here) may rely upon private opinions of Department of Insurance ("DOI") staff counsel, contrary to proscriptions found in Insurance Code section 12921.9, Government Code section 11340.5,

and this Court's recent decision in *Heckart v. A-J Self Storage, Inc.* (2018) 4 Cal.5th 749.

In response, Protective Life blithely pretends that the Court of Appeal did not improperly rely upon informal communications DOI staff and so-called "SERFF Notices" as official positions taken by the DOI on the application of sections 10113.71 and 10113.72. Protective Life further suggests that the Court of Appeal's interpretation of those statutes should be allowed to "percolate." But just last week, another federal district court confronted the interpretation and application of those same two statutes, concluding that the Court of Appeal in *McHugh* had followed the interpretative guidance provided by the DOI, *even though the DOI has never taken any official position on the application of those statutes*. Thus, such "percolation" cannot be allowed to occur unfettered where the Court of Appeal's *McHugh* decision is already sweeping away other courts confronting the exact same issues. This Court's intervention is required now to stem that flood, and to confirm the continuing viability of Insurance Code section 12921.9 and Government Code section 11340.5, as well as the guidance the

Court previously provided the lower courts in *Heckart v. A-J Self Storage, Inc.* (2018) 4 Cal.5th 749.

II.

DISCUSSION

A. Protective Life's Answer Ignores One of the Principal Grounds Compelling This Court's Review.

Protective Life's Answer does not even attempt to address one of the primary issues now supporting review: whether the Court of Appeal improperly relied upon informal and unofficial private communications by DOI staff in construing sections 10113.71 and 10113.72. Protective Life obviously wishes to avoid addressing that issue directly, opting instead to argue that in construing those statutes, the Court of Appeal never relied upon any such materials or DOI staff representations. However, that argument is belied by: (1) the Court of Appeal's Opinion itself; (2) how other courts have recently construed the *McHugh* decision on that very issue; and (3) how senior policy-making officials in the DOI have explained the official position of the DOI in sworn testimony before other courts.

Specifically, beginning at page 7 of its *McHugh* Opinion, the Court of Appeal details the "special deference" it afforded to the DOI's interpretation of sections 10113.71 and 10113.72, given that agency's "special expertise." (Opn. at 7-8 [further explaining how "[w]e are required to give deference to the Department's interpretation, as long as it is reasonable and consistent with the language of the statutes"].)[1] In the pages that follow, the Court of Appeal then discusses unofficial communications by DOI staff and the SERFF Notices in question, misconstruing them as representing some official position taken by the DOI. On that basis, it explains at page 14 of its Opinion that "we conclude the Department's interpretation that the statutes apply only to term life insurance policies issued after January 1, 2013, is reasonable and correct." (Opn. at 14; see also *ibid.* [where the Court of Appeal further professes how it "therefore 'accord[s] great weight and respect to the administrative

[1] All record citations in this Petition are supported by reference to the attached Court of Appeal's October 9, 2019 Slip Opinion, abbreviated as: (Opn. at [page]); to the Appellant's Appendix, abbreviated as: ([volume] AA [page]); and to the Request for Judicial Notice, filed concurrently with this Petition, abbreviated as: (RJN [page]).

construction' of a statute by the agency entrusted with enforcing it"].) Using that compelling language, the Court of Appeal took great pains to describe its highly deferential analysis. Consequently, Protective Life cannot seriously contend that the Court of Appeal did not rely upon unofficial DOI communications and notices in reaching its Opinion, directly contrary to Insurance Code section 12921.9 and Government Code section 11340.5, as well as this Court's admonitions in *Heckart, supra* 4 Cal.5th at 769 fn. 9.

Protective Life's position is further undermined by the above-mentioned recent decision in *Thomas v. State Farm Insurance Co.* (S.D. Cal. 2019) 2019 U.S. Dist. LEXIS 213860, decided just last week on December 10, 2019. In that case, the federal district court analyzed the Court of Appeal's recent decision in *McHugh* and observed how it "deferred to the interpretation of the Department of Insurance after finding that interpretation was 'reasonable and consistent with the language of the statutes.'" (*Thomas, supra,* 2019 U.S. Dist. LEXIS 213860 at *10.) Similarly, on the question of retroactive application, the *Thomas* court further explained how the *McHugh* court "deferred to the interpretation proffered by the

Department of Insurance and affirmed the trial court's special verdict in favor of the insurer." (*Id*. at 16.) Consequently, while Protective Life might wish to feign that the Court of Appeal's Opinion did not rely upon what it incorrectly believed to be the DOI's "agency position" and "administrative construction" of the statutes in question, other courts analyzing the *McHugh* decision have already begun to view it as doing precisely that.

Finally, Protective Life's Answer also ignores the undisputed testimony of Michael J. Levy, Deputy General Counsel for the DOI, which Petitioners asked this Court to judicially notice. Mr. Levy's sworn declaration only confirms that the personal opinions of DOI staff members do not represent any official position of the DOI taken on the application of sections 10113.71 and 10113.72, citing to both Insurance Code section 12921.9 and this Court's *Heckart* opinion in support of that unequivocal stance taken by the DOI. While both the Court of Appeal and Protective Life neither mention nor analyze the proscriptions outlined in Insurance Code section 12921.9 and Government Code section 11340.5 – nor do they even attempt to discuss this Court's reasoning in *Heckart* – this Court should avoid similar myopia.

Instead, it should grant review to fairly evaluate the legislative history and purpose of sections 10113.71 and 10113.72, unencumbered by any purported "administrative construction" the DOI has never taken on the application of those statutes in the first place. The continued insurance coverage of literally millions of Californians hangs in the balance, compelling it to do so.

B. The Court of Appeal's Decision in *McHugh* Irreconcilably Conflicts with an Emerging Line of Federal District Court Decisions Applying California Law.

Protective Life also argues that the Court of Appeal's decision does not conflict with the federal district court's recent decision in *Bentley v. United of Omaha*, Case No. CV 15-7870-DMG (AJWx) (C.D. Cal.). Importantly, *Bentley* not only rejected application of the *McHugh* decision, but also held unequivocally that application of sections 10113.71 and 10113.72 to policies issued prior to January 1, 2013 was *not* a retroactive application. (*Bentley v. United of Omaha Life Ins. Co.,* (C.D. Cal. 2016) 2016 U.S. Dist. LEXIS 195183 at *10-11; see also *Bentley v. United of Omaha Life Ins. Co*., 371 F.Supp.3d 723, 732 (C.D. Cal. 2019) [stating that sections 10113.71 and 10113.72 apply "prospectively from the effective date of the Statutes and when a policy

renews it incorporates any changes in law that occurred prior to the renewal"].) In other words, contrary to the Court of Appeal's *McHugh* decision, the *Bentley* court correctly concluded that sections 10113.71 and 10113.72 do not expand coverage, but merely govern the conduct insurers must follow before they may effectively terminate for nonpayment both existing and prospective policies.

Further, sections 10113.71 and 10113.72 use of the "issued and delivered" language does not restrict their application to policies previously issued and delivered in California. That same issue was also evaluated in *Bentley*, where the District Court reasoned that the phrase "issued and delivered" included an intent by the Legislature to mandate application of those statutes to life insurance policies that have been renewed or remained in force past the effect date of the statutes. (*Bentley, supra,* 2019 U.S. Dist. LEXIS 63632 at *18.) In light of the insurer's contention that such an application would be impermissibly "retroactive," the *Bentley* court countered that "[n]othing in these cited provisions predicate the notice upon whether the policy owner is an existing, new, or renewing policy holder." (*Ibid.*) To suggest in light of *Bentley's* analysis of that same statutory language undertaken by the

Court of Appeal in this case that there is no "conflict" between those two decisions is to ignore the main "retroactivity" rationale of the *McHugh* Opinion. As it now stands in direct conflict with other decisions which have reached a contrary conclusion concerning the application of those same statutes, this Court's intervention is required now.[2]

Indeed, contrary to the Court of Appeal's conclusion, it is well-settled that simply because a statute affects an existing contract does not automatically mean that it requires a "retroactive" application. Rights affected must be "vested rights," which have nothing to do with the Legislature's power to compel insurers to provide additional notices to policyholders in the future. This is particularly so where insurance contracts are highly regulated in this State and must comply on an

[2] Protective Life's reference to *McHugh's* reliance on *Interinsurance Exchange of Auto Club of Southern Cal. v. Ohio Ins. Co.* (1962) 58 Cal.2d 142, 149 and *Ball v. Cal State Auto. Assn., Inter-Ins. Bureau* (1962) 201 Cal.App.2d 85, 87 also supports this Court's consideration. Those cases dealt with the legislative mandate of adding uninsured motorist coverage to automobile policies issued in California, using decidedly different language to achieve that goal. *Bentley* rejected those same arguments, recognizing that there are significant differences between the substantive effect of mandating an additional line of coverage to existing policies, and mandating new notice and termination procedures for existing coverages. (*Bentley*, *supra*, 2019 U.S. Dist. LEXIS 63632 at *18.) Reconciling the proper interpretation of those cases and their holdings is yet another example of the conflict between the state and federal courts requiring this Court's resolution.

ongoing basis with all applicable provisions of the Insurance Code. (Ins. Code § 41.) Nowhere does Protective Life or the Court of Appeal explain how requiring compliance with sections 10113.71 and 10113.72 would be an improper exercise of legislative power. (See *California State Automobile Assn. v. Maloney* (1951) 341 U.S. 105, 109 [observing how the police power granted to the states "is peculiarly apt when the business of insurance is involved"]; *20th Century Insurance Co. v. Garamendi* (1994) 8 Cal.4th 216, 240 [where this Court further observed that "it scarcely needs mention that the regulation of the insurance industry is squarely within the state's police power" and that "impairment of an existing contract is not necessarily unconstitutional"].)

Obviously, the Legislature intended to apply sections 10113.71 and 10113.72 to existing policies in force on January 1, 2013. It stated unequivocally in the bill that proposed the addition of those statutes to the Insurance Code that "[t]his bill intends to add additional procedural protections to a policy owner in order to avoid lapse." (Senate Ins. Comm. Analysis of Assem. Bill No. 1747, June 13, 2012.) That expressed intent is consistent with the Legislature's remedial purpose

of protecting elderly and disabled policyholders from forfeiting years of investments in premium payments through inadvertent lapses without adequate notice. That purpose only makes sense if it also applies to *existing policyholders* whose policies were previously issued – and who paid those premiums – before sections 10113.71 and 10113.72 were enacted in 2013.

Yet under the Court of Appeal's Opinion, any policy that was merely issued before 2013 would be deemed unworthy of similar protection, even where it remained "in force" at the time those statutes took effect. Such an interpretation is strained and illogical; it cannot be that the Legislature intended to allow insurers to continue lapsing large swaths of annually renewing policies simply because they were originally issued before the effective date of those statutes. (*Wooster v. Department of Fish & Game* (2012) 211 Cal.App.4th 1020, 1027 [confirming the well-established maxim that "the law abhors forfeitures"]; see also *Tetra Pak, Inc. v. State Bd. of Equalization* (1991) 234 Cal.App.3d 1751, 1756 [observing that when the meaning of a statute is in doubt, courts must construe the statute to suppress the mischief it was meant to address, to advance or extend the remedy

provided, and to bring within the scope of the law every case that comes clearly within its spirit and policy].) *The Court of Appeal could not properly presume that the Legislature viewed itself as powerless to standardize those policies*. Instead, given the broad remedial purpose of those statutes, and the general plenary authority the Legislature retains to regulate insurance practices in this state, it should have instead concluded that the Legislature intended sections 10113.71 and 10113.72 to be applied to any policy "in force" in 2013, like McHugh's policy. (See *Bentley, supra,* 2016 U.S. Dist. LEXIS 195183 at *12 [where the federal District Court reached that very conclusion, finding that "[t]he Court presumes that the Legislature meant what it said" and reasoning that limiting application of sections 10113.71 and 10113.72 only to newly issued policies would "defeat the purpose" of those statutes].) In short, Judge Gee in *Bentley* made plain what should have been apparent to the Court of Appeal: "To adopt [defendant]'s interpretation would mean that the Statutes never apply to an existing policy issued before the effective date of the Statutes, no matter how far into the future that policy is extended. This leads to an absurd result, which the Legislature could not have intended." (*Id*. at 12-13.)

This Court should grant review to address the Court of Appeal's construction of those statutes, which is completely at odds with their remedial purpose. To that end, this case presents the ideal vehicle, as the Court of Appeal decided those issues as a matter of law without ever addressing in its Opinion the other substantive challenges Petitioners advanced to reverse the trial court's Judgment. As further demonstrated by the District Court's recent *Thomas* decision, *McHugh* is already viewed by other courts as a leading case on the construction and application of sections 10113.71 and 10113.72 to life insurance policies issued before January 1, 2013. Consequently, no further record development in this case is required to fairly square those same issues of statutory construction and application for this Court's consideration and review.

III.

CONCLUSION

The proper construction and application of sections 10113.71 and 10113.72 is now in conflict. As decisions continue to be issued in both the state and federal courts on that issue – all with inconsistent outcomes – grave uncertainty is imposed on the life insurance coverage of literally millions of Californians. This Court's intervention is required now to address and resolve that conflict, and to uphold the Legislature's goal of protecting elderly and disabled policyholders from inadvertent termination of that important life insurance coverage. Accordingly, Petitioners reprise their request for this Court to grant their Petition for Review.

Respectfully submitted,

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DATED: Dec. 16, 2019

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CERTIFICATE OF COMPLIANCE PURSUANT TO THE CALIFORNIA RULES OF COURT, RULE 8.204(c)

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Jon R. Williams

McHUGH, et al. v. PROTECTIVE LIFE INSURANCE
Supreme Court of the State of California
CA Supreme Court Case No.: S259215
Court of Appeal Case No.: D072863
San Diego County Superior Court Case No.: 37-2014-00019212-CU-IC-CTL

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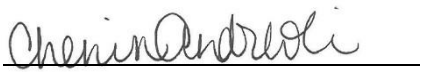
Dated: **December 16, 2019** Signature: 

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