No. 20-55231

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SARAH FLYNN THOMAS,
Plaintiff-Appellee,

v.

STATE FARM LIFE INSURANCE CO.,
Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of California, Case No. 3:18-cv-00728-BAS-BGS, Judge Cynthia A. Bashant

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* SUPPORTING APPELLANT

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INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every economic sector, from every region of the country. One important function of the Chamber is to represent the interests of its members in matters before the courts. To that end, the Chamber regularly files *amicus* briefs in cases that raise issues of concern to the nation's business community.[1]

This is such a case. The Chamber's membership includes a wide range of businesses that are subject to state regulatory schemes that, like the one at issue here, have broad-ranging effects on the contractual rights and expectations that are essential to the flow of commerce. The Chamber is thus well-suited to offer a perspective on the impact of retroactive laws on businesses, and has a strong interest in ensuring that the regulatory environment in which its members operate is a consistent one. The Chamber has filed *amicus* briefs in prior retroactivity cases,

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[1] This brief was not authored in whole or in part by any party's counsel, and no entity or person, aside from *amicus curiae*, its members, or its counsel, contributed money intended to fund the preparation or submission of the brief. *See* Fed. R. App. P. 29(a)(4)(E). All parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2).

including *Maine Community Health Options v. United States*, 140 S. Ct. 1308 (2020); *Sonoco Prod. Co. v. Michigan Dep't of Treasury*, 137 S. Ct. 2157 (2017); *Hambleton v. Washington Dep't of Revenue*, 136 S. Ct. 318 (2015); and *Ford Motor Credit Co. v. Mich. Dep't of Treasury*, 562 U.S. 1178 (2011), and is well-situated to address the issues of retroactivity raised here.

The Chamber has a particular interest in this case, which concerns the retroactive application of insurance laws and thus directly affects insurance companies that are members of the Chamber. By undermining the presumption against retroactivity in the insurance context, the decision below will have adverse practical effects on the value of insurance contracts and the stability of insurance markets. More generally, the decision below will undermine the certainty and predictability that businesses operating under state regulation need in order to form contracts and run their operations with reasonable, investment-backed reliance on existing law. For all these reasons, the Chamber respectfully supports the position of Defendant-Appellant State Farm Life Insurance Company ("State Farm") that the judgment below should be reversed and that this Court should reaffirm the strong presumption that courts may not retroactively rewrite contracts under the guise of new legislation unless the legislature unambiguously instructs them to do so.

INTRODUCTION

The retroactive application of new statutes and regulations, particularly those that impose an unexpected expansion of liability or monetary obligation, can destroy settled expectations and undermine the predictability and stability on which the flow of commerce depends. The presumption against retroactivity is a critical safeguard against such consequences, and helps to prevent the upending of pre-existing insurance policies and business contracts more generally.

The district court's opinion acknowledged the retroactivity principle and correctly held that the statutes at issue, California Insurance Code Sections 10113.71 and 10113.72, "have no retroactive effect." 1ER008. The district court erred, however, in holding that State Farm was nonetheless retroactively liable to Plaintiff-Appellee Sarah Thomas ("Plaintiff") under Sections 10113.71 and 10113.72. The district court reasoned that every payment on the relevant life insurance policy "renewed" the policy and thus incorporated the intervening statutory change. But laws are presumed not to apply retroactively absent a showing of clear legislative intent, and there is no basis to suppose here that the California Legislature intended to alter California's life insurance contracts retroactively—either directly *or* through a "renewal" loophole. The district court's erroneous attempt to side-step the retroactivity principle warrants reversal.

If the lower court's renewal decision stands, there will be significant and long-term harm not only to insurers, but also to the policyholders they serve. For one thing, changes to the law may not always benefit policyholders. For another, the inability to rely on the law that exists at the time of contract creates uncertainty, which tends to increase the cost of insurance and can discourage insurers from writing certain forms of insurance.

Left untouched, the decision also will more broadly create a dangerous precedent that private contracts of all types can be judicially rewritten through the retroactive application of new statutes even in the absence of any clear intent on the part of the legislature to legislate retroactively. And such a precedent would have adverse effects on both consumers and businesses in this Circuit extending well beyond the insurance market.

ARGUMENT

I. THE PRESUMPTION AGAINST RETROACTIVITY IS WELL-SETTLED

"[T]he presumption against retroactive legislation is deeply rooted in [California] jurisprudence." *McClung v. Emp't Dev. Dep't*, 34 Cal. 4th 467, 475 (2004). "It is an established canon of interpretation that statutes are not to be given a retrospective operation unless it is clearly made to appear that such was the legislative intent." *Aetna Casualty & Surety Co. v. Industrial Acc. Com.*, 30 Cal. 2d 388, 393 (1947). California law dictates that, "unless there is an express retroactivity

provision, a statute will *not* be applied retroactively unless it is *very clear* from extrinsic sources that the Legislature must have intended a retroactive application." *Myers v. Philip Morris Companies, Inc.*, 28 Cal. 4th 828, 841 (2002) (internal quotation marks, ellipses, and citation omitted). "[A] statute that is ambiguous with respect to retroactive application is construed to be unambiguously prospective." *Id.* (ellipses and citation omitted). This presumption can be overcome only if "the Legislature plainly has directed otherwise by means of express language of retroactivity or . . . other sources [that] provide a clear and unavoidable implication that the Legislature intended retroactive application." *Quarry v. Doe I*, 53 Cal. 4th 945, 955 (2012) (internal quotation marks, emphasis, and citation omitted).

Under this precedent, California Insurance Code Sections 10113.71 and 10113.72 do not apply to term life insurance policies issued before the statutes' effective date of January 1, 2013. Sections 10113.71 and 10113.72 contain no retroactivity provisions, nor is there "very clear" evidence from extrinsic sources, *Myers*, 28 Cal. 4th at 841, that the Legislature intended the statutes to be retroactive. Accordingly, the district court was correct insofar as it held that the statutes do not apply retroactively to life insurance policies like the one at issue here, 1ER008–10, as was the California Fourth District Court of Appeal in holding the same in *McHugh v. Protective Life Insurance*, 40 Cal. App. 5th 1166 (Ct. App. 2019), *review granted*, 257 Cal. Rptr. 3d 784 (Jan. 29, 2020, No. S259215). *See also Bentley v. United of*

Omaha Life Ins. Co., 371 F. Supp. 3d 723, 732 (C.D. Cal. 2019) (on appeal, No. 20-55466) (considering the same statutes and concluding "the Statutes do not apply retroactively").

The text of Sections 10113.71 and 10113.72 indicates the Legislature intended them to be applied only prospectively. Section 10113.72(a) states that the policy "*shall not be issued or delivered*" 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." (emphases added). These provisions cannot apply retroactively because the statutory language specifying that policies "shall not be issued or delivered" prior to an applicant's specified action necessarily excludes policies already issued and delivered in the past. Nor can an existing policyholder possibly be an "applicant" within the ordinary meaning of that term.

Not only is there thus no explicit provision requiring retroactivity in the text of the statutes, but there is also no evidence suggesting the California Legislature intended Sections 10113.71 and 10113.72 to apply retroactively. Instead, as the California Department of Insurance ("CDI") "consistently communicated," the only apparent legislative intent was that the statutes do *not* have a retroactive effect. *McHugh*, 40 Cal. App. 5th at 1171–74. Since state regulators mandate the approval of all insurance policy forms to ensure the collected premium is appropriate, it is

unlikely that the Legislature here intended to upset the CDI's balancing of obligations and premiums without any clear statutory language to that effect and in contravention of the CDI's own interpretation.

Here, as in the settled line of cases discussed above, enforcing the presumptive bar on the retroactive application of statutes is important for the stability of commerce and business expectations generally. And for reasons discussed below (*see infra* Part III), the imposition of retroactive obligations would pose a particular threat of economic disruption to insurance markets.

II. THE LOWER COURT'S "RENEWAL" HOLDING IS AN IMPROPER END-RUN AROUND RETROACTIVITY PRINCIPLES

After correctly ruling that the unrebutted presumption against retroactivity otherwise prevents the retroactive application of Sections 10113.71 and 10113.72 to the life insurance policy here, the district court erroneously permitted Plaintiff to avoid the presumption through the supposed escape hatch of policy "renewal." The district court accepted Plaintiff's argument that "the Policies were effectively renewed *each* time the premium payment was made," 1ER011 (emphasis added), so any changes in the law that occurred prior to the renewal were incorporated into the policies. *Id.* (citing *Stephan v. Unum Life Ins. Co. of Am.*, 697 F.3d 917, 927 (9th Cir. 2012)). The district court in *Bentley* similarly held that the renewal of an insurance policy is not "a mere extension of the previous policy, but a new contract." 371 F. Supp. 3d 723 at 736. Thus, despite the common-sense understanding that an

insurance policy can be "renewed" only after its term expires or the policy is cancelled, and the Legislature's clear intent not to apply Sections 10113.71 and 10113.72 retroactively, the district court invoked the renewal theory to hold that the insurance policy "renewed" *every month*, because the policyholder paid monthly premiums.

That ruling was incorrect, for the monthly "renewal" theory is simply retroactivity by another name. Because insurance policies are frequently paid monthly or annually, the renewal theory is an exception to retroactivity so large it nearly swallows the rule. "It is well[-]settled that insurance policies are governed by the statutory and decisional law in force at the time the policy is issued," *Interinsurance Exch. of Auto. Club of S. Cal. v. Ohio Cas. Ins. Co.*, 58 Cal. 2d 142, 148 (1962), but under the district court's interpretation, the law governing a given insurance policy could change by the month. Not only would this be unworkable in practice, but it would ignore all evidence that the Legislature did not intend for Sections 10113.71 and 10113.72 to be applied to pre-existing policies via the "renewal" fiction[2] and duck the settled anti-retroactivity principles adopted by the California courts. *See Evangelatos v. Superior Court*, 44 Cal. 3d 1188, 1206 (1988)

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[2] The CDI also came to the conclusion that the statutes' requirements did not attach to *renewed* policies. *See McHugh*, 40 Cal. App. 5th at 1172 (excerpting a letter from the CDI's assistant chief policy approval counsel concluding that the statutes do not require insurers "to extend the grace period for policies that are already in force and . . . when policies that were issued prior to [January 1, 2013], are renewed").

("[T]he question whether a statute is to apply retroactively or prospectively is, in the first instance, a policy question for the legislative body which enacts the statute.").

More broadly, for any contract where payment is spaced out over time, the renewal theory effectively erases the retroactivity principle. Periodic payment is a core feature of many modern contracts—including apartment leases, licensing contracts, and installment plans—and companies rely on the ability to charge consumers monthly or annually. In turn, consumers, who frequently cannot afford to pay the full value of a contract up front, depend on periodic payment. If every contract that is not paid in full upon signing is subject to the retroactive application of new laws, companies and consumers alike will face paralyzing uncertainties.

The rule of law is supposed to "give[] people confidence about the legal consequences of their actions." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994). Yet the renewal theory does the opposite, "chang[ing] the legal consequences of transactions long closed." *E. Enters. v. Apfel*, 524 U.S. 498, 548 (1998) (Kennedy, J., concurring in part in the judgment invalidating retroactive imposition of pension obligations). This type of *post hoc* change "destroy[s] the reasonable certainty and security which are the very objects of property ownership," *id.*, and the district court's renewal holding should accordingly be reversed.

III. APPLYING SECTIONS 10113.71 AND 10113.72 RETROACTIVELY WOULD HAVE ADVERSE PRACTICAL CONSEQUENCES FOR INSURANCE MARKETS

Enforcing the presumption against retroactivity is especially important in insurance markets, where predictability, certainty and continuity in the law are essential for insurers and policyholders alike. The business of insurance requires that insurance company resources be prudently managed so that funds are available to pay claims on those risks policyholders have paid insurers to assume, and not used to pay unanticipated claims or expenses that are retroactively imposed outside the terms and expectations embodied in the parties' own contracts.

Specifically, insurance is a contractual means of managing risk whereby a policyholder transfers a specified risk (here, the risk of death in a specified time period) to an insurer in exchange for a specified premium. Insurers set premiums based on their estimates of the likelihood and amount of future losses that may be covered by their policies. Determining the appropriate premiums for insurance policies requires determining the nature, probability, and magnitude of any assumed risk. *See* 1 Steven Plitt et al., *Couch on Insurance* § 1:2 (3d rev. ed. 2010). To calculate premiums, an insurer thus relies on various factors, including the probability and amount of potential loss, policy limits, and the insurer's operational costs. *Id.* at § 1:6. Insurers must also accurately calculate and set aside reserves that

enable them to continue operations while being able to pay out policyholders' future valid covered claims.

To determine the appropriate premiums and create sufficient reserves, insurance companies must be able to rely on the lapse and grace periods in their policies, as governed by the law at the time of the issuance of the policy. Adding any obligation to an insured's policy without increasing the premiums paid to the insurer—including through the retroactive imposition of new policy obligations or administrative expenses—undermines insurers' ability to prudently manage their resources. And if insurers do not receive premiums adequate to cover the risk and expenses they have undertaken, they could be left with inadequate funds to pay valid claims—thus jeopardizing both the insurers and all of their insureds.

For these reasons, the "renewal" theory threatens to upend insurance policies statewide. As interpreted by the district court, Sections 10113.71 and 10113.72 create new retroactive coverage obligations where insurers and policyholders expressly agreed that there would be none if payment lapsed—on the sole ground that premiums were later paid. Recasting such payments as effective contract renewal is especially problematic in the context of life insurance, which depends upon the certainty and stability of long-term guarantees. Life insurance policies do not expire on a regular basis and do not provide the same opportunity for revision as

other contracts, as they are written either for a set term or for an individual's life, making them particularly bad candidates for frequent "renewal."

Thus, if the decision below stands and Sections 10113.71 and 10113.72 are applied retroactively, either directly or via the renewal theory, insurers will be exposed to considerable losses that will come at a cost to both insurers and policyholders. The retroactive application of Sections 10113.71 and 10113.72 would extend the grace period for nonpayment on policies to 60 days, and would insert a notice procedure into contracts that previously provided for automatic lapse after the expiration of the grace period. Imposing these additional requirements—which contradict existing contractual provisions—would require insurers to devote resources to complying with the new requirements without any ability to recoup such costs through a change in premiums. Insurers have not allocated administrative resources to comply with potential new and ill-defined notice procedures, but rather base the premiums they charge policyholders on the legal requirements that apply at the time of contracting. Had insurers known at the time they issued the affected policies that they would have these new responsibilities in cases of nonpayment, insurers could have required premiums that were appropriate to cover such additional expense.

Imposing such requirements in the context of life insurance is particularly problematic because of the lengthy policy terms. In this case, the policy lasted more

than 60 years with a set premium for the first 30 years of the policy term. 3ER303–04, 3ER330–31.

The sheer number of life insurance contracts and the magnitude of policy and premium values underscore how critical it is that such insurance contracts and the law undergirding them remain stable and predictable. In 2018, individual life insurance protection in the United States totaled $12.1 trillion, representing over 266 million life insurance policies in effect at that time. Am. Council of Life Insurers, 2019 *Life Insurers Factbook* at 63, 66, https://www.acli.com/-/media/ACLI/Files/Fact-Books-Public/07FB19FChap7LifeInsurance.ashx. California's share of this market is considerable. California is the fourth largest insurance market in the world and the largest insurance market in the United States. *See* Cal. Dep't Ins., *Commissioner Announces California Insurers Collect $310 Billion in Premiums* (Apr. 5, 2018), http://www.insurance.ca.gov/0400-news/0100-press-releases/2018/release034-18.cfm. In 2018 alone, Californians paid over $17.6 billion in life insurance premiums, representing more than one-tenth of national life insurance premiums. Cal. Dep't Ins., *1991 - 2018 Comparison of California Life Insurance Business to Countrywide* (June 22, 2019), http://www.insurance.ca.gov/01-consumers/120-company/04-mrktshare/2018/upload/LifeMktShr2018wa.pdf.

The lower court's ruling threatens negative effects not only for insurers, but also for consumers of insurance. For example, insurers could be forced to impose higher premiums at the outset because of their inability to estimate the cost of future regulatory changes that could increase their costs, including new administrative costs and the costs of keeping otherwise lapsed policies in force. As a result, the lower court's ruling would ultimately upend the expectations of innumerable policyholders who have paid for insurance policies. Where such disruption occurs, uncertainty pervades the law and hamstrings planning and investment, to the detriment of insurers, policyholders, and contracting parties more generally.

CONCLUSION

For the foregoing reasons, this Court should reverse and direct entry of judgment in favor of State Farm.

July 6, 2020

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
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