No. 20-55231

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SARAH AISLINN FLYNN THOMAS,
Plaintiff-Appellee,

v.

STATE FARM LIFE INSURANCE COMPANY,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CYNTHIA BASHANT, DISTRICT JUDGE • CASE NO. 3:18-CV-0728-BAS-BGS

APPELLANT'S OPENING BRIEF

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DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Defendant-Appellant State Farm Life Insurance Company states that it is a wholly owned subsidiary of State Farm Mutual Automobile Insurance Company. No publicly held corporation has any ownership interest in State Farm Mutual Automobile Insurance Company or State Farm Life Insurance Company.

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APPELLANT'S OPENING BRIEF

INTRODUCTION

In this dispute over benefits under two life insurance policies, the district court erred in granting summary judgment for plaintiff Sarah Thomas, finding defendant State Farm Life Insurance Company liable for breach of contract. The undisputed facts require judgment for State Farm, not for Thomas. The policies were issued to Thomas's brother, James Flynn, in 2008, and were set to expire on Flynn's 95th birthday, in 2069. But because Flynn stopped paying the monthly premiums required to keep the policies in force in 2016, no benefits were owed as a matter of law after he died the next year.

Thomas argues that two California statutes that took effect in 2013 rescue her claim. Sections 10113.71 and 10113.72 of the California Insurance Code, enacted as Assembly Bill No. 1747 (2011-12 Reg. Sess. (Cal. 2012) ("A.B. 1747")), require that life insurance policies "issued or delivered" in California contain various extended grace period and notice provisions to protect policy owners against inadvertent lapse due to missed premium payments. Having no gift of foresight, State Farm did not comply with those extended grace period and notice provisions when

it issued the policies in 2008. Nor did State Farm comply with all of the provisions after Flynn stopped making premium payments; it complied instead with the grace period and notice provisions required under the policy as written and accepted by Flynn, and pursuant to the law as it existed when the policies issued.

Rather than apply the policy terms as written, the district court agreed with Thomas that the 2013 legislation should be read into Flynn's 2008 policies, and that State Farm's failure to comply with A.B. 1747's requirements amounted to a breach of contract. That was error because, under established California law and the presumption against retroactivity, a statute requiring insurance policies "issued or delivered" in the state to meet certain requirements is construed to apply only to policies issued *after* the statute's effective date.

The district court deviated from this approach on the theory that each monthly premium payment that Flynn did make resulted in a "renewal" of the policies, and that under the so-called "renewal principle" that has sometimes been applied to *non*-life insurance policies, the "renewal" of a policy incorporates all statutory requirements enacted

since the policy was last renewed. The "renewal principle" has no application here.

The "renewal principle" arose from cases construing automobile liability and other casualty insurance policies, which have short coverage terms (usually one year) and the opportunity for both the insurer and the insured to enter into a new policy at the end of the coverage term. At the time of renewal, the insurer and insured can opt not to renew the policy or to negotiate different terms or premiums for the new policy, accounting for changed circumstances that may have occurred since the prior policy term. Since policy "renewal" is the same as policy issuance in this context, it makes sense that statutory enactments or amendments are incorporated into auto or other casualty insurance policies *that renew after the effective date of such statutory changes*.

Individual term life insurance policies like those at issue here are categorically different. They are generally issued for a lengthy term of continuous coverage, conditioned only on the policy owner's regular payment of premiums to keep the policy in force. Assuming such premiums are paid, the insurer has no ability to cancel the policy or to renegotiate its terms based on changed conditions, such as a downturn

in the insured's health. Likewise, the insurer has no ability to change limits, exclusions, or other policy provisions, or to decide it will no longer write coverage in the insured's jurisdiction for economic or other reasons. Simply put, the policy remains in place as originally written for its entire term, and no new policy is issued upon each premium payment. Thus, the policy does not "renew" in the sense that the cases applying the "renewal principle" use that term.

Conceptually, individual term life insurance policies *could* be written like other policies, with annual renewal dates, but doing so would substantially impair the principal benefits insureds currently derive from such policies. Not only would they be subject to higher premiums or policy cancellation if they became ill, but they would also lose the benefit of policy owner protections like the standard two-year incontestability clause (depriving insurers of the ability to cancel a policy after two years from policy issuance for misstatements in the application) and suicide clause (limiting the death benefit to a return of premiums in the event of the insured's suicide within the first two years from policy issuance). Writing life insurance policies for a set term rather than on an annual renewal basis also protects the settled expectations of the

insurer, which carefully calculates the policy premium and crafts the policy terms based on the law as it exists at the time the policy issues.

To read the terms of A.B. 1747 into the life insurance policies at issue here would substantially impair the contractual relationship embodied in those policies and raise serious constitutional issues under the Contracts Clause. The plain language of the legislation on which Thomas and the district court relied is not susceptible to the "renewal principle," and the canon of constitutional avoidance supplies a further reason to reverse the district court's ruling.

The considered views of California Department of Insurance staff attorneys contemporaneous with A.B. 1747's enactment also supports State Farm's position. At that time, Department personnel consistently assured industry representatives in several communications that sections 10113.71 and 10113.72 would apply only to policies issued or delivered after January 1, 2013 and would not apply to existing policies issued prior to 2013, even if those policies were continued in force by payment of premiums in 2013 or thereafter. These considered views confirm the plain language interpretation of the statutes that State Farm advocates here.

Even if A.B. 1747 did apply retroactively to Flynn's policies, via "renewal" or otherwise, State Farm would still be entitled to summary judgment on Thomas's breach of contract claim because Thomas failed to establish a prima facie case that any failure by State Farm to comply with the act's requirements caused her damage. Thomas did not submit any evidence that, having chosen not to pay his premium within the thirty-one-day grace period, Flynn would have paid his premium within a longer sixty-day grace period. Nor did Thomas offer evidence that Flynn would have designated a third party to receive notices if given the opportunity, that any third-party designee would have received or acted upon a notice of pending lapse by timely paying Flynn's premiums, or that Flynn or a third-party designee would have had the financial means to do so. In the absence of such evidence, Thomas failed to raise a triable issue of fact that any breach by State Farm caused her damage.

For all of these reasons, the district court erred in granting summary judgment to Thomas and denying summary judgment to State Farm on Thomas's breach of contract claim.

JURISDICTIONAL STATEMENT

The district court entered final judgment on February 3, 2020. (1 ER 22.) State Farm filed a timely notice of appeal from the judgment on February 28, 2020. 3 ER 485; *see* Fed. R. App. P. 4(a)(1)(A). This Court therefore has appellate jurisdiction under 28 U.S.C. § 1291.

The district court had subject-matter jurisdiction under 28 U.S.C. § 1332(a)(1) because the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and Thomas is a citizen of a state different from State Farm. (2 ER 24-25 (¶¶ 4-6) (Thomas is a citizen of Florida, State Farm is a citizen of Illinois, and Thomas's lawsuit seeks at least $1 million in damages).)

STATEMENT OF ISSUES PRESENTED

1. Did the district court err in denying State Farm's motion for summary judgment and granting Thomas's cross-motion for summary judgment on Thomas's breach of contract claim?

2. Did the district court err in ruling that the policies at issue here "renewed" when the insured made premium payments under those policies after January 1, 2013, and that this purported "renewal"

incorporated the terms of California Insurance Code sections 10113.71 and 10113.72 into those policies?

3. Even if the district court did not err in reading the terms of sections 10113.71 and 10113.72 into the policies at issue under the "renewal principle," is State Farm nevertheless entitled to summary judgment on Thomas's breach of contract claim because Thomas failed to submit any evidence that any breach by State Farm caused her damages?

(Copies of pertinent statutes appear in the addendum.)

STATEMENT OF THE CASE

A. In 2008, State Farm issues two insurance policies to James Flynn, providing term life coverage conditioned on regular payment of premiums until expiration of the policies on Flynn's 95th birthday in 2069.

On February 11, 2008, State Farm issued a term life insurance policy (No. LF-2473-3363 ("the 3363 Policy")) insuring the life of James Flynn in the face amount of $500,000. (3 ER 295 (¶ 1), 301-26.) On March 23, 2008, State Farm issued a second term life insurance policy (No. LF-2528-3142 ("the 3142 Policy")) insuring Flynn's life in the face amount of another $500,000. (3 ER 295 (¶ 5), 328-50.) As of the date of

the events at issue in this case, Flynn's sister, Sarah Thomas, was the primary beneficiary under both policies. (3 ER 295 (¶¶ 4, 8), 314, 340.)

The two policies issued to Flynn are identical in all material respects. (3 ER 301-26, 328-50.) Each states that it "provides level term life insurance to the Policy Anniversary when the Insured is age 95" and that "[p]remiums are payable for the term of insurance." (3 ER 301, 328.) The Schedule of Benefits and Schedule of Premiums sections of the policies shows that the benefits period ends in 2069 (i.e., Flynn's 95th birthday year), and that the annual premium of $1,150 or the monthly premium of $100.08 are fixed for the first thirty years of the policy term. (3 ER 303-04, 330-31.)

The policies require the insured to pay the policy premium at regular intervals during the policy term:

> The first premium is due on the Policy Date. All other premiums are payable on or before their due dates. A due date is the first day of each payment period. Such period may be 1 month or 12 months, starting on the same day of the month as the Policy Date. If the payment period is 1 month, the monthly premium is due at the start of each 1 month payment period. If the payment period is 12 months, the annual premium is due at the start of each 12 months payment period.

(3 ER 310, 336.) If the insured misses a premium payment, the policies' grace period kicks in: "Except for the first premium, 31 days are allowed for the payment of a premium after its due date. During this time, the policy benefits continue." (*Id.*)

If the premium is not paid by the end of the grace period (and assuming no dividend accumulations exist to fill the shortfall, which was the case here), the policies lapse: "If any premium has not been paid by the end of its Grace Period, the Accumulations to Avoid Lapse provision will apply. If that provision does not apply, this Policy will lapse as of the due date of any unpaid premium. With such lapse, coverage ceases." (*Id.*)

The policies also provide the following regarding termination: "This Policy will terminate on the Policy Anniversary when the Insured is age 95. We will terminate this Policy before that date when this Policy is converted or the premium is not paid by the end of its Grace Period." (3 ER 312, 338.)

B. Starting in 2013, new California legislation requires enhanced notice, grace period, and termination provisions to be included in life insurance policies issued or delivered in the state.

On September 14, 2012, the California Legislature enacted A.B. 1747 regulating life insurance policies issued or delivered in the state. Cal. Ins. Code §§ 10113.71-10113.72 (West 2013 & Supp. 2020); 2012 Cal. Legis. Serv. ch. 315 (West 2020). The legislation took effect on January 1, 2013. *See* Cal. Const. art. IV, § 8(c)(1).

A.B. 1747 requires life insurance policies issued or delivered in California to contain a sixty-day grace period before termination of a policy for nonpayment of premium, rather than the thirty-one-day period specified in Flynn's policies. Section 10113.71(a) of the Insurance Code requires: "Each life insurance policy issued or delivered in this state shall contain a provision for a grace period of not less than 60 days from the premium due date. The 60-day grace period shall not run concurrently with the period of paid coverage. The provision shall provide that the policy shall remain in force during the grace period."

A.B. 1747 also mandates that the applicant be given the option of designating a third party to receive notices of lapse. Section 10113.72(a) provides: "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." Additionally, section 10113.72(b) states: "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."

A.B. 1747 further requires that any notice of lapse for nonpayment of premium be sent to both the policy owner and the designated third party at least thirty days before the policy lapses. Section 10113.71(b)(1) specifies: "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."

Section 10113.72(c) reinforces the notification requirement by prohibiting policy lapse unless the insurer complies with the notice rules: "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."

C. In 2016, Flynn stops paying policy premiums. The policies lapse after State Farm sends notice of pending lapse to Flynn and the contractual grace period expires.

Starting in 2011, Flynn elected to pay the monthly premiums on the two policies by electronic fund transfers from his bank account through a State Farm Payment Plan. (3 ER 295 (¶ 9).) State Farm received payment via these transfers through February 2016, which kept the policies in force through March 2016. (3 ER 295-96 (¶¶ 10-13).)

On March 16, 2016, however, the electronic transfer of funds did not go through. (3 ER 296 (¶ 14).) The next day, State Farm mailed a notice to Flynn indicating that the monthly premiums under the two policies were due and unpaid and explaining that "Coverage on your policies will end following the grace period if we do not receive your payment." (3 ER 352; see 3 ER 296 (¶¶ 15-16).)

State Farm did not receive any further premium payments from Flynn by April 16, 2016 (the end of the thirty-one-day grace period under the 3363 Policy) or by April 28, 2016 (the end of the thirty-one-day grace period under the 3142 Policy). (3 ER 296 (¶¶ 17, 20).) Consequently, the policies lapsed on those respective dates under their own terms. (3 ER 310, 312, 336, 338.) On April 16, 2016, State Farm mailed Flynn a "Notice of Life Insurance Lapse" for the 3363 Policy, and on April 28, 2016, State Farm mailed Flynn a "Notice of Life Insurance Lapse" for the 3142 Policy. (3 ER 296 (¶¶ 18-19, 21-22), 354, 356.)

The lapse notice for the 3363 Policy gave Flynn the option of *reinstating* his coverage under that policy if Flynn paid the $200.16 unpaid premiums under that policy by May 2, 2016, and the lapse notice for the 3142 Policy gave Flynn a similar reinstatement option if Flynn

paid the entire $1,150 annual premium under that policy by May 14, 2016. (3 ER 354, 356.) State Farm never received another premium payment from Flynn under the policies. (3 ER 296-97 (¶¶ 23-24, 26-27).)

D. Flynn dies in 2017. Sarah Thomas inquires about benefits under the policies, and State Farm informs her about their lapse for nonpayment of premiums.

Flynn died on January 31, 2017. (3 ER 296 (¶ 25), 362.)

On January 31, 2017, an attorney representing Flynn's estate sent a letter to State Farm inquiring about the status of the policies and requesting claim forms on behalf of the beneficiary. (3 ER 297 (¶ 29), 358.) State Farm responded by letter on February 17, 2017 that it did not have any active life insurance policies for Flynn. (3 ER 297 (¶ 30), 360.)

On June 6, 2017, a different attorney representing Thomas sent a letter to State Farm requesting copies of the two policies and an explanation why the policy benefits were not paid to Thomas as the primary beneficiary upon Flynn's death. (3 ER 297 (¶¶ 31-32), 362.) State Farm responded by letter dated July 5, 2017 enclosing copies of the two policies. (3 ER 297 (¶¶ 33-34), 364.)

On August 21, 2017, the attorney representing Thomas sent another letter to State Farm requesting further information about the premium payment history under the policies and all communications between State Farm and Flynn regarding the policies, including the notices of nonpayment of premium and of policy lapse. (3 ER 297 (¶¶ 35-36), 366-67.) On September 12, 2017, State Farm responded by letter enclosing the documents and providing the requested information. (3 ER 297-98 (¶¶ 37-38), 369.) After that date, State Farm received no further correspondence regarding the policies until the complaint initiating this case was filed. (3 ER 298 (¶¶ 39-40).)

E. Thomas sues State Farm, which removes the case to federal court.

On March 7, 2018, Thomas filed a form complaint in the San Diego County Superior Court against State Farm, asserting causes of action for breach of contract and breach of the implied covenant of good faith and fair dealing. (2 ER 30-32.) The complaint alleged that Thomas is the beneficiary of the two policies and that State Farm unreasonably denied life insurance benefits to Thomas on Flynn's death. (2 ER 32.)

Invoking diversity jurisdiction, State Farm timely removed the action to the United States District Court for the Southern District of California. (2 ER 23-25.) State Farm filed its answer shortly thereafter, denying liability and asserting as an affirmative defense that the policies lapsed for nonpayment of premiums before Flynn's death. (2 ER 59-63.)

F. Thomas and State Farm file cross-motions for summary judgment on Thomas's breach of contract claim. The district court grants partial summary judgment to Thomas on the breach of contract claim, grants partial summary judgment to State Farm on the bad faith claim, and enters judgment. State Farm appeals.

State Farm and Thomas filed cross-motions for summary judgment. (1 ER 1.) State Farm argued that it was entitled to summary judgment on both of Thomas's claims because the undisputed facts showed that both policies had validly lapsed due to nonpayment of premiums before Flynn's death. (1 ER 1-2.)

Thomas did not argue that State Farm breached any term of the policies as written. (2 ER 82-106.) Instead, she argued she was entitled to partial summary judgment on her breach of contract claim because California Insurance Code sections 10113.71 and 10113.72 applied to rewrite the policy terms, even though A.B. 1747 went into effect five years

after the policies were issued and delivered to Flynn; she argued that State Farm did not comply with statutory requirements regarding notice, third-party designation, and grace period terms. (*Id.*) Notably, Thomas did not submit any evidence that the premium would have been paid if State Farm had done what Thomas says was required under the 2013 statutory requirements. (2 ER 104-05, 109-10; 3 ER 283-84, 290-91, 294-98.) Thus, the principal issue in dispute was a pure legal question concerning whether the 2013 legislation altered State Farm's obligations under Flynn's 2008 policies. (1 ER 1-2.)

The district court granted Thomas's motion and denied State Farm's motion. (1 ER 1-15.) It first rejected Thomas's argument that A.B. 1747 applies retroactively of its own force to policies issued and delivered before its January 1, 2013 effective date. (1 ER 8-10.) After canvassing well-established California law based on the presumption against retroactivity, the court followed the California Court of Appeal's recent decision in *McHugh v. Protective Life Insurance*, 40 Cal. App. 5th 1166 (2019), to conclude that sections 10113.71 and 10113.72 operate prospectively and do not apply to pre-2013 policies, and that the Legislature did not clearly state otherwise. (*Id.*)

However, the court then pivoted and held that, because Flynn paid premiums to keep his two policies in force after A.B. 1747's 2013 effective date, the act applied to the policies under the so-called "renewal principle," under which a policy's renewal may incorporate all changes in the law that occurred prior to the renewal. (1 ER 11-15.) Although the policies at issue do not provide for renewal (*see* 3 ER 301-26, 328-50), the court analogized the life insurance policies to other types of insurance (e.g., automobile liability insurance) and concluded that the payment of periodic premiums under the policies amounted to a "renewal" (1 ER 11-15).

The district court later filed a supplemental order granting summary judgment to State Farm on Thomas's insurance bad faith claim, finding there was a genuine dispute regarding A.B. 1747's applicability to the policies at issue, and that State Farm's position that it was not liable for breach of contract was therefore reasonable. (1 ER 16-18.) The court overruled Thomas's objection to disposing of the bad faith claim in this manner, and entered judgment. (1 ER 19-22.)

State Farm filed a timely appeal from the judgment. (3 ER 485.) Thomas did not file a cross-appeal. (3 ER 496.)

SUMMARY OF THE ARGUMENT

1. Thomas's breach of contract claim depends entirely on whether the provisions of California Insurance Code sections 10113.71 and 10113.72 apply to the two life insurance policies at issue. It is undisputed that Flynn did not timely pay his March 2016 premiums under the policies, including during the subsequent thirty-one-day grace period or the additional reinstatement period. Thus, Flynn failed to comply with a contractual condition on State Farm's performance under the policies. Accordingly, Thomas's breach of contract claim fails as a matter of law, entitling State Farm to summary judgment, unless A.B. 1747 applies retroactively and is read into the policies.

2. The district court correctly concluded that A.B. 1747 does not of its own force apply retroactively to policies issued and delivered before its 2013 effective date, including the policies at issue here.

Sections 10113.71 and 10113.72 expressly apply to life insurance policies "issued or delivered" in California to include certain protections for policy owners. Established California case law holds that such language signifies the lack of any retroactive effect. And even without such language, statutes governing insurance policies apply only to

policies issued or delivered after the statute's effective date, absent clear legislative intent to the contrary. Some clauses of A.B. 1747 do not repeat the "issued or delivered" language, but the language of each provision clearly shows that the Legislature intended the interdependent legislation to apply together as a whole. Nothing in A.B. 1747 demonstrates an intent to apply its 2013 provisions to pre-2013 policies.

3. The district court erred in finding that the policies "renewed" after A.B. 1747's effective date each time Flynn paid premiums to continue the policies in force (the so-called "renewal principle"). That error led to the court's erroneous conclusion that sections 10113.71 and 10113.72 apply to and are incorporated into the policies at issue.

The "renewal principle" developed in the non-life insurance context where policies typically have terms of six months or one year and regularly renew upon the insured's payment of a renewal premium for the next policy period. Under California law, renewal of such policies at the expiration of their terms constitutes the issuance of a new policy, subject to the insurer's or the insured's desire to continue under the same terms, or to change terms such as deductibles, exclusions, limits, and so forth. As set forth at length in the legal argument below, that is simply

not how term life insurance policies work: they do not "renew" in this sense—ever. The "renewal principle" thus cannot be used to defeat the settled expectations of the contracting parties at the time they entered into their insurance contract.

Thomas's position, which the district court accepted, works a "bait and switch" on life insurers. These companies craft and sell a long-term insurance product on a fixed price basis that is amortized over the multi-year (often multi-decade) duration of the policy. Incorporating later enacted statutes into existing policies via the "renewal principle" would expand insurers' obligations under those policies with no opportunity to terminate coverage or renegotiate the premiums for those policies. For instance, adding more days to the required grace period increases the insurer's exposure without affording the insurer an opportunity to price that exposure into the premium. Likewise, requiring the insurer to send notices of termination and of the right to designate third-party recipients of such notices increases administrative costs to the insurer without giving the insurer the opportunity to incorporate such costs into the premium. Indeed, application of the "renewal principle" to read sections 10113.71 and 10113.72 into the policies at issue raises serious

constitutional concerns under the Contracts Clause, and for that reason too should be rejected.

4. Even if A.B. 1747 did retroactively apply to rewrite Flynn's policies, State Farm would still be entitled to summary judgment on Thomas's breach of contract claim because she failed to establish even a prima facie case that any failure by State Farm to comply with the legislation's requirements caused her harm.

Thomas bore the burden of producing evidence of causation. *See* Cal. Civ. Code §§ 3300, 3358 (West 2016). But she failed to submit any evidence showing that Flynn or a third-party designee would have paid the premium if only State Farm had done what Thomas claims was required under the 2013 statutes. This failure to submit any evidence on a required element of Thomas's breach of contract claim alone entitles State Farm to summary judgment, even if the 2013 legislation retroactively applies to Flynn's 2008 policies.

ARGUMENT

I. The policies as written defeat Thomas's breach of contract claim.

The claim on which the district court entered summary judgment for Thomas is for breach of contract. (1 ER 1-2.) To establish liability on that claim, Thomas was required to prove "(1) the existence of the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to the plaintiff." *Oasis W. Realty, LLC v. Goldman*, 51 Cal. 4th 811, 821 (2011), *holding limited on another ground by Baral v. Schnitt*, 1 Cal. 5th 376, 391-92 (2016). Under the plain terms of Flynn's policies as written, Thomas's breach of contract claim fails as a matter of law under the second and third elements.

Both policies conditionally promise that coverage will be provided up to the date of Flynn's 95th birthday. (3 ER 301, 312, 328, 338.) That coverage is conditioned on Flynn's paying premiums on a regular (annual or monthly) basis and state that, upon nonpayment by the end of the grace period, the policy will lapse and coverage will cease. (3 ER 310, 312, 336, 338.)

It is undisputed that Flynn failed to pay premiums for both policies beyond their grace periods. (3 ER 295-96 (¶¶ 9-24).) Flynn therefore failed to perform the contractual condition for maintaining coverage, so State Farm's treatment of those policies as lapsed in April 2016 did not breach the terms of the policies as written.

II. The district court properly found the 2013 legislation does not retroactively rewrite the policies issued and delivered to Flynn in 2008.

A. Under the presumption against retroactivity, the Legislature must use clear and unmistakable language to apply a new statute to past events. Statutes that apply to insurance policies when they are "issued or delivered" convey the opposite meaning.

In California, as elsewhere, statutes are presumed to be prospective only, absent a clear indication by the legislature to the contrary:

> "Generally, statutes operate prospectively only." "[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly. . . . For that reason, the 'principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.'"

McClung v. Emp't Dev. Dep't, 34 Cal. 4th 467, 475 (2004) (citations omitted); *see also Interins. Exch. of Auto. Club of S. Cal. v. Ohio Cas. Ins. Co.*, 58 Cal. 2d 142, 149 (1962) ("It is, of course, a settled rule of construction that statutes are not to be given retroactive effect 'unless the Legislature has expressly so declared.'").

The same rule applies to statutes governing insurance policy terms, and the rule is often reflected in statutes' reference to policies "issued or delivered" in California. In the seminal case *Ball v. California State Automobile Association Inter-Insurance Bureau*, 201 Cal. App. 2d 85, 87-88 (1962), Justice Matthew Tobriner (before his elevation to the California Supreme Court) wrote,

> The 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.
>
> . . . .
>
> Here the legislation refers to policies which "shall be issued or delivered. . . ." The specific act of issuance and delivery predated the legislative provision and cannot conceivably operate to bring within its meaning later legislation which was enacted after such issuance and delivery. The later legislation embraced only policies thereafter issued or delivered; it did not purport to affect existing contracts, and, indeed, according to appellants, "could not, *of its own force*,

> affect" appellant Ball's existing policy, "under the Federal and California Constitutions."

This holding was confirmed by the California Supreme Court, which held, "[i]t is well settled that insurance policies are governed by the statutory and decisional law in force at the time the policy is issued." *Interins. Exch.*, 58 Cal. 2d at 148.

B. Nothing in the language of A.B. 1747 or its legislative history indicates a clear legislative intention that its provisions apply retroactively to rewrite pre-2013 policies.

Here, notwithstanding the written terms of the policies, Thomas argued below that California Insurance Code sections 10113.71 and 10113.72 apply to and rewrite the policies to require State Farm to have afforded Flynn a sixty-day grace period for nonpayment of premium, to have allowed Flynn to designate a third party to receive notices of pending lapse, and to have sent such notices to that third party before lapsing the policies. (1 ER 2, 5, 8; 2 ER 94-101.) She thus argued that State Farm's failure to do these things breached the policies as a matter of law. (2 ER 104-05.)

As the district court correctly understood, the flaw in Thomas's position is that A.B. 1747 went into effect in 2013, whereas the policies were issued and delivered to Flynn in 2008. (1 ER 2, 4, 8-10; 3 ER 295 (¶¶ 1, 5).)

The operative language of A.B. 1747 plainly conveys that it applies only to policies issued and delivered *after* its 2013 effective date. Section 10113.71(a) states: "Each life insurance policy *issued or delivered in this state shall contain* a provision for a grace period of not less than 60 days from the premium due date." Cal. Ins. Code § 10113.71(a) (emphasis added). Section 10113.72(a) similarly provides: "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." *Id.* § 10113.72(a) (emphasis added).

Thus, when the Legislature used the phrase "issued or delivered" in sections 10113.71(a) and 10113.72(a), it unambiguously conveyed its intent that, as is true by default even without such language, the legislation applies prospectively only to policies issued or delivered on or after January 1, 2013. Moreover, the use of the forward-looking verbs

"shall contain" and "shall not be issued or delivered" in sections 10113.71(a) and 10113.72(a) reinforces the conclusion that the Legislature did not intend for A.B. 1747 to apply to existing policies. One further indication of the Legislature's intent is that section 10113.72(a) states that an insurer must notify an "applicant" for life insurance of his or her right to designate a third party to receive notices of pending lapse. This use of the term "applicant" clearly shows the Legislature's intent that A.B. 1747 apply only to new policies issued and delivered after the legislation's effective date.

The other provisions of A.B. 1747 then build off of these two principal subsections in a way that shows they are interdependent and must apply together or not at all. Section 10113.71(b)(1) specifies that a notice of policy lapse or termination for nonpayment of premium is ineffective unless mailed at least thirty days before the lapse date to the policy owner and the third-party designee that the insurer is required by section 10113.72(a) to allow the policy owner to designate *before issuing or delivering the policy*. Section 10113.72(b) requires the insurer to notify the policy owner annually of "*the right* to change *the written designation* or *designate* one or more persons," which clearly refers to the right to

designate in section 10113.72(a) that applies only to policies thereafter issued or delivered in California. And section 10113.72(c) prohibits an insurer from lapsing or terminating a policy for nonpayment of premium unless it has given thirty days' notice by mail to the policy owner and "the person or persons designated pursuant to subdivision (a)," which also clearly refers to section 10113.72(a) and its prospective-only right to designate.

In this manner, the Legislature made clear that every subdivision of A.B. 1747 interlocks with every other. Since sections 10113.71(a) and 10113.72(a) apply only to policies "issued or delivered" after the legislation's 2013 effective date, all of the other provisions of A.B. 1747 similarly apply only to policies issued or delivered after January 1, 2013. This is the very opposite of the clear and unmistakable language necessary to negate the presumption against retroactivity.

Nor does A.B. 1747's legislative history change the analysis. Thomas cited several snippets of legislative history in her district court motion papers (2 ER 98-100), but these references do not come close to demonstrating a clear legislative intent to impose retroactive obligations on insurers under policies drafted, priced, and issued before A.B. 1747's

enactment. Yes, the legislative history at various points talks about the consumer protections the act will provide to policy owners, many of whom are senior citizens who may need such protections to avoid inadvertent lapse due to a missed premium payment. (*Id.*) But Thomas points to nothing in those materials indicating the Legislature intended A.B. 1747 to grant new rights to such policy owners under policies issued and delivered before the legislation's effective date, much less that the Legislature expressed such retroactive intent in clear and unequivocal terms as the law requires. *See McClung*, 34 Cal. 4th at 475; *Interins. Exch.*, 58 Cal. 2d at 149.[1]

[1] The California Supreme Court has granted review to decide whether California Insurance Code sections 10113.71 and 10113.72 apply retroactively to life insurance policies issued and delivered before their effective date. *See McHugh v. Protective Life Ins.*, 40 Cal. App. 5th 1166 (2019), *review granted*, 257 Cal. Rptr. 3d 784 (Jan. 29, 2020, No. S259215).

III. The district court erred in using the "renewal principle" to read the 2013 statutory terms into policies issued and delivered before 2013.

A. The "renewal principle" is a method of policy interpretation originating outside the life insurance context; it is inapposite to the life insurance context.

Despite correctly holding that A.B. 1747 does not apply retroactively to pre-2013 policies, the district court nevertheless erred by reading the act's requirements into Flynn's policies based on the so-called "renewal principle." (1 ER 11-15.)

The "renewal principle" originated in cases outside the life insurance context. *See Argonaut Ins. Co. v. Colonial Ins. Co.*, 70 Cal. App. 3d 608, 611-13, 618-20 (1977) (comprehensive general liability ("CGL") policies); *Modglin v. State Farm Mut. Auto. Ins. Co.*, 273 Cal. App. 2d 693, 695, 700 (1969) (automobile liability policies). In those other contexts, where an insurance contract comes up for renewal every year, and each party is free to negotiate new terms or exit the contractual relationship, the offer and acceptance of a renewed policy has been deemed to effectuate a new contract. *See* Cal. Ins. Code § 660(e) (West 2013 & Supp. 2020) (stating that, as applied to automobile liability, physical damage, and collision policies, "'[r]enewal' or 'to renew' means

to continue coverage with . . . the insurer which issued the policy . . . for an additional policy period upon expiration of the current policy period of a policy"); *Borders v. Great Falls Yosemite Ins. Co.*, 72 Cal. App. 3d 86, 94 (1977) ("In order for the renewal of an insurance policy to be effective, there must be an offer to renew and an acceptance thereof. The renewal of a policy is a new contract of insurance as regards the requirements of mutual assent offer and acceptance, and new consideration.") (internal quotation marks and citations omitted).

Where "renewal" in this sense of creation of a newly formed policy occurs, statutory changes that have been enacted before the issuance and delivery of the renewed policy are implied by law into the policy terms, just as they would be implied into the first contract between the insured and insurer. *See Argonaut*, 70 Cal. App. 3d at 618-20; *Modglin*, 273 Cal. App. 2d at 700 (addressing applicability of California uninsured motorist statutes to policy reissued in California after having originally been written in Arizona for sixty-day period). Renewal may simplify the process of issuing the policy, because the contracting parties bypass the initial application process, but legally speaking, a new policy issues all the same.

This makes sense for the non-life insurance context, where most policies are written for terms of six months or one year and renew regularly. *See Argonaut*, 70 Cal. App. 3d at 618 (CGL policies generally written for one-year terms). In such cases, both the insurer and the insured are free to not renew the policy for the upcoming policy term. *See* Cal. Ins. Code § 663(a)(2) (West 2013 & Supp. 2020) (confirming that auto insurer has option not to renew policy provided it gives insured thirty days' written notice); *Fujimoto v. W. Pioneer Ins. Co.*, 86 Cal. App. 3d 305, 308-09 (1978) (quoting typical auto policy: "Subject to the consent of the company, this policy may be continued in force for successive policy periods by payment of the required continuation premium to the company on or before the effective date of each successive policy period.").

An insured under an auto policy might decide that, as the vehicle ages, it makes sense to no longer carry "comprehensive" coverage, and instead to pay less for liability coverage only. An insured under a homeowners policy might alter the premises or change the contents of the home in a way that warrants increasing or decreasing the amount of coverage. Insureds under either type of policy might also choose to change the deductible for a change in premium. Meanwhile, insurers'

actuaries might determine that risks inherent in insuring policyholders have increased or decreased, requiring a change in the cost of coverage, or dictating that certain types of coverage should no longer be offered at all. Insurers might also wish to offer new coverages depending on changes in the insurance marketplace, such as the advent of personal ownership of computing equipment or the use of personal automobiles in ride-sharing services. The foregoing authorities reflect that, at each renewal date, the parties' private contract is subject to renegotiation.

Individual term life insurance policies like those at issue here are quite different, and this explains why the "renewal principle" has no force in this context. An individual term policy like Flynn's issues once at the beginning of a fixed term of lengthy duration; it does not reissue or renew at the end of a six-month or one-year period, but rather remains in force based on the contractual terms specified from day one. (*See, e.g.*, 3 ER 301, 303-07, 328, 330-33 (specifying that policy term lasts until Flynn's 95th birthday in 2069).) If there is a renewal or reissue, it generally occurs via an offer at the end of the lengthy term, and the new premium rate is based on the adjusted mortality of the customer by age at the time of the renewal. (*See, e.g.*, 3 ER 311, 337.)

The United States Supreme Court long ago rejected the proposition that life insurance policies like those at issue here renew from year to year upon each premium payment, and instead confirmed that they remain continuously in force for a fixed term, no matter how an insured's periodic payment for that term is structured:

> We agree with the court below, that the contract is not an assurance for a single year, with a privilege of renewal from year to year by paying the annual premium, but that it is an entire contract of assurance for life, subject to discontinuance and forfeiture for non-payment of any of the stipulated premiums. Such is the form of the contract, and such is its character. It has been contended that the payment of each premium is the consideration for insurance during the next following year,–as in fire policies. But the position is untenable. It often happens that the assured pays the entire premium in advance, or in five, ten, or twenty annual instalments. Such instalments are clearly not intended as the consideration for the respective years in which they are paid; for, after they are all paid, the policy stands good for the balance of the life insured, without any further payment. Each instalment is, in fact, part consideration of the entire insurance for life. It is the same thing, where the annual premiums are spread over the whole life. The value of assurance for one year of a man's life when he is young, strong, and healthy, is manifestly not the same as when he is old and decrepit. There is no proper relation between the annual premium and the risk of assurance for the year in

> which it is paid. This idea of assurance from year to year is the suggestion of ingenious counsel.

N.Y. Life Ins. Co. v. Statham, 93 U.S. 24, 30 (1876); *see also Thomas v. Nw. Mut. Life Ins. Co.*, 142 Cal. 79, 82-83 (1904) (quoting and relying on foregoing analysis); *Methvin v. Fid. Mut. Life Ass'n of Phila.*, 129 Cal. 251, 256-57 (1900) (adopting similar reasoning under California law).

This distinction holds true under more modern case law. In explaining how term life insurance differs from workers' compensation insurance, the California Court of Appeal highlighted

> the continuing nature of a life insurance policy as contrasted to a policy of workers' compensation insurance. Customarily, policies of workers' compensation insurance expire periodically, usually annually. Upon expiration, the insured may renew the policy with the same carrier or obtain a policy from a different carrier. There is no necessary continuing relationship and each policy period constitutes a separate period of coverage. Life insurance on the other hand is issued normally on a long-term basis and continuity of coverage is vital because of the necessity of demonstrating insurability should coverage be terminated and new coverage sought.

Homestead Supplies, Inc. v. Exec. Life Ins. Co., 81 Cal. App. 3d 978, 988 (1978); *see also In re Marriage of Burwell*, 221 Cal. App. 4th 1, 18-19 (2013) (rejecting notion that each premium payment under term life insurance policy creates a new contract).

The inescapable conclusion is that, unlike in the automobile and other casualty insurance contexts from which the "renewal principle" originated, individual term life insurance policies do not "renew" upon each annual or more frequent premium payment (in the sense of a new policy issuing for a new coverage period), and there is thus no new policy issued or delivered into which statutory changes can be incorporated by operation of law.

The way individual term life insurance is underwritten explains why those policies are generally written for a fixed duration, rather than on an annual or more frequent renewal basis. Complex actuarial calculations go into setting the terms, conditions, and premiums for such policies, based on projections *under the law as it exists at the time the contract is formed*. *See N.Y. Life Ins. Co.*, 93 U.S. at 30-31. The policy language is carefully drafted to balance and protect the insured and insurer interests in the transaction over the entire duration of the policy. *Id.*

For instance, the fixed period of a term life policy protects the insured from suffering invalidation of the policy due to misrepresentations in the application after a standard incontestability

period of two years. *See, e.g.,* 3 ER 312, 338 (incontestability clause in Flynn's policies); *see also Amex Life Assurance Co. v. Superior Court*, 14 Cal. 4th 1231, 1233-34 (1997) (describing operation of standard incontestability clause in term life insurance policies).

A similar protection for the insured is found in the standard suicide clause of most life policies, whereby the insured's suicide during the first two years of the policy term restrict the death benefit to premiums paid, but not thereafter. *See, e.g.*, 3 ER 312, 338 (suicide clause in Flynn's policies); *see also Burwell*, 221 Cal. App. 4th at 23 (describing operation of standard suicide clause in term life insurance policies). If term life insurance policies were construed to "renew" every year, so as to incorporate statutory changes enacted in the interim, the time period for the incontestability and suicide clauses described above would reset at every annual premium payment, and the beneficiary protections would never come into play.

Critically, the insurer cannot simply elect not to renew or to terminate a term life insurance policy for economic reasons, such as that the particular class of life insurance has become too costly and the insurer decides it is no longer interested in participating in that class of life

insurance. Nor can the insurer decide, based on the insured's deteriorating health, that the policy should be cancelled as a bad bet for the insurer. Balanced against these protections of the insured is the predictability the insurer gains from knowing that the policy provisions are fixed *as written* (not as later rewritten by the Legislature) at the issuance date for the duration of the policy term.

Put another way, applying the "renewal principle" as Thomas urges would also work a "bait and switch" on life insurers. Life insurance companies craft and sell a long-term insurance product on a fixed price basis that is amortized over the duration of the policy. *See N.Y. Life Ins. Co.*, 93 U.S. at 30-31 (describing the operating principle animating the shared risk concept underlying the life insurance industry). Were subsequent statutory changes to be applied to this product on a retroactive basis via the "renewal principle," life insurers would see their obligations under existing policies expanded with no opportunity to cancel the policies or renegotiate the price point as a condition for renewal, the way auto or homeowners insurers can do in the standard renewal scenario. *See* Cal. Ins. Code § 663(a)(2) (confirming that auto insurer has option not to renew policy provided it gives insured thirty

days' written notice); *Fujimoto*, 86 Cal. App. 3d at 308-09. In other words, applying the "renewal principle" here would upset settled contractual expectations of insureds and insurers alike and would swallow the rule that statutes like those at issue here do not apply retroactively to policies issued and delivered before their effective date.

B. The district court committed reversible error in applying the "renewal principle" to Flynn's policies and reading the terms of the 2013 legislation into those 2008 policies.

The language of Flynn's policies is typical of normal term life insurance policies. They specify a fixed duration that lasts until Flynn's 95th birthday in 2069. (3 ER 301, 303, 312, 328, 330, 338.) The policies use the terms "premium due date," "payment period," "policy date," and "policy anniversary" to describe the policy term and when premiums must be paid, consistent with the customary operation of individual term life insurance policies. (3 ER 301, 303-05, 308-12, 328, 330-31, 334-38 (original formatting omitted).) Nowhere in the policies are the terms "renew" or "renewal" found. (*Id.*)

In its summary judgment order reading A.B. 1747's terms into Flynn's policies via the "renewal principle," the district court did not consider any of these features of individual term life insurance policies that make the underlying rationale for the "renewal principle" inapplicable to such policies. (*See* 1 ER 11-15.) Instead, the court relied on a handful of inapposite cases applying the "renewal principle" to different types of insurance policies to conclude that Flynn's payment of his monthly premiums on the two policies after A.B. 1747's 2013 effective date "renewed" those policies and thereby incorporated the act's terms into the policies. (*Id.*) In this, the district court erred.

The district court began with the erroneous premise that the "renewal principle" applies to individual term life insurance policies. (1 ER 11.) For this, the court cited two other district court orders, in *Cerone v. Reliance Standard Life Insurance Co.*, 9 F. Supp. 3d 1145, 1149-50, 1151-52 (S.D. Cal. 2014), and *Bentley v. United of Omaha Life Insurance Co.*, 371 F. Supp. 3d 723, 736 (C.D. Cal. 2019). But *Cerone* is entirely distinguishable, and *Bentley* is simply incorrect.

In *Cerone*, the court interpreted California Insurance Code section 10110.6, which barred insurance plan administrators from engaging in discretionary analyses of life and disability insurance policies when deciding whether and how to award benefits. *Cerone*, 9 F. Supp. 3d at 1149; *see also Stephan v. Unum Life Ins. Co. of Am.*, 697 F.3d 917, 927 (9th Cir. 2012) (reciting principle that insurance policies incorporate statutory changes enacted before their latest reissuance or renewal, holding the same statute at issue in *Cerone* and similar statute did not alter policies at issue under that principle, and not discussing at all whether individual term life insurance policies "renew" at every premium payment). Section 10110.6 expressly applied to "a policy . . . offered, issued, delivered, *or renewed*, whether or not in California . . . ," *id.* (emphasis added), and defined "renewed" "[f]or purposes of [that] section" as "continued in force on or after the policy's anniversary date." Cal. Ins. Code § 10110.6(b) (West 2013). Thus, in section 10110.6, the Legislature expressly declared that the limitation on administrators' discretion applied to policies that "continued in force" at or after the time the statute was enacted, unlike in sections 10113.71 and 10113.72. In fact, the absence of any reference to renewal in sections 10113.71 and 10113.72,

when compared to section 10110.6's express reference to and definition of "renewal" in a similar context, lends further support to State Farm's position. *See Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1723 (2017) ("[D]ifferences in language like this convey differences in meaning").

Numerous other statutes regulating insurance policies similarly demonstrate that the Legislature understands the concept of renewal and knows how to draft a statute that unmistakably applies both to the first issuance of a policy and to subsequent renewal policies. *See, e.g.*, *Argonaut*, 70 Cal. App. 3d at 618 (applying "renewal principle" to California Insurance Code section 11580.9, which "applies only to insurance policies issued *or renewed* on or after November 23, 1970"); *see also* Cal. Ins. Code §§ 396(g) (West Supp. 2020) (stating provision "applies to policies that are issued and take effect *or that are renewed* on or after January 1, 2016" (emphasis added)), 570 (West 2013) (applying statute to "each insurer which issues, amends, *or renews*, on or after January 1, 1975, a policy of insurance" (emphasis added)), 10101(a) (West Supp. 2020) (applying statutory requirements to property insurance policies "issued *or renewed* in this state" (emphasis added)), 10112.1(a) (West

2013) (applying statutory requirements to "every health insurer that issues, sells, *renews*, or offers policies for health care coverage in this state" (emphasis added)), 10112.9(a)(1) (West Supp. 2020) (applying statutory prohibition to insurers who "market, offer, amend, issue, *or renew*" certain policies (emphasis added)), 10112.27(a) (West Supp. 2020) (applying statutory requirements to health insurance policies "issued, amended, *or renewed* on or after January 1, 2017" (emphasis added)), 10123.91(a) (West 2013) (applying statutory requirement to "every insurer that issues, amends, *or renews*" a health insurance policy "[o]n or after January 1, 2009" (emphasis added)), 10128.4 (West 2013) (applying statutory requirements to "all policies issued, delivered, amended, *or renewed* in this state after January 1, 1977" (emphasis added)).

It is logical that the same language is not in the legislation at issue here, given that insureds and insurers do not "renew" individual term life insurance policies, as is done with other types of insurance.

Bentley involved the same question presented in this appeal, and the *Bentley* court came to the same conclusion as the court below. *Bentley*, 371 F. Supp. 3d at 730-31. Indeed, the court below heavily relied on *Bentley*. (*See* 1 ER 11-15.) But *Bentley* went off course by importing

into the life insurance context the "renewal principle" from two earlier California cases, *Modglin*, 273 Cal. App. 2d at 700, and *Argonaut*, 70 Cal. App. 3d at 619-20, that arose in the casualty insurance context. *Bentley*, 371 F. Supp. 3d at 733-34, 735-36. *Bentley* and the court below did not take account of the important distinctions (described above) between how life insurance policies operate and how auto or other liability or casualty insurance policies operate—distinctions that make all the difference to whether the "renewal principle" applies.

To see why this is true, consider the facts of *Modglin* and *Argonaut*. In *Modglin*, the insurer issued an auto liability policy with a two-month term that was renewable at the end of the term upon payment of a renewal premium. *Modglin*, 273 Cal. App. 2d at 695-96. Toward the end of the term, the insurer mailed the insured a renewal premium notice, and the insured paid the renewal premium, which the Court of Appeal held was sufficient to renew the policy, into which the court implied statutory changes that had taken effect before the parties decided to renew their contractual relationship. *Id.* at 700. Under established California law, the old policy ceased, and the insurer issued a new policy to the insured for the new term. *See* Cal. Ins. Code § 660(e) (stating that,

as applied to automobile policies, "'[r]enewal' or 'to renew' means to continue coverage with . . . the insurer which issued the policy . . . for an additional policy period upon expiration of the current policy period of a policy"); *Borders*, 72 Cal. App. 3d at 94 ("The renewal of a policy is a new contract of insurance as regards the requirements of mutual assent offer and acceptance, and new consideration") (internal quotation marks and citations omitted).

Here, Flynn's policies did not "renew" as the policy in *Modglin* did. Flynn's policy term was not due to expire until 2069, and State Farm did not issue a new policy to Flynn each time he paid a premium, nor could State Farm renegotiate the policies' terms or rates at each premium due date or decline to renew the policy if Flynn paid the premium the way the insurer could have done in *Modglin*. This is the critical distinction that *Bentley* and the court below missed.

Argonaut presents the same story. In that case, several insurers issued liability policies to various employers who were potentially liable for an accident at a construction site, and the question was whether a particular policy should be deemed primary and the other policies should be deemed excess. *Argonaut*, 70 Cal. App. 3d at 611-15. A California

statute enacted after the purportedly primary policy was first issued but before it was re-issued on renewal established new rules for deciding the primary/excess question in that situation, and the Court of Appeal had to decide if the statute applied to that policy. *Id.* at 618. Premiums under the policy were due monthly, but if one or more premium payments were missed, the policy would simply be canceled and automatically reinstated once the past due premiums were paid. *Id.* at 618-19. In applying the "renewal principle" to the policy, the *Argonaut* court relied on California Insurance Code section 660(e), which provides that any auto liability policy written for a term of one year or more, or that lacks an expiration date (as this policy did), shall be deemed to be written for successive policy periods or terms of one year. *Id.* at 619-20. *Argonaut* concluded that, under section 660(e) and the policy's cancellation and reinstatement provisions, the insured's renewal premium payment constituted a renewal that incorporated statutory changes enacted in the interim into the policy. *Id.* at 620.

Unlike in *Argonaut*, Flynn's policies had a specified term that lasted until 2069. (3 ER 301, 303, 312, 328, 330, 338.) And no statute like section 660(e) applied to Flynn's policies to deem every premium

payment to be a renewal. Rather, each premium payment Flynn made was part of the total premium owed over the whole policy period and operated to continue in force the same policy for the same continuous term, with no opportunity for renegotiation, alteration, or unilateral insurer cancellation of the policy terms.

The district court's error can be summed up in the following passage from its ruling: "'renewing' a policy and paying a premium lead to the same result: continuing coverage for a period covered by a premium." (1 ER 15.) This statement is facially incorrect in the context of life insurance, for the reasons explained above. Because the animating rationale of the "renewal principle"—i.e., that parties can choose to end their contractual relationship or to extend it on terms in keeping with the statutes in effect at the time of renewal—does not apply to term life policies, neither can the doctrine itself.

C. The canon of constitutional avoidance counsels against applying the "renewal principle" to incorporate the 2013 legislation's terms into the 2008 policies.

There is another reason why the district court's interpretation of the 2013 legislation through the lens of the "renewal principle" is problematic: it violates the canon of constitutional avoidance, in this case due to constitutional problems under the Contracts Clause.

The constitutional avoidance canon is a method of statutory interpretation under which, "if an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,' [courts] are obligated to construe the statute to avoid such problems." *I.N.S. v. St. Cyr*, 533 U.S. 289, 299-300 (2001) (citations omitted), *superseded by statute on another ground*, REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 310, *as recognized in Nasrallah v. Barr,* 140 S. Ct. 1683, 1690 (2020); *see also People v. Garcia*, 2 Cal. 5th 792, 804 (2017) (applying constitutional avoidance canon in interpreting California statute).

Here, Thomas and the district court posit one way of interpreting the 2013 legislation (i.e., so that its terms apply and are read into policies issued and delivered before their effective date but for which a premium

is paid to continue coverage after their effective date), while State Farm posits a different interpretation (whereby the act does not apply to policies issued and delivered before its effective date, regardless of how and when premiums come due to keep the policies in force after the date of issuance). While State Farm's interpretation is compelled by A.B. 1747's plain language and applicable case law, even if the act's language were ambiguous on this point, State Farm's interpretation remains correct because Thomas's and the district court's interpretation threatens to violate the Contracts Clause.

Providing that "[n]o state shall . . . pass any . . . Law impairing the Obligation of Contracts," *Sveen v. Melin*, 138 S. Ct. 1815, 1821 (2018) (quoting U.S. Const., art. I, § 10, cl. 1), "[t]he Contracts Clause restricts the power of States to disrupt contractual arrangements," including insurance policies, *id.* In examining whether a statute violates the Contracts Clause "[t]he threshold issue is whether the state law has 'operated as a substantial impairment of a contractual relationship,'" which entails consideration of "the extent to which the law undermines the contractual bargain, interferes with a party's reasonable expectations, and prevents the party from safeguarding or reinstating his

rights." *Id.* at 1821-22. If there is substantial impairment, "the inquiry turns to the means and ends of the legislation," which entails asking "whether the state law is drawn in an 'appropriate' and 'reasonable' way to advance 'a significant and legitimate public purpose.'" *Id.* at 1822.

Under both the substantial impairment and means-ends tests, Thomas's and the district court's "renewal principle" interpretation of sections 10113.71 and 10113.72 falls afoul of the Contracts Clause. As explained *supra* pp. 32-41, reading those statutes' grace period, notice, and termination provisions into policies issued and delivered before their effective date under the guise of the inapposite "renewal principle" would upend settled expectations of insurer and insured alike and thereby substantially impair the contractual relationship embodied in the individual term life insurance policy.

The district court's interpretation is also not a reasonable or appropriate way to accomplish the Legislature's purpose of protecting insureds from inadvertent lapse due to missed premium payments. While that legislative end may be laudable, the means the Legislature chose must be tailored and balanced to avoid sweeping more broadly than necessary and running into constitutional problems. State Farm's

interpretation—applying A.B. 1747's protections to policies issued and delivered after the legislation's January 1, 2013 effective date—provides an appropriate means-ends fit by ensuring that A.B. 1747's protections apply to policies issued on a going-forward basis but protecting the settled expectations of insurers and insureds alike with respect to policies already issued before that date. State Farm's interpretation avoids the "bait and switch" effect that Thomas's and the district court's "renewal principle" interpretation would have on insurers and insureds, and thereby avoids the serious Contracts Clause problems that applying the "renewal principle" here would cause. Under the canon of constitutional avoidance, even assuming sections 10113.71 and 10113.72 are ambiguous as to their temporal scope, the better interpretation is to apply those statutes only to policies issued and delivered after their effective date.

D. The California Department of Insurance's consistent view of the 2013 legislation and advice to life insurers regarding its application further supports State Farm's position.

Lending further support to State Farm's position is the fact that staff attorneys at the California Department of Insurance not surprisingly came to the same conclusion as State Farm did. They consistently advised life insurers that sections 10113.71 and 10113.72 apply only to policies issued and delivered after those statutes' 2013 effective date and do not apply to policies "renewed" (in the inapposite sense of continuing in force after a premium payment) after that date.

Having a sophisticated understanding of different classes of insurance and how they operate, the Department published its commentary on the applicability of sections 10113.71 and 10113.72 for the life insurance industry contemporaneously with A.B. 1747's enactment, stating that the legislation would apply to new policies issued in 2013 and after, but not to pre-2013 policies. The Department published this advice on its System for Electronic Rate and Form Filing ("SERFF"), which is "an internet-based system that enables insurance companies . . . to submit rate and form filings to the Department for approval of insurance products and changes to existing products" and

that "provides regulatory guidance to insurers . . . , including guidance for compliance with the statutes." *McHugh*, 40 Cal. App. 5th at 1172. The Department's SERFF instructions for complying with the 2013 legislation stated: "All life insurance policies issued or delivered in California on or after [January 1, 2013] must contain a grace period of at least 60 days." *Id.*

When insurance industry representatives sent inquiries to Department personnel for further advice as to A.B. 1747's applicability to existing policies, the Department's Chief Counsel of the Policy Approval Bureau, Leslie Tick, responded in a March 2013 letter, stating:

> "In 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. If the statutes had retroactive effect they would effect [*sic*] actions which have already occurred, and which were lawful at the time, making them retroactively unlawful. Parties to a contract would have no certainty as to the terms of their agreement if the Legislature could change those terms retroactively. [¶] Generally a policy is 'issued or delivered' just once—when it is new. A statutes [*sic*] would have to say 'and renewed' in order to apply to renewals, because presumably those renewed policies were issued or delivered before the Jan[uary] 1, 2013 effective date. [¶] For these reasons the statutory changes brought by [Assembly Bill No. 1747], apply on a going forward basis—that is, the changes apply to policies issued or

> delivered on or after [January 1, 2013]. [Assembly Bill No. 1747] does not require insurers to extend the grace period for policies that are already in force and does not require insurers to extend the grace period when policies that were issued prior to [January 1, 2013], are renewed."

Id. Echoing this clear advice, Tick reiterated in a July 2016 email that the Department had issued SERFF commentary on this question and added that A.B. 1747 "applies to new policies issued on or after [January 1, 2013, but] not to policies renewed on or after [January 1, 2013]." *Id.* at 1173. Furthermore, a different Department attorney, Nancy Hom, stated in a December 2012 email that "[t]he requirements of [Assembly Bill No. 1747] are not retroactive. The bill applies to policies issued or delivered on or after January 1, 2013, not before." *Id.* at 1172-73.

This advice was not a formal regulation, and State Farm does not ask this court to formally defer to this guidance under either California administrative law principles or *Chevron* deference. State Farm simply highlights the Department's views as evidence consistent with the case law demonstrating that individual term life insurance does not "renew" in the form of a new contract through payment of policy premiums, but rather continues in force as originally written through payment of premiums—and that statutes enacted after the issuance date of a policy

thus cannot properly be read into that policy under the "renewal principle."

IV. Even if the 2013 legislation did retroactively apply to Flynn's policies, Thomas's breach of contract claim still fails for lack of evidence of causation.

Even if Thomas and the district court were correct that A.B. 1747 applies retroactively to and is incorporated into Flynn's 2008 policies, via the "renewal principle" or otherwise, State Farm would still be entitled to summary judgment on Thomas's breach of contract claim because Thomas failed to submit any evidence that any breach by State Farm of the policies (read as incorporating the 2013 legislation's requirements) caused her damages.

Under California law, "[a]n essential element of a claim for breach of contract are damages *resulting from the breach*. Causation of damages in contract cases requires that the damages be proximately caused by the defendant's breach." *St. Paul Fire & Marine Ins. Co. v. Am. Dynasty Surplus Lines Ins. Co.*, 101 Cal. App. 4th 1038, 1060 (2002); *see* Cal. Civ. Code § 3300 ("For the breach of an obligation arising from contract, the measure of damages . . . is the amount which will compensate the party aggrieved for all the detriment *proximately caused thereby*, or which, in

the ordinary course of things, *would be likely to result therefrom*." (emphasis added)).

Furthermore, "damages cannot be *presumed* to flow from liability." *Metzenbaum v. R.O.S. Assocs.*, 188 Cal. App. 3d 202, 211 (1986). Instead, the plaintiff must "establish a *causal connection* between the breach and the damages sought." *Id.* And "the breaching party is only liable to place the nonbreaching party in the same position as if the specific breach had not occurred." *St. Paul Fire*, 101 Cal. App. 4th at 1061. Damages for breach of contract may not place the plaintiff in a better position than if the contract had been fully performed. *See* Cal. Civ. Code § 3358.

Here, these principles dictate entry of summary judgment for State Farm. Thomas submitted no evidence whatsoever in connection with her summary judgment motion or her opposition to State Farm's summary judgment motion to show that, had State Farm done what Thomas says was required under A.B. 1747's grace period and notice provisions, Flynn's policies would not have lapsed. (2 ER 104-05, 109-10; 3 ER 283-84, 290-91, 294-98, 372-99, 432.)

In particular, Thomas did not submit any evidence that Flynn would have paid his premium within a longer sixty-day grace period. For all we know, Flynn decided that the potential future benefit of providing for his sister in the event he should predecease her was no longer worth the premiums he was paying, and a longer notice period would not have changed that calculus. Nor is there evidence that Flynn would have designated a third party to receive notices if given the opportunity, that any third-party designee would have received or acted upon a notice of pending lapse by timely paying Flynn's premiums, or that Flynn or a third-party designee would have had the financial means to do so. (*Id.*) In the absence of any such evidence, the court is left to speculate whether Flynn or a third-party designee (whether Thomas or someone else) would or could have acted to pay the premiums and prevent the policies from lapsing if State Farm had complied with the 2013 act's requirements.

Because speculation cannot substitute for evidence of causation, *see Saelzler v. Advanced Grp. 400*, 25 Cal. 4th 763, 775-76 (2001), the district court should have granted State Farm summary judgment even after erroneously concluding that the 2013 legislation applies to Flynn's policies based on the "renewal principle."

CONCLUSION

The judgment should be reversed and the case remanded with instructions to enter judgment for State Farm dismissing Thomas's complaint in its entirety without leave to amend.

June 29, 2020

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STATEMENT OF RELATED CASES

The following appeals pending in this court raise the same or closely related issues as are presented in this appeal:

Shaff v. Farmers New World Life Insurance Co., No. 19-56129

Bentley v. United of Omaha Life Insurance Co., Nos. 20-55435, 20-55466

ADDENDUM

PURSUANT TO
FED. R. APP. P. 28(F)
CIR. R. 28-2.7

State of California

INSURANCE CODE

Section 10113.71

10113.71. (a) Each life insurance policy issued or delivered in this state shall contain a provision for a grace period of not less than 60 days from the premium due date. The 60-day grace period shall not run concurrently with the period of paid coverage. The provision shall provide that the policy shall remain in force during the grace period.

(b) (1) A notice of pending lapse and termination of a life insurance policy shall not be effective unless mailed by the insurer to the named policy owner, a designee named pursuant to Section 10113.72 for an individual life insurance policy, and a known assignee or other person having an interest in the individual life insurance policy, at least 30 days prior to the effective date of termination if termination is for nonpayment of premium.

(2) This subdivision shall not apply to nonrenewal.

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

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

(Amended by Stats. 2013, Ch. 76, Sec. 137. (AB 383) Effective January 1, 2014.)

State of California

INSURANCE CODE

Section 10113.72

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.

(Added by Stats. 2012, Ch. 315, Sec. 2. (AB 1747) Effective January 1, 2013.)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) 20-55231

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