Case No. S259215

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

BLAKELY MCHUGH AND TRYSTA M. HENSELMEIER
Plaintiffs, Appellants, and Petitioners,
vs.
PROTECTIVE LIFE INSURANCE COMPANY
Defendant and Respondent.

AFTER DECISION BY THE COURT OF APPEAL OF THE STATE OF CALIFORNIA,
FOURTH DISTRICT, DIVISION ONE, CASE NO. D072863

(ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO
THE HONORABLE JUDITH F. HAYES
CASE NO. 37-2014-00019212-CU-IC-CTL)

ANSWER BRIEF ON THE MERITS

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ACB	Amicus Curiae Brief (in Court of Appeal)
Assembly Bill 1747	Assembly Bill No. 1747 (2011-2012 Reg. Sess.)
Department	California Department of Insurance
Opn.	Court of Appeal Opinion
OBOM	Opening Brief on the Merits
PFR	Petition for Review
Plaintiffs	Petitioners/Appellants Blakely McHugh and Trysta M. Henselmeier
Protective	Respondent Protective Life Insurance Company
RA	Respondent's Appendix (in Court of Appeal)
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I.

INTRODUCTION

A great deal is missing from Plaintiffs' Opening Brief on the Merits, for all the pertinent considerations show that Assembly Bill 1747 means the opposite of what Plaintiffs say. Assembly Bill 1747 created new requirements, on a going-forward basis, that were incorporated into life-insurance policies issued or delivered in California after the statute's effective date—requirements relating to the grace period allowed to pay the premium; to the timing of notice; and to the right to designate a third party to receive notice. But the statute did not incorporate these new requirements into existing policies, whose terms were agreed to under the law that previously was in place.

Plaintiffs' discussion of these issues goes off the rails right from the start. The background presumption is not, as Plaintiffs claim, 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." (OBOM 42-43.)[1] This Court has long held that policies are instead governed "by the statutory and decisional law in force *at the time the policy is issued*," even when "there has been a subsequent amendment or repeal of" those laws. (*Interinsurance Exch. of Auto. Club of S. Cal. v. Ohio Cas. Ins. Co.* (1962) 58 Cal.2d 142, 148, 149 (*Interinsurance Exch.*), italics added.) Far from incorporating Insurance Code changes into every policy already "in force," this Court has

[1] The table on page 10 lists all abbreviations used in this brief.

held that old policies do not incorporate new requirements "'unless the Legislature has expressly so declared.'" (*Id.* at p.149, quoting *DiGenova v. State Bd. of Educ.* (1962) 57 Cal.2d 167, 174.) This express-statement rule is grounded in the longstanding presumption against retroactivity, and in this regard California does not stand alone. The leading insurance-law treatise confirms that "[a]s a general rule," new statutes "should never be construed as having a retrospective effect on the provisions of an existing contract of insurance unless the terms of the statute show clearly a legislative intent that it should operate retrospectively." (2 Couch on Insurance (June 2020 update) § 19:7.)

Plaintiffs say nothing about this rule, and under it they cannot prevail. Assembly Bill 1747 does not expressly or clearly state that policies issued before its effective date must incorporate its new requirements. To the contrary, the language in Assembly Bill 1747, which Plaintiffs largely do not address, points decidedly *against* that result. One of Assembly Bill 1747's core provisions speaks to the rights an insurer must afford to "applicant[s]" for insurance—language Plaintiffs previously have conceded operates only on policies "appli[ed]" for, and therefore issued, after the statute's effective date. (Assem. Bill No. 1747 (2011-2012 Reg. Sess.) § 2, codified at Ins. Code, § 10113.72, subd. (a).)[2] Another of Assembly Bill 1747's core provisions speaks to the grace-period "provision" a policy "shall contain"—language that cannot operate on already-issued policies, which

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

already "contain" their "provision[s]." (Assem. Bill No. 1747 (2011-2012 Reg. Sess.) § 1, codified at § 10113.71, subd. (a).) California precedent unaddressed by Plaintiffs holds that statutory language almost identical to Assembly Bill 1747's "embraced only policies thereafter issued or delivered" and does "not purport to affect existing contracts." (*Ball v. Cal. State Auto. Assn. Inter-Ins. Bureau* (1962) 201 Cal.App.2d 85, 88 (*Ball*).)

Nor are Plaintiffs accurately conveying what Assembly Bill 1747's legislative history reveals. Plaintiffs repeatedly assert that these materials make Assembly Bill 1747 apply to "existing policies," "existing policyholders," and "existing insurance coverage"; their discussion invokes those phrases no fewer than eleven times. But those phrases do not appear in the legislative history even once. The legislative history does not say, expressly or otherwise, that Assembly Bill 1747 altered the terms of policies agreed to before the statute's effective date.

It thus should come as no surprise that all officials from the California Department of Insurance who considered the issue concluded that "[t]he bill applies to policies issued or delivered on or after [the bill's effective date], not before." (RA 113.) These officials' interpretations are worthy of respect. The point is not that this Court should prefer their interpretation over its own. The point is that they were right.

Plaintiffs are wrong when they claim that applying Assembly Bill 1747's new requirements only to newly issued policies would undermine the Legislature's intent and render the stat-

ute's purposes "strained and illogical." (OBOM 54.) As the Supreme Court of the United States explained in an opinion by Justice Stevens, a "legislator who supported a prospective statute might reasonably oppose retroactive application of the same statute." (*Landgraf v. USI Film Prods.* (1994) 511 U.S. 244, 286 (*Landgraf*).) Like numerous laws enacted in numerous contexts, Assembly Bill 1747 reflects what Justice Stevens described as a common "compromise[]," under which policymakers incorporate reforms into new contracts going forward, without upsetting important reliance interests embodied in existing contracts that were agreed upon long ago. (*Ibid.*) These kinds of compromises are important and fair. Assembly Bill 1747's language calls for this particular compromise to be enforced and for this Court to affirm.

II.

FACTS AND PROCEDURAL BACKGROUND

At the heart of Plaintiffs' statement of facts is unadorned legal argument. Plaintiffs represent, as "facts," that Assembly Bill 1747 made its 60-day grace period "applicable to" William McHugh's policy, that Assembly Bill 1747 "provided" him a right to receive 30 days' notice before the policy terminated, and that Assembly Bill 1747 "gave" him the right to designate a third party to receive that notice. (OBOM 25-26.) But those statements—and many more like them in Plaintiffs' brief—are not facts. They are legal contentions that beg the very question on which this Court has granted review: whether these new requirements applied to policies that were issued and delivered before the statute's effective date. The facts pertinent to that question are as follows.

A. 2005: McHugh purchased his policy.

McHugh bought this policy from Chase Life Insurance Company—the predecessor-in-interest to Respondent Protective Life Insurance Company—in 2005, eight years before Assembly Bill 1747 became law. (1 AA 106-131.) It is unclear why Plaintiffs believe that it "was a 10-year term life policy, ending in 2015." (OBOM 23.) McHugh purchased the policy when he was 35, and it was for "term life insurance to age 95." (1 AA 107, capitalization omitted.) It thus was for a 60-year term, and it set out a schedule of premiums McHugh needed to pay to keep the policy in force through 2065. (1 AA 109-113.) The annual premium was

$310 for the first ten years, and it increased each year after that. (1 AA 112.) If McHugh died while his policy was in force, it would pay out $1 million. (1 AA 109.)

It is undisputed that California law in 2005 did not require policies to comply with the requirements Assembly Bill 1747 eventually would establish. So McHugh's policy contained a provision stating that if he did not pay his premium on the annual due date, he would have "[a] grace period of 31 days" to send in his payment and keep his policy in place. (1 AA 117.)

B. 2012: The Legislature passed Assembly Bill 1747, effective in 2013.

Seven years later, the Legislature passed Assembly Bill 1747 during the 2011-2012 Regular Session. (See 1 AA 608; see also Cal. Assem. Bill History, 2011-2012 A.B. 1747, reproduced at 1 AA 581-694.) The Legislature did not designate Assembly Bill 1747 an "urgency statute[]," so under the California Constitution, the statute's provisions went "into effect on January 1," 2013. (Cal. Const., art. IV, § 8(c)(1) & (3); see also 1 AA 608 [designating Assembly Bill 1747 "Non-Urgency"].)

The attachment to this brief reproduces Assembly Bill 1747 in full. The first two sections are directly implicated here, and they established the following three new requirements.

1. *Assembly Bill 1747 required policies to contain a provision for a 60-day grace period.*

First, Assembly Bill 1747 established that life-insurance policies issued and delivered in California must contain provisions stating that if policyholders fail to pay their premiums

when they are due, they will have a 60-day grace period to cure the problem and keep their policies from lapsing. Section 1 of Assembly Bill 1747 stated that the newly created Insurance Code section 10113.71 would provide:

> (a) Every[3] 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.

(Assem. Bill No. 1747 (2011-2012 Reg. Sess.) § 1, codified as amended at § 10113.71, subd. (a).)

2. *Assembly Bill 1747 required insurers, before issuing policies, to give applicants the right to designate third parties to receive notice.*

Second, Assembly Bill 1747 established that when someone applies for a policy, the insurer must let them designate another person, in addition to themselves, to receive notice when the premium is overdue. Section 2 of Assembly Bill 1747 stated that the newly created Insurance Code section 10113.72 would provide:

> (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

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3 The legislature later amended section 10113.71, subdivision (a) to replace "every" with "each" effective January 1, 2014. (See Assembly Bill No. 383 (2013-2014 Reg. Sess.) § 137.) This was a non-substantive change pursuant to Assembly Bill No. 383, 2013 Cal ALS 76.

> receive notice of lapse or termination of a 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.

(Assem. Bill No. 1747 (2011-2012 Reg. Sess.) § 2, codified at § 10113.72, subds. (a) & (b).)

3. *Assembly Bill 1747 required notice within 30 days of a nonpayment, and at least 30 days before the end of the grace period.*

Third, Assembly Bill 1747 required notice to policyholders and their designees that a premium is overdue—and that the policy is therefore set to lapse—no later than 30 days after the policyholder misses the payment, and at least 30 days before the 60-day grace period ends. Assembly Bill 1747 set out this requirement twice.

First, Section 1—the section with the grace-period requirement—stated that Insurance Code section 10113.71, subdivision (b) would provide:

> (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.
> [¶] . . . [¶]

> (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.

(Assem. Bill No. 1747 (2011-2012 Reg. Sess.) § 1, codified at § 10113.71, subd. (b).)

Similarly, Section 2 of Assembly Bill 1747—which established the third-party designation requirement—provided that Insurance Code section 10113.72, subdivision (c) would say:

> (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.

(Assem. Bill No. 1747 (2011-2012 Reg. Sess.) § 2, codified at § 10113.72, subd. (c).)

4. *Assembly Bill 1747's legislative history did not say that the Legislature intended the new requirements to be applied to previously issued policies.*

The legislative history accompanying the statute did not say that its authors intended its new requirements to apply to policies that already had been issued and delivered. These documents contain two statements, repeated several times, speaking

more generally to the understanding held by the law's author, Assembly Member Mike Feuer, of its purpose.

The first statement summarized Assembly Member Feuer's views as follows:

> According to the author, the bill provides consumer safeguards from which people who have purchased life insurance coverage, especially seniors, would benefit. Under existing law, individuals can easily lose the critical protection of life insurance if a single premium is accidentally missed (even if they have been paying premiums on time for many years). If an insured individual loses coverage and wants it reinstated, he or she may have to undergo a new physical exam and be underwritten again, risking a significantly more expensive, possibly unaffordable premium if his or her health has changed in the years since purchasing the policy. Therefore, the protections provided by AB 1747 are intended to make sure that policyholders have sufficient warning that their premium may lapse due to nonpayment.

(1 AA 610-611; accord 1 AA 613, 615, 627, 630, 633, 645, 672.)

A second summary of Feuer's views appears in other documents in the legislative history:

> The Author explains that codifying a grace period that provides a longer window of time to pay bill will help reduce the likelihood that policy will lapse. In some instances, people who faithfully paid their life insurance policies for years 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.). Once the policy lapses, the individual must be re-underwritten with a new exam, which may cause the quoted premium to skyrocket or the policy owner to abandon the policy.

(1 AA 616; accord 1 AA 629, 634, 693.)

5. *Department of Insurance officials contemporaneously interpreted Assembly Bill 1747 as not applying to policies issued before its 2013 effective date.*

In the wake of Assembly Bill 1747's passage, officials from the California Department of Insurance consistently took the position that the statute's new requirements would apply only to policies issued and delivered after the January 1, 2013 effective date.

Before Assembly Bill 1747 went into effect, Department officials had a conversation on this issue with two industry groups, the Association of California Life and Health Insurance Companies and the American Council of Life Insurers. The latter group sent its members, including Protective, a report in October 2012. (2 AA 828.) That report explained that during a phone call, officials from three different divisions within the Department—its Legislative Office, Policy Approval Bureau, and Financial Analysis Division—had "agreed that the 60-day grace period and alternate designee provisions will be applied prospectively, and will only apply to those policies issued or delivered on or after January 1, 2013." (2 AA 826-828.)

The following month, the Department issued a public document entitled "SERFF Instructions for Complying with AB1747." (RA 110-111.) In a federal-court filing of which this Court has taken judicial notice at Plaintiffs' request, the Department explained that SERFF is short for "System for Electronic Rates & Forms Filing." (RJN 14.) The Department elaborated that this system is an "Internet-based product of the National Association

of Insurance Commissioners," which is "the U.S. standard-setting and regulatory support organization created and governed by the chief insurance regulators from the 50 states, the District of Columbia and five U.S. territories." (RJN 14, fn.2.) "Insurers use SERFF to electronically submit insurance rate and policy forms to state departments of insurance for review of and approval of . . . changes to new products," and "State departments of insurance can also post state filing requirements and instructions for insurers to look at in advance of filing preparation." (RJN 14-15.)

The Department has represented that its "SERFF Instructions for Complying with AB1747"—which it attached to the federal-court filing this Court has taken judicial notice of, and which also are in the Record on Appeal—contained its "positions and guidance related to the statutes." (RJN 21, citing Ex.2.) The instructions stated that "[a]ll life insurance policies issued or delivered in California on or after 1/1/2013 must contain a grace period of at least 60 days." (RA 110, italics omitted.) The instructions also said that any "policy forms" the agency had approved in prior years would need to "be revised to contain a grace period of at least 60 days before they are used to issue or deliver a new policy on or after 1/1/13." (RA 110.)

Both before and after Assembly Bill 1747 went into effect, Department officials consistently took the position that the statute's new requirements do not apply to policies issued and delivered before it went into effect. One of the Department's lawyers on the October 2012 call with the industry associations wrote an email to an insurance company that month advising that "[t]he

bill applies to policies issued or delivered on or after January 1, 2013, not before." (RA 113.) The Policy Approval Bureau's Assistant Chief Counsel confirmed in a March 2013 email to an insurer that "the statutory changes brought by AB1747, eff. 1/1/2013, apply on a going forward basis—that is, the changes apply to policies issued or delivered on or after 1/1/2013" and do "not require insurers to extend the grace period for policies that are already in force." (RA 108.) The Assistant Chief Counsel reiterated, in a July 2016 email to attorneys at a law firm, that Assembly Bill 1747 "applies to new policies issued on or after" the effective date. (RA 116.)[4] In a March 2015 letter attached to an amicus brief in the Court of Appeal, a Senior Compliance Officer informed a policyholder's lawyer that "[t]he Department's position is that California Insurance Code Section 10113.71 applies only to policies issued on or after January 1, 2013." (ACB, Am. Council of Life Insurers, Exh. 1, at p.1.) The record contains no instances—and Protective is aware of none—of a Department official taking the position that the statute's new requirements apply to policies issued and delivered before the effective date.

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[4] The Record on Appeal reflects that, in addition to attaching the SERFF instructions and the foregoing correspondence to its motion for directed verdict, Protective arranged for all pertinent "communications from the [Department]" to be "provided to" the trial court "in a sealed envelope along with the appropriate custodian of records declaration from the [Department] compliant with California Evidence Code Sections 1560, 1561, 1562, and 1271," rendering them "self-authenticating and admissible business records." (RA 94, fn.3.)

C. 2013: Protective terminated McHugh's policy when he failed to pay his premium.

This lawsuit arose after McHugh failed to pay the premium that was due on January 9, 2013—and then failed to cure the nonpayment during the policy's 31-day grace period and a subsequent, additional 31-day period Protective gave him to keep the policy in place.

As McHugh's premium due date for that year approached, Protective—which in the intervening years had succeeded to Chase's rights and obligations under the policy—followed its standard practice of sending McHugh a payment notice well in advance of the due date. (2 AA 853.) That "First Notice of Payment Due," dated December 20, 2012, reminded McHugh that the premium was due on January 9, 2013, and that "unless [his] payment [was] made by 02/09/13," the end of the policy's 31-day grace period, his "policy [would] terminate or lapse." (2 AA 853.) McHugh did not pay the premium by the due date, so Protective sent him a "Second Notice of Payment Due" on January 29. (2 AA 831; 8 RT 1551:13-16.) It stated that Protective had "not received [his] payment for the 01/09/2013 premium" and warned that "[t]o make sure you have continuous coverage, we must receive your payment by 02/09/2013," or else "your policy will lapse." (2 AA 855.)

But McHugh did not pay by February 9. Nine days later, Protective sent McHugh a "Last Notice of Payment Due," informing him that the policy's 31-day "grace period ha[d] expired." (2 AA 857.) But the notice added that "[i]f your policy has lapsed,

you may reinstate without having to provide evidence of insurability if we receive your payment by 03/12/2013, during the insured's lifetime." (2 AA 857.) As a witness testified at trial, that notice was referring to Protective's practice of giving its policyholders an additional 31-day "prompt-reinstate period," in addition to the policy's 31-day grace period, to keep their policies in place. (8 RT 1551:17-18, 1542:4-5.) But McHugh did not pay by March 12, either, so a Protective officer testified that his policy "formally terminated on March the 12th." (8 RT 1612:7-10.)

McHugh died three months later, apparently from suicide. (2 AA 959.)

D. 2014-2019: Plaintiffs sued Protective for not paying policy benefits, and the jury and Court of Appeal both ruled for Protective.

A year after McHugh's death, Plaintiffs filed this lawsuit, asserting claims against Protective for breach of contract and breach of the implied covenant of good faith and fair dealing. (1 AA 24-35, 78-104.) Plaintiffs' theory was that McHugh's policy incorporated Assembly Bill 1747's new requirements and that Protective had breached the policy by not complying with them. (1 AA 96, 458-460.)

Before and during the trial, Protective repeatedly asked the trial court to grant it judgment as a matter of law because Assembly Bill 1747 did not apply to policies, like McHugh's, that were issued and delivered before the statute's effective date. (2 AA 730-33; 3 AA 1410, fn.1; 1 RA 20-30, 86-142; 7 RT 1341-1348; 8 RT 1479:7-19; 10 RT 1764-1766; 8 RT 1591:6-7.) But the trial

court denied those motions, including Protective's motion for a directed verdict after the close of evidence at trial. (10 RT 1768.)

So Protective argued to the jury that even if Assembly Bill 1747's new requirements had been incorporated into the policy, Protective had not violated those requirements in any actionable way. Protective contended that it had afforded McHugh even more notice of his nonpayment, and even more time to pay his premium, than Assembly Bill 1747 would have required. That was so because, among other things, Protective gave McHugh the additional 31-day "prompt-reinstate period," on top of the 31-day grace period the policy provided, to pay the overdue premium. The jury found for Protective. (4 AA 2099.)

While Protective defended the jury verdict in the Court of Appeal, it also requested affirmance on an alternative ground: that the trial court should have granted its motion for directed verdict because Assembly Bill 1747's new requirements did not apply to McHugh's policy. (See Opn. 3.) The Court of Appeal unanimously affirmed on that basis. Examining various considerations—including Assembly Bill 1747's language, the legislative history, the Department's interpretations, and the presumption against retroactivity—the Court of Appeal concluded that "the statutes apply only to policies issued or delivered after January 1, 2013, and not to McHugh's policy." (Opn. 4.)

Plaintiffs are wrong when they represent that the Court of Appeal "concede[d] that its construction of those statutes was 'at odds' with their authors' intent." (OBOM 36.) What the Court of Appeal said was that its opinion was "somewhat at odds with" an

"amicus brief filed by the California Advocates for Nursing Home Reform, Inc." (Opn. 14.) That brief had made assertions about the legislative history. But it had failed, the Court of Appeal reasoned, to "analyze any of the statutory language or address the case law governing when statutes will be deemed to apply retroactively." (Opn. 15.)

The Court of Appeal thus "affirm[ed] the judgment on" the "additional ground that, as a matter of law," the trial court should have granted "Protective Life's motion for a directed verdict." (Opn. 4.) The Court of Appeal did not "address the other contentions appellants raise[d]," concerning the validity of the jury's verdict. (Opn. 4.) Plaintiffs then secured this Court's review solely of the statutory-interpretation issue the Court of Appeal addressed. (PFR 7.)

III.

LEGAL ARGUMENT

When legislators regulate various kinds of economic activity, they often decide that the rules governing that activity ought to be changed on a going-forward basis. But these same legislators often understand that applying new rules to already-existing contractual relationships would cause unfairness and disruption—because, among other things, the parties to those contracts premised their agreements on the old rules. Legislators in these circumstances often have struck a balance, limiting the new rules' operation to matters that arise in the future, and allowing existing contracts to remain governed by the law that was on the books when the parties made their agreement.

That is the balance the Legislature struck with Assembly Bill 1747. This statute called for new life-insurance policies issued and delivered in California to contain provisions affording various new reforms in the future. But Assembly Bill 1747 did not redline these new requirements into policies, like McHugh's, whose terms were agreed upon before the statute went into effect.

As explained in the pages that follow, numerous considerations show that this route was the one the Legislature chose. This Court has long held that changes to insurance statutes do not apply to preexisting policies unless the Legislature "'expressly'" says they do. (*Interinsurance Exch.*, *supra*, 58 Cal.2d at p.149.) Far from expressly saying that Assembly Bill 1747's new requirements applied to preexisting policies, the Legislature used language showing that they did not. That is why every Department

of Insurance official and Justice on the Court of Appeal who has considered the issue has read this statute as not affecting policies like McHugh's, and that is why this Court should do the same.[5]

A. Under this Court's decision in *Interinsurance Exchange*, changes to the Insurance Code do not apply to existing policies unless the Legislature has expressly so declared.

The place to begin is with the right default rule. The one proposed by Plaintiffs—which would presume that all "changes to the Insurance Code are 'read into' and applied to [all] policies issued previously" (OBOM 43-44)—is the inverse of what California law provides. That has been clear since this Court's decision in *Interinsurance Exchange*, which declined to apply a new statute to a preexisting insurance policy because, in this Court's words, "insurance policies are governed by the statutory and deci-

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[5] A few portions of Plaintiffs' brief could be read to raise issues about the correctness of the jury's verdict. (See OBOM 30, 37-39, 62-69.) Because Plaintiffs did not petition for this Court's review of that issue, this Court should not address those parts of Plaintiffs' brief. (Cf. Cal. R. Ct. 8.516(a)(1) [noting that when the Court specifies the issues on review, "[u]nless the court orders otherwise, the parties must limit their briefs and arguments to those issues and any issues fairly included in them"].) If this Court wishes to address the issue, Protective requests that the parties be allowed to submit supplemental briefs because that issue would implicate extensive evidence and arguments. For example, Plaintiffs now suggest without any foundation that the notices Protective sent McHugh "prejudiced" him. (OBOM 64, italics omitted.) Significant parts of Protective's Court of Appeal briefing explained why the jury had ample evidence to conclude otherwise. (See RB 12-25, 41-56; Supp.RB 7-19.)

sional law in force *at the time the policy is issued*." (*Interinsurance Exch.*, *supra*, 58 Cal.2d at p.148, italics added.) Critically for present purposes, this Court held that this rule "is followed even though there has been a subsequent amendment or repeal of the statute incorporated into the policy." (*Id.* at p.149.) That is so because of "the theory that 'a statute should be given the least retroactive effect that its language reasonably permits.'" (*Ibid.*, quoting *Corning Hosp. Dist. v. Superior Court* (1962) 57 Cal.2d 488, 494.) While recognizing that the Legislature has the power to make new statutes apply to "all policies in force at the effective date" when the Constitution allows it, this Court emphasized that it will not assume that the Legislature intended that kind of "retroactive effect" unless the Legislature "'expressly so declared.'" (*Ibid.*)

Interinsurance Exchange's requirement that insurance statutes contain this "express[]" legislative statement is grounded in the general presumption "that legislation operates prospectively rather than retroactively." (*Myers v. Philip Morris Co.* (2002) 28 Cal.4th 828, 841 (*Myers*).) Plaintiffs are wrong when they suggest that Insurance Code section 41—which states that "'[a]ll insurance in this State is governed by the provisions of this code'"—overcomes this presumption. (OBOM 43-44, quoting § 41.) Section 41 reflects the proposition, invoked by this Court in *Interinsurance Exchange*, that code provisions "in force at the time the policy is issued" become "part of the contract.'" (*Interinsurance Exch.*, *supra*, 58 Cal.2d at pp.148-149, quoting 13 Appleman, Insurance (1983), p.8.) Section 41 does not speak to the effect of

changes to the Insurance Code, and does not alter the rule that if the Legislature wishes to incorporate changes into "all policies" already in force, it must say so "'expressly.'" (*Id.* at p.149.) None of the Court of Appeal precedents Plaintiffs cite for this proposition purported to read new laws into old polices. (See OBOM 43-44, citing *Mitchell v. United Nat. Ins. Co.* (2005) 127 Cal.App.4th 457, 471; *State Farm Fire & Cas. Co. v. Superior Ct.* (1989) 210 Cal.App.3d 604, 610; *Cal-Farm Ins. Cos. v. Fireman's Fund Am. Ins. Co.* (1972) 25 Cal.App.3d 1063, 1071.) The analysis in each is consistent with the presumption that policies incorporate the law that was on the books at the time they were issued.

Plaintiffs cannot credibly claim that *Interinsurance Exchange* confined this rule exclusively to statutes that have the quality of making "legal what was previously illegal." (OBOM 58, italics omitted.) California is not alone in applying the rule, and neither *Interinsurance Exchange* nor any other authority has cabined it in the way Plaintiffs suggest. The law in other jurisdictions is that "[a] statute that becomes effective after the date of issuance of an insurance policy does not apply to that policy absent legislative intent," expressed "so clearly . . . as to leave no room for doubt," that "the statute be applied retroactively." (*Am. Nat. Fire Ins. Co. v. Smith Grading & Paving, Inc.* (1995) 317 S.C. 445, 448; accord *Smith v. Jackson Nat'l Life Ins. Co.* (D. Utah Mar. 29, 2019) Case No. 1:18-cv-00018-EJF, 2019 WL 1429613, at p.*3 (*Smith*) [applying Utah law].) Williston on Contracts describes the black-letter law as: "a statute that becomes

effective after the issuance of an insurance policy does not become part of that policy absent evidence of a legislative intent that the statute is to be applied retroactively." (16 Williston on Contracts (4th ed.) (May 2020 update) § 49:24, footnote omitted.) Citing multiple state-court decisions, Couch on Insurance calls it the "general rule" that "statutes operate prospectively and should never be construed as having a retrospective effect on the provisions of an existing contract of insurance unless the terms of the statute show clearly a legislative intent that it should operate retrospectively." (2 Couch on Insurance, *supra*, § 19:7.)

These same authorities belie Plaintiffs' suggestion that this presumption plays no role in this case because Assembly Bill 1747 would have affected only "conduct which Protective Life took *after* those statutes became effective"—namely, when it cancelled McHugh's policy in 2013—and thus would have been "entirely *prospective*." (OBOM 56, 58.) That is not how the presumption against retroactivity works. Plaintiffs' central claim, as they describe it in their brief, is that Protective breached McHugh's policy because that policy "incorporated" Assembly Bill 1747's new "protections." (OBOM 43.) This Court in *Interinsurance Exchange* said that reading new requirements into already-existing policies is precisely the sort of "retroactive effect" that triggers the Legislature's obligation to speak "expressly." (*Interinsurance Exch.*, *supra*, 58 Cal.2d at p.149.) A law that would "modify existing . . . contracts," to paraphrase what the Court of Appeal has said in a different context, "operate[s] retroactively." (*Gordon H. Ball, Inc. v. State of California ex rel. Dept. Pub. Wks.* (1972) 26

Cal.App.3d 162, 170, fn.12 (*Gordon H. Ball*).) As a federal court in Utah has put it, even when the change a new statute would bring about is increasing insurers' notice obligations to existing policyholders in the future, that law still is "retroactive" because of its "impact" on "preexisting contractual rights." (*Smith*, *supra*, 2019 WL 1429613, at p.*4.)

Plaintiffs' assertion that Assembly Bill 1747 is merely "procedural" gives them no basis for eliding the anti-retroactivity principle. (OBOM 57, italics omitted.) This Court has resisted any "clear-cut distinction between purely 'procedural' and purely 'substantive legislation," and has emphasized instead that any law that would "operat[e] on existing rights would be retroactive." (*Aetna Cas. & Surety Co. v. Ind. Acc. Com.* (1947) 30 Cal.2d 388, 394 (*Aetna*).) Assembly Bill 1747 creates substantive rights for policyholders, and a policyholder to whom the statute applies would have a breach-of-contract claim in circumstances where he or she otherwise would not. That is no procedural change. As a court in another state has explained, a law imposing new notice requirements on insurers "affects and alters the rights and duties of the parties" and thus "plainly qualifies as substantive." (*Smith*, *supra*, 2019 WL 1429613, at p.*4.)

It makes sense that the anti-retroactivity principle applies to these statutes. As this Court has said of the law of contracts generally, "to hold that subsequent changes in the law which impose greater burdens or responsibilities upon the parties become part of that agreement would result in modifying it without their

consent, and would promote uncertainty in commercial transactions." (*Swenson v. File* (1970) 3 Cal.3d 389, 394-95). That is a particular problem for life-insurance policies, whose essential terms—and, especially, their premiums and payouts—are locked into place from the beginning, "cannot be changed without [the parties'] common consent," and are based on projections under the law as it exists at the time the contract is formed. (5 Couch on Insurance, *supra*, § 69:7; accord *N.Y. Life Ins. Co. v. Statham* (1876) 93 U.S. 24, 30.) Unanticipated changes to the ground rules will necessarily prejudice one of the parties, who will not be able to alter the agreed-upon premiums to account for the change.

The presumption against incorporating these changes into existing policies thus promotes fairness, and it is far from a one-sided rule that helps only insurance companies. The casebooks are replete with examples of statutes—including the one in *Interinsurance Exchange*—that, if retroactively applied to existing policies, would have undermined the rights of insureds. (See, e.g., *Interinsurance Exch.*, *supra*, 58 Cal.2d at p.146 [statute creating new ground for insurers to exclude insureds' coverage]; *Coffman v. State Farm Mut. Auto. Ins.* (Colo. 1994) 884 P.2d 275, 276 [same].) Both parties to the insurance contract have strong interests in avoiding such unexpected shifts in their legal relationship.

The presumption thus applies with full force to these kinds of statutes. Plaintiffs cannot sue Protective on the theory that McHugh's policy incorporated these new requirements unless they can point to "express language" in Assembly Bill 1747 or "other sources" that "provide a clear and unavoidable implication

that the Legislature intended" this type of "retroactive application." (*Myers*, *supra*, 28 Cal.4th at p.844.) As explained below, they cannot.

B. The only reasonable reading of Assembly Bill 1747's text is that its new requirements do not apply to policies issued and delivered before the effective date.

Assembly Bill 1747's text does not—even arguably—contain the "express[]" language Plaintiffs would need to overcome the anti-retroactivity principle. (*Interinsurance Exch.*, *supra*, 58 Cal.2d at p.149.) The Court of Appeal rightly observed that the "Legislature knows how to specify that statutory changes apply to insurance policies then in effect." (Opn. 13.) Yet this statute does not say, as other Insurance Code sections do, that it applies to all "policies in force" regardless of their dates of issuance. (§ 10235.95, subd. (a); § 10752.2.) Nor does it say, as many other statutes do, that it applies "retroactively." (Health & Saf. Code, § 101878; see also Prob. Code, § 2640.1, subd. (d) ["It is the intent of the Legislature for this section to have retroactive effect."].) It does not say anything even close. The statute was not "enacted as part of any urgency legislation," and thus did not even go into effect until several months after the Legislature passed it. (*Glavinich v. Commonwealth Land Title Ins. Co.* (1984) 163 Cal.App. 3d 263, 272.) These realities are reason enough to read Assembly Bill 1747's new requirements as not applying to policies issued before its effective date. As the Court of Appeal has explained, a statute's "silence as to retroactive application" makes "the presumption of prospective application . . . controlling." (*In re Marriage of Ludwig* (1976) 58 Cal.App.3d 744, 749.)

But the same result would follow even if this anti-retroactivity jurisprudence had no role to play. Assembly Bill 1747's language is not, in fact, silent on this matter. It may be true that, as Plaintiffs note, this statute does not make "specific reference" to the precise "date"—month, day, and year—when its requirements start to apply. (OBOM 49, italics omitted.) But Assembly Bill 1747's text is clear enough. As explained in the pages that follow, the words in the statute's critical provisions—the language precluding insurers from issuing policies "until" they give "applicant[s]" the right to designate third parties; the language saying policies "shall contain" a "provision" setting out the 60-day grace period; and the language requiring insurers to give the notice 30 days before that same 60-day grace period ends—can only be understood as applying exclusively to policies issued and delivered after the statute became effective.

1. *The requirement that insurers grant "applicant[s]" the right to designate third parties to receive notice does not apply to policies issued and delivered before Assembly Bill 1747's effective date.*

First consider the Assembly Bill 1747 requirement that even Plaintiffs do not claim applied to pre-2013 policies—the third-party-designation requirement in the statute's second section:

> (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. . . .

(Assem. Bill No. 1747 (2011-2012 Reg. Sess.) § 2, codified at Ins. Code, § 10113.72, subd. (a).) There are two reasons this requirement could not possibly have applied to already-existing policies like McHugh's.

The first is that this subdivision grants this right only to policy "applicant[s]." (Ins. Code, § 10113.72, subd. (a).) As the Court of Appeal put it, an "existing policyholder is not—and by definition cannot be—an 'applicant.'" (Opn. 10.) Plaintiffs conceded as much at trial, telling the jury that "sub[division] (a) of this statute deals with applicants," that "McHugh was not an applicant," that "[h]e was an applicant back in 2004, 2005," and that for that reason "plaintiff is not alleging a violation of [Insurance Code, section 10113.72,] sub[division] (a)." (10 RT 1780:14-15.)

Counsel also could have offered a second reason his client was not alleging a violation of this subdivision: its operative language states that a policy "shall not be issued or delivered . . . until" the designation right is afforded. (§ 10113.72, subd. (a).) That is thoroughly prospective language. The Court of Appeal has explained that "[t]he phrase 'shall be,' to the commonsensical mind, connotes the future and implies the application of the subject under discussion to future events." (*Russell v. Superior Court* (1986) 185 Cal.App.3d 810, 818-819 (*Russell*); accord *Seale v. Balsdon* (1921) 51 Cal.App. 677, 681 (*Seale*) ["'[S]hall be'" in a statute "represents what will take place in future time."].) So, as one federal district court has reasoned, a "plain reading" of the phrase "shall not be issued and delivered . . . until" in Assembly Bill

1747 shows that this statute contemplates "no retroactive application." (*Avazian v. Genworth Life & Annuity Ins.* (C.D. Cal. Dec. 4, 2017) Case No. 2:17-cv-06459, 2017 WL 6025330, at p.*2, fn.2, italics omitted.)

This language tracks terminology found in uninsured-motorist statutes throughout the country, whose language courts have found inapplicable to policies issued before those statutes' effective dates. Justice Tobriner wrote the California decision on point when he was on the Court of Appeal, and it addressed an Insurance Code section stating that no auto policy "'shall be issued or delivered in this State . . . unless the policy contains . . . a provision'" covering accidents with uninsured drivers. (*Ball*, *supra*, 201 Cal.App.2d at p.86, quoting § 11580.2.) This decision in *Ball* concluded that this language "embraced only policies thereafter issued or delivered," not "existing contracts." (*Id.* at p.88.) That was so, *Ball* reasoned, because "[t]he terms 'issued' and 'delivered' must refer to the original issuance and delivery of the policy; they are fixed as to time and do not stretch into infinity." (*Id.* at p.87.) When other state courts have interpreted their own, similarly worded statutes, they have "uniformly" agreed, as one court has put it, with *Ball*. (*Higgins v. MFA Mut. Ins. Co.* (Mo. App. 1977) 550 S.W.2d 811, 815 [collecting cases]; accord *VanMarter v. Royal Indem. Co.* (R.I. 1989) 556 A.2d 41, 44-45; *Granite States Ins. Co. v. Styles* (Ala. 1989) 541 So.2d 1062, 1063-1064.) "When the Legislature enacts language that has received definitive judicial construction," this Court will "presume that the

Legislature was aware of the relevant judicial decisions and intended to adopt that construction." (*Foley v. Interactive Data Corp*. (1988) 47 Cal.3d 654, 675.)

Having no argument that Assembly Bill 1747's nearly-identical language should operate differently—and thus no argument that Insurance Code section 10113.72, subdivision (a) could have applied to policies that already were in force—Plaintiffs resort to suggesting that subdivision (b) nonetheless had that effect. (See OBOM 46.) That is not a reasonable way to read the statute. Subdivision (b) follows up on subdivision (a)'s mandate—that "no policy shall be issued or delivered . . . until" the "applicant" has a chance to make the designation—with this language:

> (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.

(Assem. Bill No. 1747 (2011-2012 Reg. Sess.) § 2, codified at § 10113.72, subd. (b).) That language is not, as Plaintiffs claim, "independent" of subdivision (a). (OBOM 47.) It is, to the contrary, wholly dependent on it. Subdivision (b) does not refer to just any insurer, any policyholder, or any third-party designation. It refers to "[t]he" insurer, "the" policy owner, and "the" designation—and twice notes that "the" designation can be "change[d]." (§ 10113.72, subd. (b).) These are all references back to subdivision (a) and the designation process it initiates on a prospective-only basis. Subdivision (b) requires "[t]he" insurer to notify "the" policy owner of his or her right to change "the" designation—but

only if the policy was one that was "issued or delivered," after giving the applicant the right to make the original "designat[ion]," under subdivision (a). The subdivision that follows, subdivision (c), thus refers to the entire process as "pursuant to subdivision (a)." (§ 10113.72, subd. (c).)

Inasmuch as subdivision (b) builds on the foundation that subdivision (a) establishes, it cannot, any more than subdivision (a), apply to policies that were issued before Assembly Bill 1747's effective date. This Court "interpret[s] related statutory provisions on the assumption that they each operate in the same manner" and presumes that "one subsection of a subdivision of a statute" would not "operate in a manner 'markedly dissimilar' from other provisions in the same list or subdivision." (*Grafton Partners L.P. v. Superior Court* (2005) 36 Cal.4th 944, 960, quoting *People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 307.) As one federal court has noted, when one part of a statute is transparently "prospective," the rule requiring courts to construe statutes as a whole "cuts against" any suggestion that other parts of the same statute "should be given retroactive effect." (*Perlin v. Time Inc.* (E.D. Mich. 2017) 237 F. Supp. 3d 623, 632-633, italics omitted.) Subdivision (b) cannot sensibly operate on policies that its companion provision, subdivision (a), does not affect.

2. *The requirement that policies "shall contain a provision" with the 60-day grace period does not apply to policies issued and delivered before Assembly Bill 1747's effective date.*

The same conclusion follows about Assembly Bill 1747's grace-period requirement, which the statute's first section created:

> (a) Every 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.

(Assem. Bill No. 1747 (2011-2012 Reg. Sess.) § 1, codified at § 10113.71, subd. (a), as amended.) The plain text of this subdivision—and particularly its phrase "shall contain a provision"—encompasses only policies issued and delivered after the statute's effective date.

The statute's precise words are important, and they deviate substantially from the gloss put on them in Plaintiffs' brief. The statute does not say, as Plaintiffs suggest, that policies must "adhere to" the grace period. (OBOM 15.) The statute says that policies "shall contain a provision" setting the grace period out. (§ 10113.71, subd. (a).) This means that, for an insurer to comply with this requirement, there "shall" be a specific "provision," and that provision must be "contain[ed]" in a policy. (*Ibid.*) This "provision shall," in the statute's words, "provide" specific things—not just "a grace period," but also "that the policy shall remain in force during" that time. (*Ibid.*)

That, too, is the language of prospectivity, through and through. When the Legislature passed the statute, the only policies sure to "contain" the "provision" Assembly Bill 1747 required would have been ones issued and delivered after its effective date. (§ 10113.71, subd. (a).) Any policies issued and delivered before then already "contain[ed]" their grace-period "provision[s]," and very few would have "contain[ed]" the one the statute required. (*Ibid.*) Most would have contained grace-period provisions, like the one in McHugh's policy, involving a period of time that was shorter than 60 days but nevertheless consistent with prior California law. It is implausible that the Legislature meant to make those already-issued and -delivered policies illegal as soon as the statute went into effect. The Legislature could only have meant for these new "provision[s]" to be "contain[ed]" only in those policies that were issued and delivered after the statute's effective date. (*Ibid.*) That explanation is all the more likely because the Legislature frequently uses the phrase "shall contain a provision" to denote prospective application: six of the Insurance Code sections Plaintiffs claim to be expressly "limit[ed] . . . to subsequently issued policies" state that the policies at issue "shall contain a provision" setting forth the new requirement. (OBOM 49, fn.5, citing §§ 10113.5, 10117.5, 10178.5, 10233.25, 10352, 10353.)

Plaintiffs go far afield when they claim—without so much as a nod to the phrase "shall contain a provision"—that the words "issued or delivered" are this subdivision's "touchstone language," that they are "verb[s]" in the "simple past tense," and that they

"indicat[e] that the policies to which" this subdivision "applies have already been either 'issued or delivered.'" (OBOM 45, italics omitted.) Everything they say on that front is wrong. The words "issued or delivered" are not the verbs here; the words "shall contain" are. The phrase "issued or delivered" is a "past participial phrase" in this context—an "adjective[al]" phrase modifying the noun "policy." (*In re Roberts* (Bankr. S.D. Ind. 2010) 431 B.R. 914, 917-918.) And that is not just grammatical trivia. It is important because, as dictionaries and courts have shown, past-participial phrases are "not restricted to past time." (*Ibid.*, italics omitted, quoting Oxford Dict. English Grammar (1994) pp.282 & 286-87; accord *Lang v. United States* (7th Cir. 1904) 133 F. 201, 204.) They can "refer[] solely to events occurring in the future." *Bernal v. NRA Group, LLC* (6th Cir. 2019) 930 F.3d 891, 895 (*Bernal*).) The Sixth Circuit has called them "tenseless," and has stressed that "the actual timing is 'determined by other elements in the sentence or by context.'" (*Ibid.*, quoting Cambridge Grammar of the English Language (2002) p.1429.)

With those realities in mind, the words "issued or delivered" in this subdivision have a dramatically different meaning from the one Plaintiffs try to foist on them. The "other elements in" this subdivision, and the "context"—namely, the statute's central mandate that issued-and-delivered policies "shall contain" the "provision"—are crucial. (*Bernal*, *supra*, 930 F.3d at p.895.) That mandate, for all the reasons discussed, can only apply to policies issued after the statute's effective date. So when the Legislature passed a statutory subdivision requiring policies "issued

or delivered" in California to contain a new grace-period provision, the Legislature could only have been "referring solely to" the policies that would be issued and delivered "in the future"—and thus after Assembly Bill 1747's effective date. (*Ibid.*)

That understanding fits hand-in-glove with the longstanding interpretation by the Court of Appeal in *Ball*, discussed above, of the words "issued or delivered" in California's uninsured-motorist statute—a statute that also speaks of the "provision[s]" policies must "contain[]." (§ 11580.2; see *supra* at p.38.) *Ball* reasoned that the language of that statute, taken as a whole, could not "conceivably operate" on policies issued before the enactment of the "later legislation." (*Ball*, *supra*, 201 Cal.App.2d at p.88.) The terms "issued and delivered" in that statute "embraced only policies *thereafter* issued or delivered." (*Ibid.*, italics added.) So too here. As the Court of Appeal put it below, it is reasonable to "presume the Legislature was aware of the customary interpretation of the phrase 'issued or delivered'" applied in *Ball*. (Opn. 12.)

Plaintiffs' other grace-period arguments have no force. Plaintiffs are wrong when they assert that, because the statute as amended says "[e]ach" policy shall contain the grace-period provision, the statute must be "explicitly" calling for "every policy already issued or delivered in California" to do so. (OBOM 44, italics omitted.) That word—which, as the Court of Appeal observed, was not even in the statute when McHugh died—does not call for that result at all. (Opn. 13, fn.7.) When the statute says "[e]ach" policy shall contain the provision, it is referring to "[e]ach" policy issued or delivered after the statute's effective

date. (§ 10113.71, subd. (a).) Courts have rejected the suggestion that a similar word—"any"—connotes legislative intent to apply new statutory requirements to transactions occurring before the effective date. (*See Gordon H. Ball*, *supra*, 26 Cal.App.3d at p.170 [construing statute's reference to "any" payment as referring to any payment made after the statute's effective date, not before]; *Langley v. Home Indem. Co.* (Me. 1971) 272 A.2d 740, 747 ["Here, the legislature's use of the word 'any' to modify the automobile liability insurance contracts covered by the statute, standing by itself and without legislative resort to supplemental language convincingly connoting specific retrospective intent—(language such as 'regardless of when executed, issued or delivered,' or 'whether executed, issued or delivered before or after the effective date hereof,')—fails to convey a meaning 'clear, strong and imperative' in favor of retrospective operation."].)

On the other hand, Plaintiffs are right when they say that the word "shall" in this statute, appearing as it does immediately before the verb "contain," serves as a "mandatory directive." (OBOM 44.) But they misperceive what the mandatory directive is. The word "shall" conveys, as numerous courts have explained, the future tense. (*Russell*, *supra*, 185 Cal.App.3d at pp.818-819; *Seale*, *supra*, 51 Cal.App. at p.681; *Helm v. Bollman* (1959) 176 Cal.App.2d 838, 842-843.) The Legislature's mandatory directive was that policies "shall contain" the grace-period "provision." (§ 10113.71, subd. (a).) That directive could have been fulfilled only in the future, in policies issued or delivered after the statute's effective date.

3. *The requirement that insurers give policyholders notice of a nonpayment within 30 days, and at least 30 days' notice before termination, does not apply to policies issued and delivered before Assembly Bill 1747's effective date.*

The same conclusion flows from Assembly Bill 1747's remaining requirement, which governs the notice's timing. That requirement, which appears in both of the statute's first two sections, is intertwined with the third-party-designation and grace-period requirements created therein. (See Assem. Bill No. 1747 (2011-2012 Reg. Sess.) §§ 1-2, codified at § 10113.71, subd. (b), § 10113.72, subd. (c).) It can no more apply to policies issued or delivered before Assembly Bill 1747's effective date than those requirements can.

The statute does not set out the timing rules "independent[ly]" of the third-party designation requirement, as Plaintiffs suggest. (OBOM 47.) Each time the statute mentions the notice's timing, it references the third-party-designation right and the Code section housing it, and specifies that the notice must go to that third-party designee as well. Insurance Code section 10113.72 provides that the policy cannot lapse 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)." (§ 10113.72, subd. (c).) Insurance Code section 10113.71 is similar: it provides notice to be mailed not only to the named policy owner but also "a designee named pursuant to Section 10113.72 for an individual life insurance policy," and specifies the notice shall be given to the policy owner "and to the designee" within 30 days after the premium is

due and unpaid. (§ 10113.71, subd. (b)(1) & (3).) The notice-timing requirement is thus premised on the designation "pursuant to subdivision (a)" having happened and, thus, "a designee" having been "named pursuant to Section 10113.72." (§ 10113.72, subd. (c); § 10113.71, subd. (b)(1).) As the Court of Appeal observed, those things will have happened only with respect to policies issued after Assembly Bill 1747's effective date. (See Opn. 10-11.)

Nor is the notice's timing independent of the 60-day grace period from Assembly Bill 1747's first section. In that section, the subdivision creating the grace-period obligation immediately precedes the subdivision governing the notice's timing. (See § 10113.71, subds. (a) & (b).) The former mandates that "the policy shall remain in force" during the 60 days, and the latter establishes what the "effective date of termination" can be once this grace period is done. (*Ibid.*) And the notice operates within a period encompassing 60 days—the 30 days an insurer has to give notice to the policyholder "after a premium is due and unpaid," and the separate 30 days that must follow, after the notice is given, before the "effective date of termination." (§ 10113.71, subd. (b)(1) & (3); § 10113.72, subd. (c).) This Court construes statutory language "in the context of the statute as a whole and the overall statutory scheme," and gives "'significance to every word, phrase, sentence, and part of an act in pursuance of the legislative purpose.' [Citation.]" (*People v. Canty* (2004) 32 Cal. 4th 1266, 1276.) Because the grace-period requirement cannot apply to policies issued before Assembly Bill 1747's effective date, the notice-timing requirement cannot either.

At each step of the way, Assembly Bill 1747 sends a consistent message. Far from expressly stating that all policies already in force will incorporate its provisions, Assembly Bill 1747's language, as the Court of Appeal observed, "indicate[s] the new law applies only to term life insurance policies issued or delivered after January 1, 2013." (Opn. 10.) Even if the presumption against retroactivity had no role to play, the only reasonable conclusion is that the statute's three core requirements apply only to policies issued and delivered after its effective date.

C. Reading Assembly Bill 1747's new requirements as not applying to policies issued and delivered before the effective date is consistent with the statute's intent and purpose.

This Court's "inquiry" could "end" with Assembly Bill 1747's plain language, but available evidence of the Legislature's intent as well as consideration of the statute's purposes only reinforce the conclusion the Court of Appeal reached. (*Diamond Multimedia Systems, Inc. v. Superior Court* (1999) 19 Cal.4th 1036, 1047.)

1. *Assembly Bill 1747's legislative history does not suggest that its new requirements apply to policies issued and delivered before the effective date.*

Plaintiffs are asking far more of the legislative history than it can give. These materials say nothing, expressly or otherwise, suggesting that the Legislature intended for Assembly Bill 1747's new requirements to be incorporated into policies issued and delivered before its effective date.

Plaintiffs cannot deny the essential points. To make the case that Assembly Bill 1747's new requirements were retroactively incorporated into the terms of existing policies, Plaintiffs would need to point to "clear" language offering an "unavoidable implication" that the Legislature intended to take that step. (*Myers*, *supra*, 28 Cal.4th at p.844.) Yet Assembly Bill 1747's legislative history never used the words "retroactive" or "retroactivity," or any words remotely like them. (See *supra* at p.20; 1 AA 580-694 [reproducing legislative history in full].) When speaking of the policies to which Assembly Bill 1747 would apply, the legislative history never referred to the phrase "in force." It never employed words like "before" or "prior to" when adverting to the statute's effective date. Nor does the legislative history ever speak of "existing policies," "existing insurance coverage," or "existing policyholders"—even though Plaintiffs, when purporting to summarize that legislative history, invoke those phrases no fewer than eleven times. (See OBOM 15, 19, 51, 52, 53, 54, 78.)

All Plaintiffs have pointed to instead is conjecture, based on isolated statements by the bill's author, which do not even address the issue. One example is from a committee-hearing summary, which describes the author's view that his bill would "provid[e] 'consumer safeguards from which people who have purchased life insurance coverage (past tense), especially seniors, would benefit.'" (OBOM 51, quoting 1 AA 610-611.) Plaintiffs are the ones who inserted the parenthetical "(past tense)" into that quote, and that verb tense cannot show that anyone associated

with the Legislature "consciously considered" the weighty question of the statute's retroactivity in any event. (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1211.) Plaintiffs likewise cannot get any mileage out of the legislative history's references to the word "policyholders," or to an administrative regulation that previously required a 30-day grace period for certain policies. (OBOM 52.) Those are paradigmatic examples of "vague phrases" that cannot "satisfy" the clear-and-unavoidable-implication test. (*Myers*, *supra*, 28 Cal.4th at p.843.)

Worse still, almost all the phrases cited by Plaintiffs come from Assembly Bill 1747's author. "Legislative intent and the intent of the author," the Court of Appeal rightly reasoned below, "are not necessarily the same." (Opn. 15.) Plaintiffs now dismiss that observation as "pedantic." (OBOM 36.) But this Court, too, has "repeatedly declined to discern legislative intent from comments by a bill's author because they reflect only the views of a single legislator instead of those of the Legislature as a whole." (*Myers*, *supra*, 28 Cal.4th at p.843.) There is "[n]o guarantee," this Court has stressed, "that those who supported [the author's] proposal shared his view of its compass." (*In re Marriage of Bouquet* (1976) 16 Cal.3d 583, 589-590.)

The only time Plaintiffs focus on the views of someone besides the bill's author underscores how little aid the legislative history provides them. Plaintiffs suggest that the support for the bill, documented in the legislative history, from the Department of Insurance and the Association of California Life and Health Insurance Companies—along with these entities' belief that the bill

would help "policyholders"—somehow stand as proof that they "understood" the bill to apply to policies issued before the effective date. (OBOM 53.) But those entities' statements stand as nothing of the sort. As noted in the statement of facts, both entities later "agreed," during discussions after the bill passed, "that the 60-day grace period and alternate designee provisions will be applied prospectively, and will only apply to those policies issued on or after January 1, 2013." (See *supra* at p.20, quoting 1 AA 826-828.) The Department memorialized that position in the agency's SERFF instructions, and agency officials repeated that position many times over. (See *supra* at pp.21-23.)

So if the legislative history's reference to these entities stands as proof of anything, it is that the vague phrases Plaintiffs have seized upon are not reliable measures of what anyone understood, at the time the Legislature was considering the bill, about its effect on policies issued before the effective date. The legislative history does not contain an "unequivocal and inflexible statement of retroactivity." (*Myers*, *supra*, 28 Cal.4th at p.843.) It does not contain any statement of retroactivity at all.

2. *Assembly Bill 1747's purposes do not suggest that its requirements apply to policies issued and delivered before the effective date.*

Nor do the statute's underlying purposes counsel a different result. Plaintiffs make much of the notion that the statute is "remedial in nature" and "should be liberally construed." (OBOM 50-51, italics omitted.) But they ignore this Court's jurisprudence emphasizing that "[l]egislative intent in favor of the retrospective

operation of a statute cannot be implied from the mere fact that the statute is remedial and subject to the rule of liberal construction." (*Aetna*, *supra*, 30 Cal.2d at p.395.) "The rule that a remedial statute is construed broadly does not permit a court to ignore the statute's plain language . . . ." (*Even Zohar Const. & Remodeling, Inc. v. Bellaire Townhouses, LLC* (2015) 61 Cal.4th 830, 833.) And the Legislature had good reasons to draw the line between policies issued before Assembly Bill 1747's effective date and policies issued thereafter.

Those reasons are bound up in the same considerations that give rise to the presumption against retroactivity in general and the form of it that operates on insurance statutes in particular. (See *supra* at pp.33-34.) "[I]t will frequently be true," as Justice Stevens once wrote for the Supreme Court of the United States, "that retroactive application of a new statute would vindicate its purpose more fully." (*Landgraf*, *supra*, 511 U.S. at pp.285.) But "[t]hat consideration is not sufficient to rebut the presumption against retroactivity." (*Id.* at p.285-286.) That is so because "[s]tatutes are seldom crafted to pursue a single goal, and compromises necessary to their enactment may require adopting means other than those that would most effectively pursue the main goal." (*Ibid.*) These additional goals can include certain legislators' desire to avoid interfering with existing contractual relations. These compromises include statutes, like Assembly Bill 1747, that take a prospective-only approach to the reforms they effectuate.

That approach was especially sound here, as it allowed the Legislature to avoid not only the disruption that a more retroactive statute would have caused, but also the constitutional concerns that would have flowed from it. "[T]he antiretroactivity principle finds expression in several provisions of our Constitution," including the Contracts Clause, which "prohibits States from passing [a] type of retroactive legislation, laws 'impairing the Obligation of Contracts.'" (*Landgraf*, *supra*, 511 U.S. at p.266, quoting U.S. Const., art. I, § 10, cl. 1.) The California Constitution, too, provides that any "law impairing the obligation of contracts may not be passed." (Cal. Const., art. I, § 9.) And Assembly Bill 1747 would have raised serious concerns had it altered the terms of policies that were entered into years before. The agreed-to premium pricing reflected, among other things, the grace-period and notice provisions in the policies. Plaintiffs are dismissive of this point, but they do not consider how the analysis would work if the shoe were on the other foot. If Assembly Bill 1747 had proposed to retroactively *shorten* contractually agreed-upon grace and notice periods, there would have been little question that it would have raised serious concerns. Because that is true, any corresponding extension of those same grace and notice periods would have raised parallel concerns about the rights of the parties on the other side of this contractual bargain.

It is thus not hard to see why many "legislator[s] who supported a prospective" version of Assembly Bill 1747 would have "reasonably oppose[d] retroactive application of the same statute." (*Landgraf*, *supra*, 511 U.S. at p.286.) Drawing the line in

that way means that older policies will be treated differently from newer policies, but that is not the "critical conflict" Plaintiffs make it out to be. (OBOM 17, italics omitted.) It is the natural outgrowth of our legal system's presumption, dictated by "[e]lementary considerations of fairness," that new statutes operate prospectively. (*Landgraf*, *supra*, at p.265.) "Every change in the law," this Court has explained, "brings about some difference in treatment as a result of the prospective operation of the amendment." (*Aetna, supra*, 30 Cal.2d at p.395.) As Plaintiffs have shown, the Legislature has chosen prospective-only application for new Insurance Code provisions on multiple occasions, because often that path is the fairest one to take. (See OBOM 49-50, fn.5 [citing nine Insurance Code provisions whose "application" Plaintiffs claim to have been expressly "limit[ed] . . . only to subsequently issued policies"].) It was the fairest one to take in this instance too.

D. The interpretations from the Department of Insurance were correct and worthy of respect.

If there were any doubt about Assembly Bill 1747's inapplicability to policies like McHugh's, interpretations from the Department of Insurance would remove it. The Department's "SERFF Instructions for Complying with AB1747," issued a month after Assembly Bill 1747 passed, provided that "[a]ll life insurance policies issued or delivered in California on or after 1/1/2013 must contain a grace period of at least 60 days," and that any "policy forms" that the agency had approved in previous years would need to "be revised to contain a grace period of at

least 60 days before they are used to issue or deliver a new policy on or after 1/1/13." (RA 110, italics omitted.) Correspondence from Department officials confirmed that "[t]he bill applies to policies issued or delivered on or after January 1, 2013, not before." (RA 113.) In light of the common direction in which all the above-discussed considerations point, the Court of Appeal was right to call these administrative interpretations "reasonable" and "correct." (Opn. 14.)

Yet as Plaintiffs would have it, courts would be precluded from considering these documents at all. (See OBOM 69-77.) Plaintiffs' argument on this front has no significance to the case's ultimate outcome; Assembly Bill 1747's meaning is apparent even without the insights these materials provide. But Plaintiffs' argument is wrong in any event. The weight accorded to any executive-branch interpretation, this Court has recently reiterated, is "situational" and depends on "a complex of factors." (*Christensen v. Lightbourne* (2019) 7 Cal.5th 761, 771 (*Christensen*).) "Depending on the context," an agency official's interpretation "may be helpful, enlightening, even convincing." (*Yamaha Corp. v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7-8 (*Yamaha*).) Or it may be "of little worth." (*Id.* at p.8.) The interpretations at issue here, as explained in the pages that follow, fall on the "helpful, enlightening, even convincing" side of the ledger, and they are at the very least worthy of respect.

1. *The SERFF instructions properly interpreted Assembly Bill 1747's grace-period requirement as applying to "insurance policies issued or delivered in California on or after 1/1/2013."*

Plaintiffs get almost everything about the SERFF instructions wrong. First, Plaintiffs assert that the instructions have no value because they were not "adopted as a regulation and filed with the Secretary of State" under the Administrative Procedure Act. (OBOM 70, citing Govt. Code, § 11340.5, subd. (b).) But that is wrong: the APA exempts from its scope "instructions relating to the use of" a "form prescribed by a state agency." (Gov't Code, § 11340.9, subd. (c).) Then, Plaintiffs claim that the instructions do not "constitute official positions taken by the [agency] itself concerning the interpretation and application of the statutes in question." (OBOM 71.) But that is wrong, too: the Department has represented that "[t]he SERFF instructions speak for themselves and contain [the Department's] positions and guidance related to the statutes." (RJN 21.)

Finally, Plaintiffs contend that a federal trial court has held that the instructions "do not interpret sections 10113.71 and 10113.72." (OBOM 72.) That is, to be fair, half right. But it is also half wrong. The federal court's opinions in that case did observe that the SERFF instructions "do not interpret" section 10113.72's provisions governing the timing of the notice. (*Bentley v. United of Omaha Life Ins. Co.* (C.D. Cal. Sept. 14, 2016) No. CV 15-7870-DMG (AJWx), 2016 WL 7443190, at p.*3, cited in *Bentley v. United of Omaha Life Ins. Co.* (C.D. Cal. 2019) 371 F.Supp.3d

723, 727-728, fn.1 (*Bentley*).)[6] But that court did not say the same about section 10113.71. It could not have, since the SERFF instructions cite section 10113.71 and say that "[a]ll life insurance policies issued or delivered in California on or after 1/1/2013 must contain a grace period of at least 60 days." (RA 110.)

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[6] Plaintiffs assert that the federal court's orders in *Bentley* "conflict[ed]" with the Court of Appeal's reading of Assembly Bill 1747, but that, it turns out, is fully wrong. (See OBOM 19-20.) Those orders were all about an insurance concept known as renewal: the federal court was addressing whether policies alleged to have been "renewed" after Assembly Bill 1747's effective date incorporated some of its new requirements. (*Bentley*, *supra*, 371 F.Supp.3d at pp.730-732.) In holding that they did, the court relied on Ninth Circuit precedent stating that "[t]he law in effect at the time of a renewal of a policy governs the policy." (*Id.* at p.732, quoting *Stephan v. Unum Life Ins. Co. of Am.* (9th Cir. 2012) 697 F.2d 917, 927.) According to the *Bentley* court, the mere fact that such policies were "in force subsequent to the Effective Date" was "insufficient for the Statutes to apply," and the court emphasized that "a renewal must occur before the Statutes can apply." (*Id.* at p.737, fn.12.) Everyone agrees that McHugh's policy did not renew after Assembly Bill 1747's effective date, and Plaintiffs concede that the renewal principle "is not germane to" their "arguments." (OBOM 20, fn.2.) So this Court need not consider whether the *Bentley* court's holding was correct.

Regardless, it is unclear why Plaintiffs are asserting, without citing any particular court order or opinion, that the *Bentley* court "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." (OBOM 19.) The court in *Bentley* instead entered an order distinguishing the Court of Appeal's decision because McHugh's policy "never renewed." (In Chambers – Order Denying Deft's Ex Parte Appl. to Stay Case, *Bentley v. United of Omaha Life Ins.* (C.D. Cal. Oct. 21, 2019, No. CV 15-7870-DMG (AJWx)) Doc.196) [attached as Exhibit A to Protective's Motion for Judicial Notice, which this Court granted on January 29, 2020].)

The SERFF instructions thus confirm the conclusion Assembly Bill 1747's text otherwise demands, and no principle of administrative law precludes their consideration. The Department issued the instructions in November 2012, "contemporaneous with legislative enactment of the statute being interpreted." (*Yamaha*, *supra*, 19 Cal.4th at p.12). The instructions set out the Department's acknowledged position, and thus the view of an agency that "possess[es] special familiarity with satellite legal and regulatory issues" associated with Assembly Bill 1747. (*Id.* at 11.). The instructions are "'consistent[]'" with the interpretations of Assembly Bill 1747 that Department officials offered in a less formal way in the months and years that followed. (*Id.* at p.13, quoting Cal. Law Revision Com., Tent. Recommendation, Judicial Review of Agency Action (Aug. 1995) p.11.) The interpretation these instructions embody is not only "probably correct," but eminently so. (*Ibid.*)

2. *Informal correspondence from Department officials properly interpreted all of Assembly Bill 1747's new requirements as applying "to policies issued or delivered on or after January 1, 2013, not before."*

The informal correspondence from Department officials, interpreting not only the grace-period requirement but also the rest of the statute, also is worthy of consideration and respect. Plaintiffs' APA-related criticism of these materials is not well founded: these materials, too, are exempt from the APA's formality requirements because they are "regulations directed to a specifically named person or to a group of persons." (Gov't Code,

§ 11340.9, subd. (i).) Plaintiffs do stand on firmer ground when they point out that in another case, this Court gave interpretations from certain Department of Insurance advisory letters "little weight." (*Heckart v. A-1 Self Storage* (2018) 4 Cal.5th 749, 769, fn.9.) But that was a case in which the Insurance Commissioner himself subsequently adopted a position that was at odds with those letters. The circumstances here are different, and the correspondence here carries more weight.

That is so in part because this correspondence bears more of hallmarks of administrative interpretations with the "'power to persuade.'" (*Yamaha*, *supra*, 19 Cal.4th 1 at p.14, italics removed, quoting *Skidmore v. Swift & Co.* (1944) 323 U.S. 134, 140.) Much of this correspondence was, as the Court of Appeal noted, "contemporaneous with legislative enactment of the statute being interpreted." (Opn. 14, citing *Yamaha, supra*, at p.12.) And although the Department has stated that correspondence of this sort may not necessarily express the agency's position (RJN 24), the Department has not actually disagreed with the interpretation this correspondence advanced. The positions in this correspondence are, as the Court of Appeal noted, "consistent[]," not only with each other, but also with the SERFF instructions setting out what the Department itself acknowledges to be its "position." (RJN 21.) These letters and emails were written by numerous officials and thus are not "an interpretation prepared 'in an advice letter by a single staff member.'" (*Heckart*, *supra*, 4 Cal.5th at p.769, fn.9.)

Just as critically, this correspondence shows both "careful consideration" by the officials involved and "special familiarity with satellite legal and regulatory issues" the statute addresses. (*Yamaha*, *supra*, 19 Cal.4th at p.11.) The March 2013 email from the Policy Approval Bureau's Assistant Chief Counsel is particularly instructive. She explained that "[i]n general, new laws take effect on a going forward basis so that everyone knows what the law is when they enter into an agreement, such as an insurance policy." (RA 108.) "Parties to a contract would have no certainty as to the terms of their agreement," she continued, "if the Legislature could change those terms retroactively." (RA 108.) Referencing the statute's use of the terms "issued or delivered," she observed that "[g]enerally, a policy is 'issued or delivered' just once—when it is new." (RA 108.) For those reasons, she explained, "the statutory changes brought by AB1747, eff. 1/1/2013, apply on a going forward basis—that is, the changes apply only to policies issued or delivered on or after 1/1/2013." (RA 108.)

This correspondence, while "not controlling upon the courts," at least "constitute[s] a body of experience and informed judgment to which courts and litigants may properly resort for guidance." (*Yamaha*, *supra*, 19 Cal.4th at p.14.) Plaintiffs have no basis for insinuating that these communications were part of some illicit "back-channel." (OBOM 74.) Quite the contrary. The Department is "the government agency charged with enforcing the state's insurance laws." (*State Comp. Ins. Fund v. Superior Court* (2001) 24 Cal.4th 930, 940.) When insurers and policyholders alike wish to seek the Department's "'informed judgment'"

about their compliance obligations, they should be affirmatively encouraged to do so. (*Yamaha*, *supra*, at p.14, quoting *Skidmore*, *supra*, 323 U.S. at p.140.) That is an act of good faith on their part. When the guidance they receive is sound and consistent—and grounded, as here, in a firm understanding of this Court's precedents, the statutory text, and a pragmatic understanding of the purposes the laws at issue serve—they should be able to rely on this guidance, secure in these officials' assurances that their actions are consistent with the law.

So, too, should courts be able to consider and, when "independently judg[ing] the text of the statute," give these interpretations whatever respect that, under all the circumstances, they are due. (*Yamaha*, *supra*, 19 Cal.4th at p.7.) The interpretations at issue here are due substantial respect, in part because industry participants reasonably relied on them, but more importantly because as the Court of Appeal found, they are transparently "correct." (Opn. 14.) They cement the conclusion, compelled by all the other interpretive circumstances, that Assembly Bill 1747's new requirements do not alter the terms of insurance policies that, like McHugh's, were issued and delivered before this statute became law.

IV.

CONCLUSION

This Court should hold that Assembly Bill 1747 does not apply to policies issued before its effective date, and on that basis this Court should affirm the judgment of the Court of Appeal. If this Court does not affirm the Court of Appeal's judgment, it should remand for the Court of Appeal's consideration, in the first instance, of any arguments Plaintiffs have properly preserved concerning the validity of the jury verdict entered for Protective in this case.

Respectfully submitted,

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s/ John C. Neiman, Jr.
John C. Neiman, Jr.
(admitted *pro hac vice*)

Counsel for Defendant and Respondent Protective Life Insurance Company

CERTIFICATION OF COMPLIANCE

Pursuant to California Rule of Court Rule 8.204, subdivision (c), the undersigned counsel for Protective Life Insurance Company certifies that, as calculated by the Microsoft Word 2016 software program, the relevant parts of this brief contain a total of 13,030 words, including footnotes.

DATED: July 29, 2020

Respectfully submitted,

s/ John C. Neiman, Jr.
John C. Neiman, Jr. (admitted *pro hac vice*)

Counsel for Respondent

PROOF OF SERVICE

I am a citizen of the United States. I am over the age of 18 and not a party to this action. My business address is 1901 Sixth Avenue North, Birmingham, Alabama 35203.

On July 29, 2020, I filed this document through the True-Filing system, which will serve an electronic copy of this document on all registered True-Filing participants, including the attorneys for the Petitioners. I also served the Court of Appeal via TrueFiling, on the same date.

I served the trial court by placing a paper copy of this document, in a sealed envelope from my law firm whose address appears above, following our ordinary business practices. I am familiar with my law firm's practices regarding mailing. On the same day that correspondence is placed for mailing, it is deposited with the U.S. Postal Service with postage prepaid. But due to the late electronic filing of this brief, the trial court's copy will be mailed the following day. I addressed the envelope to the following:

San Diego Superior Court, Central Div.
Attn: Hon. Judith F. Hayes
330 W. Broadway, Dept. 68
San Diego, CA 92101

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

DATED: July 29, 2020

s/ John C. Neiman, Jr.
John C. Neiman, Jr.

STATUTORY ATTACHMENT

The following copy of Assembly Bill No. 1747 (2011-2012 sess.) is attached to this brief pursuant to California Rule of Court 8.520, subdivision (h):

Assembly Bill No. 1747

CHAPTER 315

An act to amend Section 10173.2 of, and to add Sections 10113.71 and 10113.72 to, the Insurance Code, relating to life insurance.

[Approved by Governor September 14, 2012.
Filed with Secretary of State September 14, 2012.]

LEGISLATIVE COUNSEL'S DIGEST

AB 1747, Feuer. Life insurance: nonpayment premium lapse: notice.

Existing law requires that life insurance policies contain certain provisions, including, but not limited to, an individual life insurance policy notice of the right to cancel a policy. Existing law requires life insurers to provide certain notices to individual life insurance policyholders, including, but not limited to, a notice of premium increases.

This bill would require that every life insurance policy issued or delivered in this state contain a provision for a grace period of not less than 60 days from the premium due date and that the policy remains in force during the 60-day grace period. The bill would also require an insurer to give the applicant for an individual life insurance policy 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 bill would require an insurer to provide each applicant with a form, as specified, to make the designation and to notify the policy owner annually of the right to change the designation. The bill would prohibit a notice of pending lapse and termination from being effective unless mailed by the insurer to the named policy owner, a named designee 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. The bill would also make conforming changes.

Vote: majority Appropriation: no Fiscal Committee: no Local Program: no

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 10113.71 is added to the Insurance Code, to read:

10113.71. (a) Every[7] 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 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.

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[7] The legislature later amended section 10113.71, subdivision (a) to replace "every" with "each" effective January 1, 2014. This was a non-substantive change pursuant to Assembly Bill No. 383, 2013 Cal ALS 76.

SEC. 2. Section 10113.72 is added to the Insurance Code, to read:

10113.72. (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.

SEC. 3. Section 10173.2 of the Insurance Code is amended to read:

10173.2. When a policy of life insurance is, after the effective date of this section, assigned in writing as security for an indebtedness, the insurer shall, in any case in which it has received written notice of the name and address of the assignee, mail to the assignee a written notice, postage prepaid and addressed to the assignee's address filed with the insurer, not less than 30 days prior to the final lapse of the policy, each time the policy owner has failed or refused to transmit a premium payment to the insurer before the commencement of the policy's grace period or before the notice is mailed. The insurer shall give that notice to the assignee in the

proper case while the assignment remains in effect, unless the assignee has notified the insurer in writing that the notice is waived. The insurer shall be permitted to charge the policy owner directly or against the policy the reasonable cost of complying with this section, but in no event to exceed two dollars and fifty cents ($2.50) for each notice.

As used in this section, "final lapse of the policy" means the date after which the policy will not be reinstated by the insurer without requiring evidence of insurability or written application.