

California Anti-Lapse Statutes and Litigation

Association of Life Insurance Counsel

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What is the Issue?

- Do California's anti-lapse statutes for life insurance, which went into effect on January 1, 2013, apply to existing life insurance policies that were issued before that effective date?
 - Litigation landscape
 - Current cases and issues
 - *McHugh v. Protective Life* -- Trial and appeal
 - Status of pending appeals before California Supreme Court and Ninth Circuit
 - Defense and amicus arguments before appellate courts
 - Potential outcomes and consequences

California Anti-Lapse Statutes

- Effective January 1, 2013
- Ins. Code. §10113.71: “Each life insurance policy issued or delivered in this state” shall contain a provision for a 60-day grace period.
 - Notice of pending lapse and termination of life insurance policy “shall not be effective” unless mailed by the insurer to the policy owner and a designee named pursuant to section 10113.72.
- Ins. Code. §10113.72: “An individual life insurance policy shall not be issued or delivered in this state until the applicant has been given the right” to designate a person to receive notice of lapse for non-payment.
 - Insurer shall notify policy owner of right annually
 - “No individual life insurance policy shall lapse or be terminated” unless insurer gives at least 30 days notice to owner and designee.

Current Litigation

- 43 Cases – 20 putative class actions
- Key issues
 - Retroactivity
 - Renewal Principle
 - Extraterritorial Application
 - Constitutional Limitations
 - Regulatory interpretation
 - Strict Construction – Causation
 - Remedies
- Current Landscape
 - Settlements, Trials, Motions and Appeals

McHugh v. Protective Life Insurance Co.

- San Diego Superior Court
 - Summary judgment on retroactivity / Tentative ruling
 - Legislative history / Elder protection Issues
- 2017 Trial
 - California DOI Issues
 - Offers of Proof
 - Strict compliance under California law and impact on Statutory application and implementation
 - Plaintiff's theory on non-compliance: Never-ending insurance
 - Damages / Causation – the silver bullet
 - Renewals not an issue
 - Defense verdict and significance in context of class certification

McHugh v. Protective Life Insurance Co

- California Court of Appeals, Fourth District
 - Issues framed
 - Jury issues
 - Statutory interpretation and application
 - Previous decisions interpreting what “issued or delivered” means
 - Presumption against retroactivity
 - Construction by regulator – consideration or deference to California DOI
- California Supreme Court Grants Review
 - Ct. of Appeals opinion no longer binding or precedent
 - Plaintiffs have taken advantage of uncertainty by filing class action complaints

McHugh before Supreme Court

- Plaintiffs asserted a conflict between *McHugh* and Ninth Circuit required review
 - Did not mention the renewal principle
 - Supreme Court hears retroactivity cases
 - Conflicts outside Courts could also invite review
- Plaintiffs argue their position before trial court
 - Intent to protect seniors supports immediate application of requirements to all policyholders (even if they aren't seniors)
 - Characterize Court of Appeals' consideration of DOI as reliance on improper regulation

Cases before 9th Circuit

- *Bentley v. United of Omaha, Thomas v. State Farm*
 - Invoking the “renewal principle”
 - Adapted from auto and liability cases
 - Contracts effectively rewritten with every “renewal” – i.e., premium payment
 - Term policy treated as a series of one year policies, renewed with each payment.
 - Both Courts believed “renewal principle” trumped *McHugh*
 - *Bentley*: *McHugh* was inapposite, didn’t address renewals
 - *Thomas*: Court agreed *McHugh* was correctly decided, but didn’t impact application of renewal principle

Amicus arguments

- Life insurance policies are unique long-term private contracts
 - Courts have long rejected *Bentley's* and *Thomas's* characterization of life insurance as series of renewals.
 - Long duration of contracts require predictability
 - Pricing and product design based on contract terms
 - Parties should look to contract, not Insurance Code, for their rights
- Focus on benefits and long-term guarantees beyond death benefit
 - Level premium
 - Continued coverage regardless of change in health, even if uninsurable
 - Conversion
 - Incontestability

Amicus Arguments

- Court must consider impact on broader scope of products and policy owners
 - Lower court rulings reflect limited scope of cases – individual plaintiffs or specific term products
 - Analogy to liability and auto cases assumes that both parties have the right to discontinue coverage
 - Treating a premium payment as a renewal will yield inconsistent results
 - Not every product has monthly or even annual set premiums
 - Policyholders fund policies differently
 - Premium payments aren't always made to continue coverage
- Conflict of law issues and portability of coverage
 - No other state follows the “renewal principle”

What's Next ?

- Supreme Court has interest in clarity beyond insurance context
 - Courts have held the legislature knows how to express retroactive intent
 - Clear rule avoids further confusing recurring retroactivity disputes
 - Steers clear of impairment vs. police power questions
- Will Ninth Circuit seek or wait for guidance from Cal. Supreme Court?
- What would remedies look like?
 - Death claims
 - Amending existing contracts
 - “Relapsing” policies
 - Reinstatements
 - Retroactive calculation of policy values