**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.

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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)

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## PETITIONERS' OPENING BRIEF ON THE MERITS

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***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.: D075400**
**San Diego County Superior Court Case No.: 37-2014-00019212-CU-IC-CTL**

## CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Petitioners: BLAKELY McHUGH, TRYSTA M. HENSELMEIER

Respondent: Protective Life Insurance Company

Please check the applicable box:

**X** There are no interested entities or persons that must be listed in this certificate under rule 8.208.
__ Interested entities or persons required to be listed under rule 8.208 are as follows:

| Name of Interested Entity or Person | Nature of Interest |
|---|---|
| 1. | |
| 2. | |

Date: May 29, 2020

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## TABLE OF CONTENTS

## TABLE OF CONTENTS
**(continued)**

**Page**

## TABLE OF CONTENTS
**(continued)**

**Page**

## TABLE OF AUTHORITIES

**Page**

**Cases**

## TABLE OF AUTHORITIES
**(continued)**

**Page**

**Cases (continued)**

## TABLE OF AUTHORITIES
**(continued)**

**Page**

**Cases (continued)**

## TABLE OF AUTHORITIES
**(continued)**

**Page**

**Cases (continued)**

## TABLE OF AUTHORITIES
**(continued)**

**Page**

**Cases (continued)**

## TABLE OF AUTHORITIES
**(continued)**

**Page**

**Statutes, Codes & Rules**

## TABLE OF AUTHORITIES
**(continued)**

**Page**

**Statutes, Codes & Rules (cont.)**



**Other**

Plaintiffs/Appellants/Petitioners, BLAKELY McHUGH and TRYSTA M. HENSELMEIER (collectively "Petitioners"), hereby submit this Opening Brief on the Merits in proceedings before this Court reviewing the published decision of the Court of Appeal, Fourth District, Division One (per Justices O'Rourke, Huffman, Aaron) issued on October 9, 2019, affirming the trial court's Judgment in favor of Defendant/Respondent, PROTECTIVE LIFE INSURANCE COMPANY ("Protective Life") in the underlying life insurance coverage dispute.[1]

## I.

## ISSUES PRESENTED

On January 29, 2020, the Court granted review in this matter to consider the following related questions:

1. Were the provisions of Insurance Code sections 10113.71 and 10113.72 intended by the Legislature to apply, in whole or in

[1] All factual citations in this Opening 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 Appellant's Appendix, abbreviated as: ([volume] AA [page]); and the exhibits admitted in the underlying trial, abbreviated as: (Exh. [number].)

part, to life insurance policies in force as of January 1, 2013, regardless of the original date of issuance of those policies?

2. Did the lower courts in this case properly rely upon private opinions of Department of Insurance staff counsel? (See Ins. Code § 12921.9; Gov. Code § 11340.5; *Heckart v. A-J Self Storage, Inc.* (2018) 4 Cal.5th 749.)

## II.

## INTRODUCTION

In 2011, the State of California recognized a serious problem with senior and disabled insurance policyholders unintentionally losing important life insurance coverage due to inadvertent failures to pay policy premiums. Often decades of premium investments in those policies were lost when a single payment was missed and those policies were terminated as a result of the mental or physical decline of those elderly or disabled policyholders.

To address those issues, in 2012 the Legislature passed Assembly Bill 1747 ("AB 1747" – 2011-2012 Reg. Sess.), adding sections 10113.71 and 10113.72 to the Insurance Code on January 1, 2013. Importantly, those statutes codified protections requiring at least 30-days' notice of a

pending lapse before an insurer could legally terminate a life insurance policy. They further mandated that all life insurance policies "issued and delivered" in California must adhere to at least a 60-day grace period for premium payments, irrespective of the period originally designated in those policies. And finally, to provide seniors and disabled policyholders with added protection against inadvertent lapses, those statutes also required that every policyholder would be entitled to designate a secondary individual or entity to receive notice of any pending lapse for non-payment.

Those statutes were *remedial* in nature, meant to address a specific threat or harm, and were intended to apply immediately to all in force policies under Insurance Code section 41. (See Legislative History of AB 1747 at 1 AA 580-694 [detailing how that legislation was needed to provide consumer safeguards for existing policyholders who previously purchased life insurance coverage, especially seniors].) Those sections further embodied well-settled public policies placing the affirmative burden on insurers to provide proper notice of termination in light of those enlarged grace periods and notice requirements. Non-

conforming notices would be deemed "ineffective," leaving existing policies in force. (1 AA 644.)

Notably, that remedial legislation was supported not only by numerous senior and consumer protection groups, but also by the insurance industry and the Department of Insurance ("DOI"). Further, it was signed into law without any indication from the DOI that those statutes would not go into effect immediately and apply to all existing in force policies in California. Indeed, to the extent that the Legislature expressly enacted those statutes to protect senior and disabled "policyholders" from inadvertently losing decades of prior premium investments in those policies, it was reasonable to conclude that legislation would apply to existing in force policies.

However, after the passage of those statutes, some insurers (including Protective Life) began to advance the argument that those statutes (and in particular, their provisions extending grace and notice periods) were not intended to apply to existing in force policies issued before January 1, 2013. Following their passage, the DOI did not take a position on the application of the statutes, either way. Rather in response to off-the-record phone inquiries pressed by certain insurers, a

limited number of DOI staff members purportedly opined that those statutes do not apply to existing policies, even though they also indicated that their responses would not be put in writing and should not be considered a formal rule, bulletin, or guideline issued by the DOI.

Obviously, such an interpretation of those statutes would invite a *critical conflict*. Indeed, it would mean that nearly all life insurance policies in existence before January 2013 are immune from the requirements of sections 10113.71 and 10113.72 and therefore subject to a disparate set of grace period and cancellation rules. It would also mean that as those policies continue in force for decades into the future, when the additional notice and grace period provisions embodied in sections 10113.71 and 10113.72 would become even more important to protecting aging policyholders, those policyholders would be afforded no such protections. And it would mean that only relatively "new" policies, issued after January 1, 2013, enjoy the valuable protections provided by sections 10113.71 and 10113.72, even where the loss of past premiums due to inadvertent lapses of those policies would be relatively limited.

*This case embodies that conflict* and requires this Court's intervention to preserve the Legislature's remedial intent in enacting sections 10113.71 and 10113.72. To its credit, the trial court below correctly concluded that sections 10113.71 and 10113.72 applied to the in force life insurance policy which Petitioners' decedent, William McHugh ("McHugh"), purchased in 2005, and for which McHugh had paid significant premiums to Protective Life over that eight year period. The Court of Appeal, however, reached the opposite conclusion, finding that sections 10113.71 and 10113.72 applied only to *new policies issued after January 1, 2013* and therefore did not prevent the inadvertent lapse of McHugh's policy. It did so by relying on insurance industry informal communications with certain DOI staff members, and "policy form" notices issued by the DOI to the insurance industry, neither of which represented the official position of the DOI on the interpretation of those statutes. Nevertheless, the Court of Appeal improperly concluded that those informal communications and policy form notices required "administrative deference." Consequently, the Court of Appeal's published decision now holds that the protections provided by sections 10113.71 and 10113.72 inure only to *new policyholders*,

contrary to the Legislature's express desire to protect *existing elderly and disabled policyholders from inadvertent lapses of their valuable life insurance coverage*.

Concurrently, other courts have construed sections 10113.71 and 10113.72 and have reached decisions in conflict with the Court of Appeal's decision in this case. Indeed, as many insurance coverage actions are filed in federal court, at least one federal district court (*Bentley v. United of Omaha*, Case No. CV 15-7870-DMG (AJWx) (C.D. Cal.)) applied California law to conclude that sections 10113.71 and 10113.72 applied to policies issued before January 1, 2013, irrespective of when they were originally issued. Further, Judge Gee in *Bentley* specifically considered and refused to follow the Court of Appeal's decision in this case, concluding that it did not reflect how this Court would likely construe those same statutes. In doing so, Judge Gee also disagreed with the Court of Appeal's conclusion that application of those statutes to previously issued policies would necessarily be "retroactive" or would otherwise unconstitutionally impair those policies. Finally, Judge Gee in *Bentley* correctly refused to consider any informal communications or other materials from the DOI, including

the very policy form "SERFF Notices" relied upon by the Court of Appeal. That decision in *Bentley* has since been challenged by the insurer-defendant in that case, and is presently before the Ninth Circuit Court of Appeals.[2]

Given the obvious disagreement in those holdings concerning the applicability of the exact same statutes – and the split of authority rapidly developing in the state and federal courts in the wake of the Court of Appeal's decision – Petitioners call upon this Court now to reach the following two conclusions and to reverse the Court of Appeal's decision. Specifically, Petitioners first explain why (A) this Court should find that the provisions of Insurance Code sections 10113.71 and 10113.72 apply to all life insurance policies in force on their effective date, January 1, 2013, regardless of the date those policies were originally issued. Such a determination by this Court is the only

[2] Judge Gee's analysis in *Bentley* concerning the construction and application of sections 10113.71 and 10113.72, the relevance of DOI informal communications and policy form notices, and the lack of any retroactive application of those statutes, are all contrary to the Court of Appeal's decision in this case. However, *Bentley* also separately relied upon a "renewal principle" argument which was never addressed by the Court of Appeal and is not germane to Petitioners' arguments before this Court. (See *Bentley v. United of Omaha Life Ins. Co.* (C.D. Cal. 2019) 371 F.Supp.3d 723, 735-737.)

reasonable conclusion consistent with the plain language of sections 10113.71 and 10113.72, the harm the Legislature intended to address and remedy through their enactment, and the Legislature's plenary power to regulate insurance practices in this state under Insurance Code section 41. Petitioners next detail why (B) this Court should similarly clarify that the lower courts may not rely upon unauthorized positions and communications by DOI staff regarding the construction of those statutes. Again, that holding by this Court is also the only reasonable conclusion consistent with prior statutory and decisional law specifying the well-established requirements for agencies like the DOI to take official, binding positions on statutory law within their purview.

The Court's decision on those two issues will bring welcome relief to elderly and disabled policyholders who are particularly susceptible to the current uncertainty conflicting decisions impose on their important life insurance coverage. Indeed, for many of those policyholders, life insurance benefits are the only financial legacy they will leave to their families. This is precisely why the Legislature enacted sections 10113.71 and 10113.72: to ensure that decades of premium payments and commensurate life insurance benefits are not inadvertently

forfeited by that particularly vulnerable class of policyholders, while requiring insurers only to provide reasonable grace periods, and adequate notice, before those policies can lawfully be terminated for nonpayment. Accordingly, Petitioners respectfully request the Court to reverse the Court of Appeal's erroneous construction of those statutes, and to direct the Court of Appeal to enter a new disposition, confirming the application of those statutes to McHugh's Protective Life insurance policy in question.

## III.

## RELEVANT FACTUAL AND PROCEDURAL HISTORY

### A. Background.

As previewed above, the underlying case involved the controverted loss of $1,000,000 of life insurance benefits to Petitioner, Blakely McHugh ("Blakely"), the surviving daughter of McHugh and the sole beneficiary designated under the term life insurance policy McHugh held with Protective Life at the time of his death. (Exh. 25; 1 AA 106-131.) Petitioner, Trysta M. Henselmeier, was named as a nominal plaintiff as she is the representative of McHugh's estate, but presented

no separate claim for damages on the estate's behalf. (1 AA 79; 3 AA 1369.)

## B. Relevant Provisions Contained in McHugh's Life Insurance Policy with Protective Life.

In March of 2005, McHugh was issued a $1,000,000 term life insurance policy by Chase Insurance Company. (Exh. 25; 1 AA 106-131.)[3] That policy was delivered on or about March 8, 2005, along with a contemporaneous acknowledgment that the policy was "in force." (*Ibid*.) That policy further indicated that coverage ran from January 9, 2005, with an annual premium having been previously paid by McHugh at about that same time. (*Ibid*.)

The relevant provisions of that policy were that it was a 10-year term life policy, ending in 2015, after which it could be continued with a higher premium payment. (*Ibid*.) While premium payments were due every year on the 9th of January, payment could be made under the terms of that policy within a 31-day "grace period" without any termination of coverage. (1 AA 117.) Consequently, payment was

[3] Chase was later acquired by Protective Life, which assumed all of Chase's obligations under the policy in question.

considered timely as long as it was received within 31 days from the annual due date of January 9 (or by February 9), and if it was not received during that grace period, the policy lapsed and coverage ceased. (1 AA 117 ["If the premium remains unpaid at the end of the grace period, coverage will cease"].) On the other hand, under the terms of that same policy, if the insured died during the grace period, coverage continued, with any unpaid premiums later deducted from the policy proceeds. (*Ibid*.)

### C. The Mandatory Change in the Policy's Grace Period Imposed by the Insurance Code.

By January of 2007, McHugh's policy with Protective Life passed the two-year maturity period in which a claim for benefits could have been contested for any reason. (1 AA 105.) McHugh paid all premiums due yearly in the amount of $310 through January of 2012, making his policy "in force" until 31 days after January 9, 2013 (including the policy's grace period).

In the interim, as explained above, in 2012 the Legislature enacted Insurance Code sections 10113.71 and 10113.72. Those changes to the Insurance Code, effective January 1, 2013, provided

McHugh with an extension of the policy's grace period, from 31 days to 60 days, during which he could pay his premium without the policy lapsing or being subject to any requirement of reinstatement. (Ins. Code §§ 10113.71, subd. (a).)[4] Those changes also provided McHugh with the right to receive a 30-day written notice sent "after" a premium was due and was unpaid and "prior to the effective date of termination if termination is for nonpayment of premium." (§§ 10113.71, subd. (b)(3) and 10113.72, subd. (c).) Further, those new provisions also gave McHugh the annual right to designate another person to also receive all notices concerning payment of policy premiums, pending lapse, and termination, so as to lessen the risk of an involuntary lapse. (§ 10113.72, subd. (b).)

### D. Protective Life's Premature and Ineffective Termination of McHugh's Policy.

In December 20, 2012, Protective Life sent McHugh a notice reminding him that his premium would be due on January 9, 2013. (Exh. 117; 3 AA 1628.) At the time Protective Life sent that notice,

[4] All further statutory references are to the Insurance Code unless otherwise indicated.

there was no premium that was yet due or which remained unpaid. That notice further indicated that the policy would lapse on February 9, 2013 if a premium was not received. (*Ibid*.)

Thereafter, on January 9, 2013, Protective Life mailed an Annual Report to McHugh, advising him of his policy's status. (Exh. 15.) However, that January 9, 2013 Annual Statement did *not* advise McHugh of the new 60-day grace period applicable to his policy, nor did it inform him of the newly enacted right to 30-days' notice before termination of his policy, or his related right to designate someone else to receive premium notices. (*Ibid*.)

On January 28, 2013, Protective Life mailed to McHugh a "Second Notice of Payment Due," which indicated that no premium payment was yet received and which incorrectly (in light of the newly enacted Insurance Code provisions extending that grace period to 60-days) advised McHugh that if payment was not received by February 9, 2013, the policy would lapse. (Exh. 118; 3 AA 1690.) Based upon Protective Life's assertion in that notice that coverage would lapse on February 9, 2013, that notice gave McHugh only 10 days' written notice before termination of the policy for nonpayment, which also violated the

mandatory 30-day pre-termination notice required by those same newly enacted provisions of the Insurance Code. (§ 10113.71, subd. (b).) Additionally, that notice did not advise McHugh of any other upcoming dates, including that the actual last day to timely make a premium payment was 60-days from January 9, 2013, or March 10, 2013. (Exh. 118.)

On February 9, 2013, Protective Life lapsed and terminated coverage under the policy for nonpayment. Thereafter, on February 18, 2013 (again, well before the end of the 60-day grace period then in effect), Protective Life sent McHugh a further notice advising him that the policy had lapsed and that his coverage had ceased. (Exh. 119; 3 AA 1692.) At about the same time that February 18, 2013 notice was sent by Protective Life, McHugh suffered a serious fall which, from that point until his death, left him disabled, caused him continuing physical pain and discomfort, and required surgery on April 1, 2013. (7 RT 1382, 1398-1399.)

## E. McHugh's Death and Protective Life's Denial of Petitioners' Claims for the Policy Benefits.

McHugh died on June 13, 2013. Following McHugh's death, Petitioner Henselmeier contacted Protective Life to inquire about the status of the policy and to inquire whether a claim could be made. (7 AA 1415-1418.) She was advised by Protective Life that the policy had lapsed, and that no benefits were available. (*Ibid.*) Ultimately, Petitioners filed suit on June 13, 2014, within one year of McHugh's death. (1 AA 24.)

## F. Proceedings in the Trial Court.

Prior to trial, the parties brought cross-motions for summary judgment regarding the application of sections 10113.71 and 10113.72 to McHugh's policy. (See, *e.g.,* 1 AA 436-465.) In ruling on those motions, the trial court concluded that both of those statutes applied, and that such an application was prospective only and not "retroactive." (2 AA 1167-1168.) The trial court ultimately concluded that the legislative intent of those statutes was to protect senior policyholders, and that to decline to apply those statutes to existing policies would thwart the obvious remedial purpose of those statutes. (*Ibid.*) The trial

court also rejected consideration or use of any unofficial materials or informal communications by DOI staff members, sustaining objections to those materials. (*Ibid*.)

Consistent with those rulings on summary judgment, at the outset of trial Petitioners urged the trial court to decide purely legal issues surrounding Protective Life's noncompliance with both the terms of the insurance contract and relevant provisions of the Insurance Code. (3 AA 1400-1408, 1489-1497.) Petitioners also alternatively asked the lower court that if those issues were to be presented to the jury, it should pre-instruct the jury that Protective Life must "strictly comply" with the mandatory requirements of sections 10113.71 and 10113.72 before it could terminate McHugh's policy and effectuate a forfeiture of policy benefits. (3 AA 1444-1462.) Finally, Petitioners revived those same arguments in a Motion for Directed Verdict, again asserting that the application of sections 10113.71 and 10113.72 was an issue of law for the trial court to decide, and that no evidence demonstrated that Protective Life strictly complied with those sections when it applied the wrong grace period and prematurely lapsed and terminated McHugh's policy. (3 AA 1469-1479.)

Ultimately, the jury found on Petitioners' breach of contract claim that: (1) Protective Life and McHugh entered into a contract for insurance; (2) McHugh failed to do what that policy required him to do but was excused from having to do "all, or substantially all, of the significant things the contract required him to do"; (3) all conditions that were required for Protective Life's performance occurred and were not excused; and (4) Protective Life did something that the contract prohibited it from doing. (4 AA 2173-2174.) However, the jury inconsistently then found that Petitioners were not harmed by Protective Life's "failure." (*Ibid.*)

After entry of Judgment in Protective Life's favor, Petitioners renewed their same arguments in a Motion for Judgment Notwithstanding the Verdict ("JNOV") and in a Motion for New Trial. (3 AA 1601-1610, 1631-1886.) Protective Life then opposed those motions (4 AA 1910-2097) and the Petitioners replied. (4 AA 2101-2159.) Ultimately, the lower court denied those motions without elaboration or explanation in its final order. (4 AA 2164.) Petitioners' timely appeal from both the Judgment and the denial of their JNOV motion then followed. (4 AA 2179.)

## G. The Court of Appeal's Opinion.

On appeal, Petitioners maintained that the application of sections 10113.71 and 10113.72 presented an issue of law which should have never been placed before a jury, but instead entitled them to judgment in their favor. They further asserted that if that issue required a jury's determination, the trial court erred by refusing their proffered instruction to the jury that it must "strictly construe" provisions of the Insurance Code against forfeiture. Petitioners further contended that the jury should have never been instructed on McHugh's duty to "mitigate" his damages by seeking "reinstatement" of his already in force policy and thereby permitting Protective Life to do what its policy prohibited it from doing. (*McHugh*, *supra,* 40 Cal.App.5th at 1171 fn. 4.)

Notwithstanding the trial court's summary judgment ruling, finding that sections 10113.71 and 10113.72 applied to McHugh's policy, Protective Life did not subsequently challenge that ruling via cross-appeal. Instead, it merely requested that as an alternative basis for affirming the lower court's Judgment, the Court of Appeal (pursuant to Code Civ. Proc. § 906) should find that ruling was erroneous and that

those statutes only applied to policies issued after their enactment. Without proffering any evidence of impairment at trial, Protective Life further contended that any other application of sections 10113.71 and 10113.72 would be impermissibly "retroactive." Finally, Protective Life invited the Court of Appeal to rely upon informal and unwritten conversations with certain DOI staff members, as well as "SERRF Notices" issued by the DOI regarding acceptable policy forms. Protective Life did so to demonstrate that at least some unidentified DOI staff member or members believed that sections 10113.71 and 10113.72 applied only to policies issued after January 1, 2013. (*McHugh*, *supra,* 40 Cal.App.5th at 1170-1172.)

Rather than address Petitioners' multiple appellate challenges, the Court of Appeal instead accepted Protective Life's invitation and disposed of the entire appeal based upon its construction of sections 10113.71 and 10113.72, finding they only controlled policies issued after January 1, 2013, and therefore did not apply to McHugh's policy. (*McHugh*, *supra,* 40 Cal.App.5th at 1171.) It did so purporting to defer to the DOI's "agency expertise" in the interpretation of those statutes, citing to general policy form "SERRF Notices" as evidence that the DOI

had already concluded that sections 10113.71 and 10113.72 only apply to policies issued after January 1, 2013. (See, *e.g., id.* at 1171-1173, 1177.) Somewhat ironically, the Court of Appeal cited to the previously mentioned *Bentley* federal district court decision to support its view of the significance of those policy form SERFF Notices (*id.* at 1172), even though *Bentley* previously rejected the same argument raised by the insurer in that case and found instead that those SERRF Notices did *not* represent an official position taken by the DOI concerning the interpretation and application of those sections 10113.71 and 10113.72. (*Bentley, supra,* 371 F.Supp.3d at 727 n.1, 728.)

More importantly, the Court of Appeal's use of those policy form SERFF Notices and references to unofficial and private DOI staff communications, both as evidence of official positions taken by the DOI, completely disregarded Insurance Code section 12921.9. That code section makes clear that even public letters or legal opinions signed by the Insurance Commissioner or the Chief Counsel of the Department of Insurance issued "in response to an inquiry from an insured or other person or entity" that discuss either generally or in connection with a specific fact situation the application of the Insurance Code "shall not

be construed as establishing an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, rule, or regulation." Instead, Government Code § 11340.5 (specifically cross-referenced by Ins. Code § 12921.9) mandates that any "guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule" cannot be issued, utilized, enforced, or attempted to be enforced by any state agency (including the DOI) unless it first has been adopted as a regulation and filed with the Secretary of State. (Govt. Code § 11340.5, subd. (b).) Alternatively, section 11340.5 requires that such an agency guideline or criterion be: (1) sent to the Secretary of State; (2) made known to the agency, the Governor, and the Legislature; (3) published in the California Regulatory Notice Register within 15 days of the date of issuance; and (4) made available to the public and the courts. (Govt. Code § 11340.5, subd. (c).)

This is precisely why this Court most recently held in *Heckart v. A-J Self Storage, Inc.* (2018) 4 Cal.5th 749, 769 fn. 9, that "instructions" issued by DOI staff only do not reflect "'careful consideration by senior agency officials' but rather reflect an interpretation prepared 'in an advice letter by a single staff member

. . . .'" (*Id.,* citing *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 13 [similarly confirming that an interpretation of a statute contained in a regulation adopted after public notice and comment is more deserving of deference than one contained in an advice letter prepared only by staff members].)

The Court of Appeal, however, made no attempt to demonstrate that those policy form SERRF Notices, or any other informal hearsay statements made by any DOI staff, met the rigors of a "regulation adopted after public notice" as required by Insurance Code section 12921.9 and Government Code section 11340.5. Nor did it even address this Court's similar directions in *Heckart.* Citing those SERFF Notices, the Court of Appeal instead opined that its construction of sections 10113.71 and 10113.72 was somehow "consistent" with the DOI's "administrative construction" of those statutes (*McHugh*, *supra,* 40 Cal.App.5th at 1177), even though the DOI has never taken an official position on the interpretation or application of those statutes, either way.

Finally, the Court of Appeal was forced to concede that its construction of those statutes was "at odds" with their authors' intent. (*McHugh*, *supra,* 40 Cal.App.5th at 1177.) Indeed, the Court of Appeal acknowledged that the relevant legislative history confirmed those authors intended the statutes to apply to all in force life insurance policies, whenever issued. (*Ibid.* [quoting that history which made clear that "[a]ccording to the author, the bill provides consumer safeguards from which people who have purchased life insurance coverage, especially seniors, would benefit"].) But the Court of Appeal then attempted to draw a pedantic distinction between what the authors of those statutes intended, and what the Legislature writ large must have intended instead by the language it used in those statutes, a perfectly circular argument which only acted to confirm the Court's earlier "plain meaning" construction of those statutes. (*Ibid.*)

Based upon the foregoing, the Court of Appeal concluded that sections 10113.71 and 10113.72 apply only to policies issued after January 1, 2013, and affirmed the lower court's Judgment on that alternative basis. (*McHugh*, *supra,* 40 Cal.App.5th at 1177-1178.)

## IV.

## DISCUSSION

### A. This Court Should Find That the Provisions of Insurance Code Sections 10113.71 and 10113.72 Apply to All Life Insurance Policies In Force on Their Effective Date, January 1, 2013, Regardless of the Date Those Policies Were Originally Issued.

#### 1. The Relevant Language of McHugh's Policy Confirms That It Remained In Force – Including During Any Applicable Grace Periods – Until It Is Properly Terminated.

As a fundamental principle, any analysis of insurance coverage must start with the language of the policy in question. (*Delgado v. Inter. Exchange of the Automobile Club of So. Calif.* (2009) 47 Cal.4th 302, 308 ["We look first to the terms of the policy"].) As a default, McHugh's policy states that Protective Life is obligated to pay the policy benefits where the policy is "in force" at the time of the insured's death. (1 AA 107.) Once issued, that policy remained in force unless validly terminated. (See, *e.g., 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]; see also *National Auto. & Casualty Ins. Co. v. California Casualty Ins. Co.* (1983) 139 Cal.App.3d 336, 341 [policy remained "in force" because insurer failed to strictly comply with statutorily imposed notice requirements before cancellation of policy could be affected].)

Moreover, as McHugh's policy provisions further make clear, coverage remained in force during the grace period allowed for premium payments to be made by him. (1 AA 117 ["This policy will continue in force during the grace period"].) Consequently, the only basis for Protective Life to terminate that policy was if a premium payment was not made by the end of the applicable grace period. Any time prior to the running of that grace period, Protective Life pledged in that policy itself that it would remain "in force." (*Ibid.*)

Consequently, the issue of whether the policy's original 31-day grace period was extended to 60 days through the enactment of sections 10113.71 and 10113.72 is fundamental to determining coverage under McHugh's policy, as well as coverage under countless other life insurance policies similarly issued or delivered in California. If it was extended, then Protective Life's purported termination of McHugh's policy during that extended grace period was a *legal nullity*, with the policy therefore remaining in force up through the time of McHugh's subsequent death a few months later, in June of 2013. (*Mackey, supra*, 105 Cal.App.4th at 1258; *Kotlar*, *supra*, 83 Cal.App.4th at 1121-1122.)

Similarly important is how those statutes also separately mandate when notice of termination must be given by insurers (at least 30-days *prior* to the date of cancellation), and provide insureds with the opportunity to designate another person to also receive any termination notices to prevent them from being inadvertently missed. Thus, the application of those statutes to McHugh's policy – and to any other life insurance policy issued or delivered in California before 2013 – now requires this Court's careful consideration.

## 2. The Plain Language of Sections 10113.71 and 10113.72 Contains No Temporal Qualifiers, But Simply Dictates That Those Provisions Should Apply to Every In Force Policy.

As a matter of background, section 10113.71 provides:

> **10113.71. Provision providing for grace period from premium due date; notice of pending lapse or termination of life policy.**
>
> (a) Each life insurance policy issued or delivered in this state shall contain a provision for a grace period of not less than 60 days from the premium due date. The 60-day grace period shall not run concurrently with the period of paid coverage. The provision shall provide that the policy shall remain in force during the grace period.
>
> (b)
>
> (1) A notice of pending lapse and termination of a life insurance policy shall not be effective unless mailed by the insurer to the named policy owner, a designee named pursuant to Section 10113.72 for an individual life insurance policy, and a known assignee or other person having an interest in the individual life insurance policy, at least 30 days prior to the effective date of termination if termination is for nonpayment of premium.
>
> (2) This subdivision shall not apply to nonrenewal.

(3) Notice shall be given to the policy owner and to the designee by first-class United States mail within 30 days after a premium is due and unpaid. However, notices made to assignees pursuant to this section may be done electronically with the consent of the assignee.

(c) For purposes of this section, a life insurance policy includes, but is not limited to, an individual life insurance policy and a group life insurance policy, except where otherwise provided.

Similarly, section 10113.72 states as follows:

**10113.72. Applicant given right to designate person to receive notice of lapse or termination.**

(a) An individual life insurance policy shall not be issued or delivered in this state until the applicant has been given the right to designate at least one person, in addition to the applicant, to receive notice of lapse or termination of a policy for nonpayment of premium. The insurer shall provide each applicant with a form to make the designation. That form shall provide the opportunity for the applicant to submit the name, address, and telephone number of at least one person, in addition to the applicant, who is to receive notice of lapse or termination of the policy for nonpayment of premium.

> (b) The insurer shall notify the policy owner annually of the right to change the written designation or designate one or more persons. The policy owner may change the designation more often if he or she chooses to do so.
>
> (c) No individual life insurance policy shall lapse or be terminated for nonpayment of premium unless the insurer, at least 30 days prior to the effective date of the lapse or termination, gives notice to the policy owner and to the person or persons designated pursuant to subdivision (a), at the address provided by the policy owner for purposes of receiving notice of lapse or termination. Notice shall be given by first-class United States mail within 30 days after a premium is due and unpaid.

As explained above, the Court of Appeal broadly concluded that because sections 10113.71 and 10113.72 were enacted in 2012 and only became effective at the beginning of 2013, they did not apply to McHugh's policy, which was originally issued in 2005 and was nearing its anniversary date in 2013. One of the rationales for that conclusion was that only changes to the Insurance Code which are in effect at the time a policy is *originally issued* control the provisions of that policy moving forward. But that conclusion is flawed for several important reasons, not the least of which is that it ignores the well-settled principle that applicable changes to the Insurance Code are "read into"

and applied to policies issued previously where they remain "in force" at the time those changes are enacted. (See Ins. Code § 41 ["All insurance in this State is governed by the provisions of this code"]; see also *20th Century Insurance Co. v. Garamendi* (1994) 8 Cal.4th 216, 240 [confirming that the state's regulation of insurance is squarely within its police power].) Consequently, even though the protections guaranteed by sections 10113.71 and 10113.72 were not in the language of McHugh's policy when it was originally issued, they are incorporated into all "in force" policies by law. (*State Farm Fire & Cas. Co. v. Superior Court* (1989) 210 Cal.App.3d 604, 610; see also *Cal Farms Ins. Cos. v. Fireman's Fund Am. Ins. Co.* (1972) 25 Cal.App.3d 1063, 1071 [where "there was a conflict between the policy provision and the statute, [] the effect of our holding is to automatically amend the policy provision to conform to the requirements of the statute"].) Consequently, as of January 1, 2013, McHugh's Protective Life policy was deemed to contain a 60-day grace period, a right to a 30-day termination notice, a right to annually designate, and all other protections mandated by sections 10113.71 and 10113.72. While Petitioners further maintain that all of those provisions should have

been explained by Protective Life in the January 9, 2013 Annual Report it mailed to McHugh (Exh. 15), regardless, on January 1, 2013, his policy was deemed to contain all of those provisions. (Ins. Code § 41; see also *Mitchell v. United National Ins. Co.* (2005) 127 Cal.App.4th 457, 471 [citing § 41 to read into the provisions of a fire insurance policy the anti-fraud and disclosure provisions contained elsewhere in the Insurance Code applicable to all insurance policies].)

Such a construction of sections 10113.71 and 10113.72 is also consistent with their plain language. It is well-settled that if statutory language is clear and unambiguous, courts need not proceed any further. (*Herman v. Los Angeles County Metropolitan Transportation Authority* (1999) 71 Cal.App.4th 819, 823.) Here, the operative language of section 10113.71 concerning the application of its 60-day grace period is found in its inclusive first word "each," and in its mandatory directive "shall": "*Each* life insurance policy issued or delivered in this state *shall* contain a provision for a grace period of not less than 60 days from the premium due date." (Ins. Code § 10113.71, subd. (a) [emph. added].) Explicitly, "each" means *every policy already issued or delivered* in California, and "shall" is a self-evident mandatory

directive. (See *Larson v. State Personnel Bd.* (1994) 28 Cal.App.4th 265, 276 ["The ordinary meaning of 'shall'. . . is of mandatory effect, while the ordinary meaning of 'may' is purely permissive in character"].)

Further, touchstone language also contained in section 10113.71 – "issued or delivered" – deliberately employs the *simple past tense* of those two words, indicating that the policies to which it applies have already been either "issued or delivered." (Oxford English Dictionary Online (3d ed. 2001) [defining "past tense" as a verb tense "expressing an action that has happened or a state that previously existed"].) As this Court recently observed in *Dr. Leevil, LLC v. Westlake Health Care Center* (2018) 6 Cal.5th 474, 479, when the Legislature uses the past tense of a verb in statutory language to describe an act, it strongly suggests completion of the act so described. (See *Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 776 [where this Court similarly confirmed that "[i]n construing statutes, the use of verb tense by the Legislature is considered significant"]; see also *City of South San Francisco v. Board of Equalization* (2014) 232 Cal.App.4th 707, 722 [construing the statutory language "imposed" contained in Rev. & Tax. Code § 7205 and finding that the Legislature's use of the past tense of

that verb indicated a completed act]; *In re Valerie A.* (2007) 152 Cal.App.4th 987, 1008 [similarly examining the past tense of the verb "shared" used in Welf. & Inst. Code § 366.26 to demonstrate the Legislature's intent to look "back in time" to an action that has previously occurred].) Indeed, it is notable that the Legislature did not use a prospective tense of those two words (speaking instead of policies "to be issued" or "to be delivered"), which would be more consistent with some action to occur in the future, only after that statute's enactment. Instead, its use of the past tense of those two words in section 10113.71 was intended to describe with specificity those policies to which that statute applies (*i.e.,* policies already "issued or delivered"), further supporting the plain meaning application of section 10113.71 to policies already in force in 2013. (See *Klein v. United States of America* (2010) 50 Cal.4th 68, 80 [confirming that "courts must strive to give meaning to every word in a statute and to avoid constructions that render words, phrases, or clauses superfluous"].)

Similarly, the language of section 10113.72 plainly requires at subd. (b) that insurers "shall" notify policyholders of the right to designate, and at subd. (c) that no policy "shall" lapse or be lapsed

without 30-days prior written notice. (Ins. Code § 10113.71, subds. (b) & (c).) Significantly, section 10113.72 directs that action in subds. (b) and (c) without any textual reference to those policies being "issued or delivered," only further demonstrating that they are obligations which bind insurers irrespective of when their policies were originally issued or delivered. (*Droeger v. Friedman, Sloan, & Ross* (1991) 54 Cal.3d 26, 38 [confirming the interpretative rule that where statutory language is clear, courts must follow its plain meaning].) The same is true with the language of section 10113.71. (See, *e.g.,* Ins. Code §10113.71, subd. (b)(1) [nowhere mentioning a requirement of "issued or delivered" in the context of flatly providing that a notice of pending lapse and termination of a life insurance policy "shall not be effective" unless 30-days prior notice is provided].) An interpretation requiring that 30-day notice to be required *in all circumstances* makes sense because the statute's various subsections are intended to impose independent obligations on insurers, and are deliberately couched in those terms.

But perhaps most importantly, the language the Legislature chose for sections 10113.71 and 10113.72 nowhere indicates that their mandatory provisions apply only to policies issued after a certain date.

To the contrary, that language expresses no such limitations, qualifiers, or exemptions to their mandates, or any other indication that they apply only to newly issued insurance policies. In the absence of such temporal direction, it was error for the Court of Appeal to have inserted into those statutes what the Legislature did not include. (*In re Hoddinott* (1996) 12 Cal.4th 992, 1002 [courts may not alter the words of a statute or insert qualifying provisions to accomplish a purpose or assumed intention that does not appear either on the statute's face, or from its language, or from its legislative history]; *City of Sacramento v. Public Employees' Retirement System* (1994) 22 Cal.App.4th 786, 793 [the meaning of a statute is to be sought in language used by the Legislature and words may not be inserted in statute under guise of interpretation].)

In short, by generally mandating that all policies already "issued or delivered . . . shall contain" a 60-day grace period, and then independently directing that insurers cannot lawfully lapse policies without 30-days' prior written notice (irrespective of when those policies were originally "issued or delivered"), the Legislature made clear its intent to *regulate the manner in which all policies in force on January 1,*

*2013 can lawfully be lapsed going forward*. If, on the other hand, the Legislature intended to limit the application of those statutes only to subsequently issued policies (as the Court of Appeal incorrectly concluded), it would have phrased those statutes in a markedly different manner, and would have made specific reference to *the time, date, or condition after which they were meant to apply*. The Legislature clearly knew how to do so.[5] Simply put, the Court of Appeal's attempts

[5] 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 § 10117.5 ["no disability insurer contract that covers hospital, medical, or surgical benefits that is issued, amended, renewed, or delivered on and after January 1, 2002, shall contain a provision . . ."]; Ins. Code § 10121 ["every self-insured employee welfare benefit plan issued or amended on or after July 1, 1972, which provides benefits to the employee's dependents, shall contain a provision granting immediate accident and sickness coverage . . ."]; Ins. Code § 10178.5 ("every self-insured employee welfare benefit plan issued, amended, or renewed on and after January 1, 1987 . . . shall contain a provision . . ."]; 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 § 10352 ["every policy of disability insurance issued, amended, or renewed on and after January 1, 1987, that offers coverage for medical transportation services, shall contain . . ."]; Ins. Code § 10353 ["every policy of disability insurance issued, amended, or renewed on or after January 1, 1992, that offers coverage for perinatal services shall contain a provision . . ."]; Ins. Code § 10127.9 ["every policy of individual life

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to graft a non-existent temporal qualifier onto the application of sections 10113.71 and 10113.72 is simply at odds with the Legislature's intent plainly expressed in the unambiguous language it chose for those two companion statutes.

### 3. Both the Broad Remedial Purpose of Sections 10113.71 and 10113.72 and Their Legislative History Further Support Their Application to Policies Issued or Delivered Prior to 2013.

In addition to the plain language of sections 10113.71 and 10113.72, the public policy that compelled their enactment further bolsters their application to life insurance policies "issued or delivered" prior to 2013. Importantly, the interpretation of insurance policy provisions of this character cannot be made as a didactic exercise in semantics; consideration must be given to public policy as expressed in pertinent statutes and in decisional articulation. (*Allstate Ins. Co. v. Smith* (1970) 9 Cal.App.3d 898, 902 902 [confirming that when changes to the Insurance Code are remedial in nature, they should be liberally

(continued from the previous page)

insurance which is initially delivered or issued for delivery in this state on and after January 1, 1990, shall have . . ."].

construed to most broadly carry out the Legislature's remedial goals].) The history of sections 10113.71 and 10113.72 convincingly demonstrates how the Legislature concluded their enactment was required to protect existing and vulnerable policyholders (the elderly and disabled, in particular) from inadvertently losing their life-long investment in important life insurance coverage.

For example, in a May 2, 2012 hearing before the Assembly Committee on Insurance considering the enactment of AB 1747, the authors of that legislation described its purpose as providing "consumer safeguards from which people who have purchased life insurance coverage (past tense), especially seniors, would benefit." (1 AA 610-611 [further describing those to be protected as "policyholders" who might inadvertently lose their existing life insurance coverage].) Similarly, the Senate Insurance Committee in a June 13, 2012 hearing also viewed the purpose of AB 1747 to prevent existing policyholders, especially seniors, from inadvertent lapses in their coverage. (1 AA 614-617 [also noting how there was no opposition to that legislation and that in addition to numerous consumer and senior groups, it was also supported by the "California Department of Insurance"].) A further

Senate reading of AB 1747 confirmed that the 30-day grace period the bill intended to enlarge to 60-days was "set in regulation but not in statute," and that the legislation would therefore apply to existing policyholders. (1 AA 618-621; see also *id.* at 622-625 [same]; *id.* at 627 [describing how the changes the bill contemplated would apply to existing "policyholders"]; *id.* at 629 [further detailing how the proposed changes to the Insurance Code were meant to protect "people who had faithfully paid their life insurance policies for years," but who "accidentally let their policy lapse (in some cases, because they were being hospitalized when the bill came; in others, as a result of a mail mix-up or forgetfulness, etc.)"]; *id.* at 630 [also explaining how the additional protections are needed to assist existing "policyholders" from inadvertently losing existing life insurance coverage]; *id.* at 633-635 [same, noting no opposition to that legislation].)

Further clarifying the purpose the Legislature expected sections 10113.71 and 10113.72 to serve, the Association of California Life and Health Insurance Companies ("ACLHIC") withdrew any opposition to AB 1747 and touted how it shared the legislative goal of helping "policyholders keep their valuable life insurance coverage in place" (1

AA 637.) Of course, by that reckoning, the insurance industry indicated through ACLHIC that it understood and agreed that the changes imposed by AB 1747 were intended to assist existing "policyholders" to keep their already existing "insurance coverage in place," and not to require different grace periods and cancellation notices just for policies issued to new potential consumers at some indefinite point in the future. That same understanding of AB 1747's purpose and application was shared universally by its proponents. (1 AA 645-663.) And notably, the DOI (both through Michael Martinez, its Deputy Commissioner and Legislative Director; and separately through Dave Jones, its Insurance Commissioner) expressed "strong" support for the passage of AB 1747 to protect "policyholders" from inadvertently losing existing insurance coverage, noting how its "additional safeguards would especially benefit seniors and offer more protection for consumers." (1 AA 653-655.)

In short, it is no exaggeration to say that AB 1747's legislative history unequivocally demonstrates how that remedial legislation was needed to provide consumer safeguards for people who had already purchased life insurance coverage (*i.e.,* "policyholders"), especially

seniors, by placing affirmative burdens on insurers to provide longer grace periods, additional notices of termination, and the right to designate others to also receive those notices before a policy could be lawfully terminated.

Yet under the Court of Appeal's construction of those statutes, any policy issued before 2013 (even on December 31, 2012) would be deemed unworthy of that same protection, notwithstanding that it remained "in force" at the time those statutes took effect. Such an interpretation is strained and illogical and has no support in AB 1747's legislative history. Indeed, after repeatedly lauding the goal of providing additional protection to existing "policyholders" (especially the elderly and disabled) from inadvertent lapses, it cannot be that the Legislature intended to allow insurers to continue lapsing large swaths of annually renewing policies simply because they 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. (See *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 Equalizat*ion (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].) This Court should *not* presume that the Legislature viewed itself as powerless to standardize grace periods and cancellation notices applicable to all in force 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 (see, *e.g.,* Ins. Code § 41), this Court should conclude that the Legislature intended sections 10113.71 and 10113.72 to be applied to any policy in force in 2013, like McHugh's policy.

#### 4. As Such an Application of Sections 10113.71 and 10113.72 Would Be Prospective Only and Not Retroactive, It Would Not Substantially Impair Any Vested Contractual Rights.

The Court of Appeal found that sections 10113.71 and 10113.72 were not impermissibly retroactive because it concluded they only applied to policies issued after January of 2013. For the foregoing

reasons, Petitioners contend that construction and application of sections 10113.71 and 10113.72 is irreconcilable with both their plain language and their legislative purpose. But even when applied to policies (like McHugh's) issued before 2013, they would neither be impermissibly retroactive nor substantially impair vested contractual rights.

A statute has retrospective effect when it substantially changes the legal consequences of past events or past vested contractual rights. (See, *e.g., Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243.) But by originally finding that sections 10113.71 and 10113.72 applied to Protective Life's conduct and McHugh's policy after January 1, 2013, the trial court only applied those statutes *prospectively*, not retrospectively. To be sure, no conduct prior to January 1, 2013 was ever put at issue; Protective Life was free to lapse policies on shortened notice and grace periods prior to that date. Rather, as the trial court correctly reasoned, those statutes were properly applied to Protective Life's conduct *after their passage*. Doing so was entirely *prospective*, as mandating additional notices and a longer grace period for lapses after the effective date of those statutes

did nothing to change the legal consequences of conduct before that time. Instead, those statutes established primarily *procedural changes* – new grace periods and related notice requirements which were not before codified but were embodied in regulation only – which applied only to *future conduct* by Protective Life. As this Court long ago explained, a statute "is not made retroactive merely because it draws upon facts existing prior to its enactment . . . . [Instead,] [t]he effect of such statutes is actually prospective in nature since they relate to the procedure to be followed in the future." (*Tapia v. Superior Court* (1991) 53 Cal.3d 282, 288, quoting *Strauch v. Superior Court* (1980) 107 Cal.App.3d 45, 49.) For that reason, "it is a misnomer to designate [such statutes] as having retrospective effect." (*Ibid.*)

Such a finding by the trial court was also consistent with the canon of statutory construction that dictates that courts should presume a statute to operate prospectively "absent an express declaration of retrospectivity or a clear indication that the electorate, or the Legislature, intended otherwise." (See *People v. Hayes* (1989) 49 Cal.3d 1260, 1274.) This Court's prior decision in *Interinsurance Exch. of Auto Club v. Ohio Cas. Ins.* (1962) 58 Cal.2d 142 does not compel a

contrary result. In that case, the issue was the effect of a new statute on the legality of a particular policy provision which was illegal when it was previously inserted into that policy. In considering the retroactivity question in that limited context, this Court simply held that the subsequent enactment of a new statute *would not make legal what was previously illegal*. (*Id.* at 138 ["the law here is, and should be, that a contract, or provision in a contract, which contravenes public policy when made is not validated by a later statutory change in that public policy"].) That conclusion was further buttressed by the fact that there was nothing in the legislative history of that statute which suggested an intent to have it applied retroactively. (*Id*. at 149-150.) In short, any retroactivity argument against the application of sections 10113.71 and 10113.72 is a classic red herring. Petitioners have always maintained that the requirements of those statutes were only intended to be applied *prospectively*. That, in fact, is the only way they were applied in this case: to conduct which Protective Life took *after* those statutes became effective. (*Tapia, supra,* 53 Cal.3d at 288.)

Similarly, such an application of sections 10113.71 and 10113.72 would not substantially impair any vested contract rights. The constitutional prohibition against contract impairment does not exact a rigidly literal fulfillment. Rather, it demands that contracts be enforced according to their "just and reasonable purport;" not only is the existing law read into contracts in order to fix their obligations, but the reservation of the essential attributes of continuing governmental power is also read into contracts as a postulate of the legal order. (*Allen v. Board of Administration* (1983) 34 Cal.3d 114, 119-120 [further noting how the contract clause and the principle of continuing governmental power "are construed in harmony; although not permitting a construction which permits contract repudiation or destruction, the impairment provision does not prevent laws which restrict a party to the gains reasonably to be expected from the contract"]; see also *People v. Gipson* (2004) 117 Cal.App.4th 1065, 1069-1070 [finding that a contracts clause challenge fails because the plea bargain in question was deemed to incorporate and contemplate not only the existing law but the reserve power of the state to amend the

law or enact additional laws for the public good and in pursuance of public policy"].)

At no point in the proceedings below did Protective Life demonstrate anything resembling "substantial impairment" of any vested contractual rights. *No such evidence was proffered by Protective Life at trial, and none otherwise exists in the record*. Moreover, in the absence of evidence of impairment, it should be noted that creating and sending form notices populated with policy-owner and designee information is a *de minimis* obligation with, at most, only a marginal impact on preexisting contracts, especially where *Protective Life and other insurers routinely send renewal and premium payment notices anyway*. Such requirements therefore cannot constitute "substantial impairment" of any right Protective Life previously enjoyed under McHugh's policy. (*20th Century Ins. Co. v. Superior Court* (2001) 90 Cal.App.4th 1247, 1268-1272.) This is especially so where the insurance industry is "heavily regulated and one in which further regulation can reasonably be anticipated." (*Id.* at 1269 [citations omitted]; *ibid.* [further explaining that whether the state actively

regulates the industry at issue frames the parties' reasonable expectations and minimizes any potential statutory impairment].)

At bottom, nothing in sections 10113.71 and 10113.72 stops Protective Life or any other insurer from lawfully exiting any insurance contract if a policyowner fails to honor his or her payment obligations. It only needs to provide a reasonable grace period and sufficient notice, *de minimis* requirements which pale in comparison to the inadvertent and substantial financial losses those remedial statutes were meant to prevent. (*Id.* at 1270-1271 [reasoning that a "significant and legitimate public purpose" such as "the remedying of a broad and general social or economic problem" easily overcomes any minimal adjustment of contractual rights arising out of the Legislature's statutory enactment of reasonable conditions for the protection of the public from sharp insurance practices].) Protective Life cannot seriously contend that protecting vulnerable policyholders (especially seniors) from losing long-established life insurance coverage due to accidentally missed premium payments is *not* a legitimate public policy objective. (See 1 AA 580-694 [legislative history of sections 10113.71 and 10113.72, confirming that public policy purpose for their enactment].) Because those statutes

accomplish those objectives in a manner that imposes little to no additional burden on insurers like Protective Life, they are constitutional regardless of even hypothetical (and at most *minimal*) resulting contractual impairment. (*20th Century Ins. Co., supra,* 90 Cal.App.4th at 1268-1272.)

### 5. The Net Effect of the Proper Application of Sections 10113.71 and 10113.72 to McHugh's Policy Is That It Was Never Properly Terminated by Protective Life and Therefore Remained "In Force" at the Time of His Death.

The record below demonstrated that Protective Life terminated McHugh's policy on February 9, 2013, well before the 60-day grace period imposed by section 10113.71 expired. Indeed, Protective Life sent McHugh two notices informing him that his policy would be terminated if the premium payment was not received by February 9, 2013, an improperly calculated grace period which did not comply with section 10113.71. (See Exh. 117, 3 AA 1628 [Dec. 20, 2012 "Premium Due" notice]; Exh. 118, 3 AA 1690 [Jan. 28, 2013 "Second Premium Due" notice].) Having not received that premium by February 9, 2013, Protective Life immediately terminated McHugh's policy on that date, even though the grace period extended by section 10113.71 was still in

effect through March 10, 2013. (See Exh. 119, 3 AA 1692 [Protective Life's Feb. 18, 2013 notice to McHugh confirming that it terminated his policy on Feb. 9, 2013, consistent with its other prior notices to McHugh].)

In doing so, Protective Life prematurely terminated a policy which it had pledged (in the policy itself) to keep in force during any applicable grace period. (1 AA 117.) That premature termination – robbing McHugh of the essence of his contractual benefit (life insurance coverage, including during all applicable grace periods) – amounted to a *material breach of that agreement*, as the jury correctly found. (4 AA 2173 [where the jury concluded that Protective Life did something that the contract prohibited it from doing, and that McHugh was excused of any further performance].)[6] Given its materiality, that breach further relieved McHugh of any further performance under that contract. (*Brown v. Grimes* (2011) 192 Cal.App.4th 265, 277-278 [confirming that "when a party's failure to perform a contractual obligation constitutes a

[6] Significantly, *Bentley* found that the insurer's failure to provide the required notice of termination before cancelling coverage was all that was required to constitute a material breach entitling the insured class to damages in the amount of their policies' proceeds. (*Bentley, supra,* 371 F.Supp.3d at 739-741.)

material breach of the contract, the other party may be discharged from its duty to perform under the contract"]; *De Burgh v. De Burgh* (1952) 39 Cal.2d 858, 863 ["in contract law a material breach excused further performance by (an) innocent party"].) Further, a breaching party like Protective Life cannot seek enforcement of a contract it has previously refused to perform. (Cf. *Filet Menu, Inc. v. C.C.L. & G., Inc.* (2000) 79 Cal.App.4th 852, 861 [party breaching divisible contract cannot enforce any portion of that contract it has not performed].)

Importantly, not only did Protective Life prematurely terminate McHugh's policy contrary to that policy's own provisions and applicable law, it further informed McHugh of that terminated status and offered to "reinstate" a policy which was still in force at that time. *As such, that termination notice by Protective Life was a watershed event, as it prejudiced McHugh and caused him to believe that his policy had been terminated when, in fact, it remained in force and did not need to be "reinstated."* (See *Scott v. Fed. Life Ins. Co.* (1962) 200 Cal.App.2d 384, 394 [reasoning that an insurer's improper notice of lapse, relied upon by the insured, "prevented the performance of the condition in the policy requiring payment of premium," and as such, the forfeiture provision of

the policy "clearly cannot be given the effect of shielding the (insurer) from the consequences of its own misrepresentation"].) Relying on Protective Life's representation, McHugh was led to believe that he had to apply for and obtain "reinstated" coverage from Protective Life, instead of simply paying the premium of his existing policy within the appropriate 60-day grace period. (7 RT 1377-1380; 2 AA 867-875.)[7]

Parenthetically, had Protective Life not prematurely terminated McHugh's policy on February 9, 2013 and instead waited until March 10, 2013 to terminate that policy, both the policy provisions and section 10113.71 could arguably have been satisfied. But by sending its premature termination notice to McHugh, and then offering to "reinstate" a policy already in force at that time, Protective Life misrepresented the status of McHugh's coverage, impacting McHugh's decision at that time to pay that premium, to seek "reinstatement" on potentially new or different terms, or to seek alternative coverage

[7] *Nota bene:* Protective Life's offer to "reinstate" McHugh's in force policy was not a method allowed under either section 10113.71 or section 10113.72. When a statute has required that the valid termination of an insurance policy can only occur through prescribed methods and procedures, strict compliance with those methods and procedures is required. (*Kotlar, supra*, 83 Cal.App.4th at 1120-1121.)

elsewhere. Indeed, it cannot be overemphasized that any such offer by Protective Life to "reinstate" McHugh's then in force policy would have restarted the two year period for the Contestability and Suicide provisions which McHugh had already satisfied several years previously, making that "reinstated" policy materially different (and far less valuable) than the policy McHugh already had in force at that time.

But perhaps most importantly, by failing to provide McHugh with proper notice concerning the applicable grace period, and then prematurely terminating McHugh's policy while the correct grace period was still running, Protective Life did not validly terminate McHugh's policy consistent with either the policy language or applicable law. As such, its attempted termination of that policy was a *legal nullity*, with the policy therefore remaining in force up through the time of McHugh's subsequent death a few months later, in June of 2013. (§ 11013.71, subd. (b) [making "ineffective" nonconforming notices]; see also *Mackey, supra*, 105 Cal.App.4th at 1258; *Kotlar*, *supra*, 83 Cal.App.4th at 1121-1122.)

Beyond McHugh's particular situation, there are also sound policy reasons why an insurer like Protective Life cannot validly terminate an insurance contract without strictly complying with restrictions found in that contract or in applicable statutory law. Public policy favors protecting beneficiaries of insurance policies from losing benefits if that result can be accomplished without doing violence to the terms of the parties' contract, and if reasonably possible in light of the circumstances. (See, *e.g., Lee v. Industrial Indemn. Co., Inc.* (1986) 177 Cal.App.3d 921, 924.) The compulsory nature of section 11013.71's provisions, mandating that terminations "shall not be effective" unless an insurer precisely complies with its requirements, only further demonstrates the Legislature's desire to reinforce that important public policy. (Ins. Code § 11013.71, subd. (b).) Requiring strict adherence to termination restrictions promotes certainty in the insuring arrangement, and properly places the burden on insurers who administer those policies, and who typically stand to benefit from claimed terminations of coverage. That burden of strict compliance on life insurers further recognizes the likely situation that policyholders will be deceased when disputes about the payment of life insurance

benefits subsequently arise, leaving them unable to testify or to counter arguments by insurers concerning whether a forfeiture for non-payment, in fact, occurred.

In sum – where sections 11013.71 and 11013.72 are properly applied to this case – the policy continued in force beyond March 10, 2013 and through McHugh's death in June of 2013 for two related reasons: (1) because Protective Life never terminated the policy in a manner which conformed with either the policy provisions or the applicable law, making its termination ineffective and void; and (2) because its premature termination materially breached its insuring agreement and prejudiced McHugh, thereby relieving McHugh of any further performance under that agreement. Under those circumstances, Petitioners are entitled to recover the policy benefits from Protective Life. (Ins. Code § 10111.)

Finally, for that short period of time that 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 is still entitled to receive the full benefits it bargained for under that insuring agreement – policy premiums for that covered period.

### B. This Court Should Similarly Clarify That the Lower Courts May Not Rely Upon Unauthorized Positions and Communications by DOI Staff Regarding the Construction of Sections 10113.71 and 10113.72.

As explained above, section 12921.9 of the Insurance Code makes clear that any letter or legal opinion issued by the DOI Commissioner or DOI Chief Counsel "shall not be construed as establishing an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, rule, or regulation." (See Ins. Code § 12921.9 [establishing that even public letters or legal opinions signed by the Insurance Commissioner or the Chief Counsel of the Department of Insurance issued "in response to an inquiry from an insured or other person or entity" that discuss either generally or in connection with a specific fact situation the application of the Insurance Code "shall not be construed as establishing an agency guideline, criterion, bulletin,

manual, instruction, order, standard of general application, rule, or regulation"].) Instead, Government Code § 11340.5 (specifically cross-referenced by Ins. Code § 12921.9) mandates that any "guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule" cannot be issued, utilized, enforced, or attempted to be enforced by any state agency (including the DOI) unless it first has been adopted as a regulation and filed with the Secretary of State. (Govt. Code § 11340.5, subd. (b).) Alternatively, section 113405 requires that such an agency guideline or criterion be: (1) sent to the Secretary of State; (2) made known to the agency, the Governor, and the Legislature; (3) published in the California Regulatory Notice Register within 15 days of the date of issuance; and (4) made available to the public and the courts. (Govt. Code § 11340.5, subd. (c).)

Section 11340.5 is part of the Administrative Procedures Act ("APA"). The APA sets forth procedures for the adoption of administrative regulations and further provides that a failure to follow those procedures voids the agency action. (Gov. Code § 11340.5, subd. (a).) A regulation includes a general rule that interprets the law enforced by the agency. (Gov. Code § 11342.600; see also *Tidewater*

*Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 571.) An interpretation is subject to the APA unless it is "essentially rote, ministerial, or . . . repetitive of . . . the [law's] plain language." (*Morning Star Co. v. State Bd. of Equalization* (2006) 38 Cal.4th 324, 336-337.) A rule that violates the APA is void regardless of whether that interpretation is a correct reading of the law. (*Id*. at 336-337.)

The purpose of section 11340.5 is to prevent "underground regulations," rules which only the government knows about. (*Kings Rehabilitation Center, Inc. v. Premo* (1999) 69 Cal.App.4th 215, 217.) Yet in this case, the Court of Appeal made no effort to demonstrate that the DOI – either through certain staff members' informal responses to insurance industry questions, or by providing policy form guidance through its SERRF Notices – made any effort to comply with either Insurance Code section 12921.9 or Government Code section 11340.5.

Again, the Court of Appeal appeared to be confused by the limited and proper use of those informal department communications and policy form SERFF Notices, neither of which constitute official positions taken by the DOI itself concerning the interpretation and application of the statutes in question. Moreover, it took that position

notwithstanding this Court's recent admonitions in *Heckart,* 4 Cal.5th at 769 fn. 9, that "instructions" issued by DOI staff should *not* be misconstrued as the position taken by the DOI itself. Similarly at odds with the Court of Appeal's Opinion, Judge Gee in *Bentley* correctly concluded that those same SERFF Notices issued by the DOI do not interpret sections 10113.71 and 10113.72, are not intended to represent an official position or interpretation of those statutes by the DOI, and are meant instead only to provide sample policy forms for the industry's adaptation. (*Bentley, supra*, 371 F.Supp.3d 723, 727-728.)

Yet the Court of Appeal's Opinion went so far as to equate those policy form SERFF Notices with the DOI's "administrative construction" of sections 10113.71 and 10113.72. Doing so was error, *as even the DOI does not view them as such*. Specifically, in support of their Petition for Review, Petitioners previously asked this Court to take judicial notice (which it did) of a declaration filed by Michael J. Levy, Deputy General Counsel for the DOI. Mr. Levy's declaration was filed in response to a subpoena issued by insurer-defendants in *Moriarty v. Am. Gen. Life Ins. Co.*, Case No. 17-cv-01709 BTM-BGS

(S.D. Cal.), seeking the deposition testimony of certain DOI senior officials regarding the construction and application of sections 10113.71 and 10113.72. Through the Attorney General's Office, the DOI moved to quash that subpoena, asserting under Insurance Code section 12921.9, subd. (b) and this Court's further guidance in *Heckart*, that the opinions of any DOI staff could *not* represent an official position taken on the interpretation or application of those statutes and that therefore their deposition testimony on those issues would be irrelevant and entitled to no legal weight whatsoever. (See Exh. A to the Request for Judicial Notice ["RJN"] previously filed in support of Petitioners' Petition for Review, and granted by Order of this Court dated 01/29/20.) In support of that motion, Mr. Levy similarly declared under oath that any of the testimony sought by those deposition subpoenas would only result in eliciting the personal opinions of DOI staff members which would not otherwise represent any official position of the DOI taken on the application of sections 10113.71 and 10113.72. (RJN at pp. 27-29.) In doing so, Mr. Levy also relied upon both Insurance Code section 12921.9 and this Court's *Heckart* opinion. (RJN at p. 29.) Thus, it is fair to say that the DOI does not regard either unofficial staff

communications or its policy form SERFF Notices as constituting its own official position regarding the interpretation and application of sections 10113.71 and 10113.72. In fact, other than originally supporting their passage to protect "policyholders" from inadvertently losing existing life insurance coverage (1 AA 653-655), the DOI has not take any official position on those two statutes.

Yet as should be clear to this Court, insurers are highly motivated to equate any unofficial communications with DOI staff and those SERFF Notices with DOI official sanction. Doing so provides them with a "back-channel" for eliciting even unofficial responses and other information the industry can then use to persuade the lower courts that their proffered interpretation of sections 10113.71 and 10113.72 have DOI approval. That is precisely what happened in this case, with the Court of Appeal taking that bait by repeatedly citing its "deferential" interpretation of those statutes, purporting to follow the DOI's "administrative construction" as expressed through those SERFF Notices and other unofficial communications, while even recognizing that doing so was directly contrary to well-documented intent of the

authors of that legislation. (*McHugh*, *supra,* 40 Cal.App.5th at 1177-1178.)

Such a misguided approach taken by the Court of Appeal, directly contrary to those statutes' compelling legislative history and the position of the DOI's senior counsel in a sworn affidavit, should not be allowed to persist and spread. Thus, Petitioners urge this Court to further reverse the Court of Appeal's decision in that regard in order to provide clarity concerning application of section 12921.9, and to maintain consistency and predictability when no official position has actually been taken by the DOI pursuant to that statute. It is also necessary to prevent staff at DOI from "informally" setting DOI policy when they are not otherwise authorized to do so, and to prevent "underground regulations" from controlling the interpretation and application of statutes in a manner at odds with the Legislature's intent.

Indeed, while the Court of Appeal cited this Court's recent opinion in *Christensen v. Lightbourne* (2019) 7 Cal.5th 761, 771, for the proposition that it should "accord[ ] great weight and respect to the administrative construction" of a statute by the agency entrusted with

enforcing it, it inexplicable omitted *Christensen's* important qualifiers accompanying that statement. Specifically, this Court in *Christensen* further explained that such deference is "always situational" and "depends on a complex of factors." (*Christensen, supra,* 7 Cal.5th at 771 [internal citations and quotations omitted].) Those factors include whether the decision in question "is carefully considered by senior agency officials," or whether it is a product of an agency's quasi-legislative functions. (*Ibid*.) Significantly, *Christensen* also noted that "[b]y contrast, where an agency's action is interpretive or merely represents the agency's view of the statute's legal meaning and effect, the agency's interpretation of the meaning and legal effect of a statute is entitled to consideration and respect but commands a commensurably lesser degree of judicial deference." (*Ibid*. [internal citations and quotations omitted].)

In this case, there is no evidence of any "agency interpretation of sections 10113.71 and 10113.72," let alone one which was "carefully considered by senior agency officials." Instead, the evidence is that the DOI (through its General Counsel) has emphatically taken *no position* concerning the interpretation of those same two statutes, demonstrated

by its Motion to Quash and refusal to have DOI staff deposed on that very issue. Moreover, the purported interpretation relied upon by the Court of Appeal is clearly not an outgrowth of any quasi-legislative action taken by the DOI. At bottom, *there is simply no official position that has been taken by the DOI regarding the interpretation or application of sections 10113.71 and 10113.72 at all*, let alone one worthy of this or any other court's "deference." As such, the ultimate determination of the meaning of those statutes – and how they should be applied in this and similar circumstances – is this Court's alone to make. (*Bonnell v. Medical Board* (2003) 31 Cal.4th 1255, 1265 [where this Court confirmed that courts must independently judge the text of a statute to determine its meaning, especially where (like here) agency deference is "unwarranted"].)

## V.

## CONCLUSION

In adding sections 10113.71 and 10113.72 to the Insurance Code, the Legislature addressed the real-world threat of senior and disabled policyholders inadvertently losing important life insurance coverage after years of investment in premium payments. It took measured and appropriate action, requiring insurers to provide proper notices and institute additional precautions before those policies could be lawfully terminated for non-payment.

The Court of Appeal's Opinion in this case eviscerates those safeguards and leaves vulnerable the very class of existing policyholders the Legislature intended to protect. It further conflates unofficial communications and actions taken by DOI staff with the official position of the DOI.

This Court should now clarify the application of sections 10113.71 and 10113.72 consistent with their plain language and remedial purpose, and direct the Court of Appeal to enter a new disposition, confirming the application of those statutes to McHugh's Protective Life insurance policy in question.

Respectfully submitted,

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DATED: May 29, 2020

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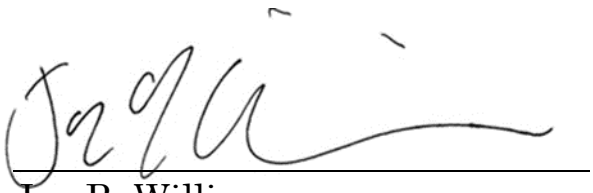
**CERTIFICATE OF COMPLIANCE PURSUANT TO THE CALIFORNIA RULES OF COURT, RULE 8.204(c)**

Pursuant to the California Rule of Court, Rule 8.204(c), I certify that the foregoing brief is proportionally spaced, has a typeface of 14 points, is double-line spaced, and based upon the word count feature contained in the word processing program used to produce that brief (Microsoft Word 2015), contains 12,802 words, excluding its caption and tables.

DATED: May 29, 2020



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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