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.

On Appeal from the United States District Court
for the Southern District of California
Case. No. 3:18-cv-0728 BAS-BGS
Hon. Cynthia Bashant, District Judge

BRIEF AMICUS CURIAE OF THE AMERICAN COUNCIL OF LIFE INSURERS IN SUPPORT OF DEFENDANT-APPELLANT STATE FARM LIFE INSURANCE COMPANY

THOMAS A. EVANS
SBN: 202841
Alston & Bird LLP
560 Mission Street, 21st Floor
San Francisco, California 94105
Tel. (415) 243-1000
Fax (415) 243-1001
tom.evans@alston.com
Attorney for Amicus Curiae American Council of Life Insurers

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), the American Council of Life Insurers states that it is not owned by any parent corporation and that no publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

IDENTITY AND INTEREST OF AMICUS CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT................... 2

ARGUMENT.. 5

I. THE TRIAL COURT'S NOVEL FORMULATION OF A "RENEWAL PRINCIPLE" IGNORES THE VALUE OF THE LONG-TERM GUARANTEES CONTAINED IN THE LIFE INSURANCE CONTRACTS........................ 5

II. THE TRIAL COURT'S TREATMENT OF EACH PREMIUM PAYMENT AS A RENEWAL DISREGARDED THE CONTRACTUAL OBLIGATIONS BETWEEN FLYNN AND STATE FARM. 10

A. Receipt of Premium During The Term Of A Life Insurance Contract Cannot Be Construed As Consent To Rewriting The Policy. 11

B. The Authority Cited By The Trial Court Does Not Support A Broad Rule That Treats All Premium Payments As "Renewals." 13

III. SUBJECTING LIFE INSURANCE POLICIES TO REWRITING WITH EVERY PREMIUM PAYMENT WILL YIELD INCONSISTENT RESULTS AND FRUSTRATE THE PARTIES' ABILITY TO RELY ON THE WRITTEN TERMS OF THE INSURANCE CONTRACT............. 16

A. A Rule That Links The Amendment Of Life Insurance Policies To The Payment Of Premium Yields Inconsistent And Unpredictable Results When Applied In The Broader Context Of All Life Insurance Products. 18

B. The Trial Court's Formulation Of The "Renewal Principle" Does Not Account For The Portability And Assignability Of Life Insurance Policies. 20

(1) Under The Trial Court's Formulation Of The "Renewal Principle," The Contents Of A Life Insurance Policy Will Vary Depending On Whether The Policy Owner Moves or Remains In The State. 21

(2) The "Renewal Principle" Will Impair The Policy Owner's Right To Assign The Policy.. 22

IV. THE TRIAL COURT'S FORMULATION OF THE RENEWAL PRINCIPLE DOES NOT FURTHER ANY RECOGNIZABLE LEGISLATIVE INTENT. 23

CONCLUSION.. 26

TABLE OF AUTHORITIES

Page(s)

CASES

Argonaut Ins. Co. v. Colonial Ins. Co.,
70 Cal. App. 3d 608, 138 Cal. Rptr. 855 (1977) 3, 13, 14, 15

Ball v. Cal-State Auto Ass'n Inter-Ins. Bureau,
201 Cal. App. 2d 85, 20 Cal. Rptr. 31 (1962) 25

Bentley v. United of Omaha Life Ins. Co.,
371 F. Supp.3d 723 (C.D. Cal. 2019) 3, 13

Bullard v. California State Auto Ass'n,
129 Cal. App. 4th 211, 28 Cal. Rptr. 3d 225 (2005) 24

Burnet v. Wells,
289 U.S. 670 (1933) 6

K.C. Working Chem. Co. v. Eureka-Security Fire & Marine Ins. Co., 82 Cal. App. 2d 120, 185 P. 2d 832 (1947) 11

Minnesota Mut. Life Ins. Co. v. Ensley,
174 F.3d 977 (9th Cir. 1999) 6

Mock v. Michigan Millers Mut. Ins. Co.,
4 Cal. App. 4th 306 (1992) 12

New York Life Ins. Co. v. Statham,
93 U.S. 24 (1876) 6, 9

Quarry v. Doe I,
53 Cal. 4th 945, 272 P. 3d 977 (2012) 24

Thomas v. Northwestern Mut. Life Ins. Co.,
142 Cal. 79, 75 P. 665 (1904) 6,15

Thomas v. State Farm Life Ins. Co.,
424 F.Supp.3d 1018 (S.D. Cal. 2019) 24

Travelers Ins. Co. v. Lesher,
187 Cal. App. 3d 169 (1986) 12

RULES

Fed. R. App. P. 29(a)(2) 1

Fed. R. App. P. 29(c)(5) 1

STATUTES, CONSTITUTIONAL PROVISIONS, AND REGULATIONS

10 Cal. Code Reg. §§ 2632.1-2648.4 12

Cal. Ins. Code § 660 14

Cal. Ins. Code §10113 16

Cal. Ins. Code § 10113.71 .... 11, 15, 21, 22

Cal. Ins. Code § 10113.72 .... 11, 15, 21

Cal. Ins. Code §11580.9(d)... 13

N.J. Stat. § 17B:25-3... 22

36 Okl. St. § 4003 22

OTHER AUTHORITIES

8 New Appleman on Insurance Law Library Edition
§81.02 (2020)... 18

Cal. Dept. of Insurance, Life Insurance Guide (2018),
http://www.insurance.ca.gov/01-consumers/105-type/95-guides/07-life/life-ins-guide.cfm....................................... 7

U.S. Census Bureau, State-to-State Migration Flows:
2018, https://www.census.gov/data/tables/time-series/demo/geographic-mobility/state-to-state-migration.html 21

IDENTITY AND INTEREST OF AMICUS CURIAE

The American Council of Life Insurers (ACLI) is the largest life insurance trade association in the United States, representing the interests of approximately 290 member companies operating in the United States and abroad.[1] ACLI member companies are among the leading providers of life insurance products. In the United States, these companies represent more than 90 percent of industry assets. In California alone, ACLI member companies provide 90% of total life insurance coverage.[2]

ACLI regularly advocates the interests of life insurers and their millions of policyholders and beneficiaries before federal and state legislators, state insurance commissioners, federal regulators, administration officials, and the courts. ACLI regularly files *amicus* briefs in cases, like this one, that involve issues of great importance to its members.

---

[1] ACLI submits this brief pursuant to Federal Rule of Appellate Procedure 29(a)(2) and states that all parties have consented to its timely filing.

[2] Pursuant to Fed. R. App. P. 29(c)(5), ACLI states that no party's counsel authored this brief in whole or in part, and that no party, no party's counsel, and no other person contributed money intended to fund the brief's preparation or submission other than ACLI on behalf of its collective membership.

ACLI and its members have a vital interest in ensuring the District Court's decision is reversed in this matter. The District Court's decision in *Thomas v. State Farm Life Insurance* conflicts with precedent that recognizes and enforces the valuable long-term guarantees provided by life insurance policies. If permitted to stand, the decision in the *Thomas* case will subject existing life insurance contracts to legislative rewriting on a monthly or annual basis, thereby undermining the ability to rely on the terms of the insurance policies as written.

BRIEF AMICUS CURIAE OF THE AMERICAN COUNCIL OF LIFE INSURERS IN SUPPORT OF APPELLANT

INTRODUCTION AND SUMMARY OF ARGUMENT

ACLI submits this amicus brief in support of Appellant State Farm Life Insurance Company because the trial court's decision effectively subjects existing life insurance contracts to retroactive amendments that were unintended by the legislature and that will subject insurers and policyowners to inconsistent and unpredictable results. The trial court relied on cases involving short-term liability and automobile policies to fashion a "renewal principle" that holds that life insurance policies are effectively renewed and reissued with each

premium payment.[3] In doing so, the trial court did not consider the valuable long-term guarantees that distinguish life insurance from other lines of insurance. Indeed, the courts have long rejected similar attempts to characterize life insurance policies as no more than a succession of monthly policies that are "renewed" with each premium payment.

In addition to misconstruing the obligations and rights under a life insurance contract, the trial court's formulation of a "renewal principle" that treats every premium payment as a renewal and reissue of the policy misreads the holding of *Argonaut Ins. Co. v. Colonial Ins. Co.*, 70 Cal. App. 3d 608, 138 Cal. Rptr. 855 (1977), in which a liability insurer's acceptance of premium beyond the ordinary term of a liability policy was construed as a decision to renew the policy. In this case, State Farm's receipt of premium during the term of the policy

---

[3] Throughout this brief, ACLI uses the quoted term "renewal principle" to identify the trial court's stated basis for its decision because that was the term used by the trial court. It does not appear that the "renewal principle" is a widely recognized term, however. A Lexis search of all federal and state cases for the term "renewal principle" turned up only eight opinions. Four of those opinions were the trial court's opinion and decisions in *Bentley v. United of Omaha*, on which the trial court relied. The search did not identify any decision by the California Supreme Court or California Courts of Appeal, published or otherwise, that contained the term "renewal principle."

could not be reasonably treated as assent to the reissue of the policy with new terms. Unlike a liability insurer at the end of a policy term, State Farm did not have the ability to vary, amend or terminate its existing life insurance policy during its 61-year term. The acceptance of premium was consistent with the continued compliance with the long-term guarantees, not with an intent to renew or issue a new policy.

The trial court's formulation of the "renewal principle" also falters when viewed in the broader context of life insurance policies generally, as opposed to the specific policies at issue. Application of the trial court's principle to permanent life insurance policies such as universal life yields inconsistent and unpredictable results, because premiums are paid at different times and in differing amounts that are not always necessary to keep coverage in effect. Unlike liability or automobile policies, life insurance contracts are long-term products that include valuable property rights. These rights can be transported into other states or assigned to other parties. If the trial court's version of the "renewal principle" were applicable to life insurance policies, variations in premium payments, changes in residence and/or changes in ownership over time could result in two policies with identical written contracts having different terms.

Application of the trial court's formulation of the "renewal principle" will undermine the ability of insureds and insurers to rely on the language of the insurance contract to determine their rights, in conflict with the Insurance Code. If, as appellees will likely contend, the legislature intended such a drastic revision to existing life insurance contracts, it would have stated its intent clearly, instead of using language that denotes an intent to require the mandatory contract terms set out at Sections 10113.71 and 10113.72 of the Insurance Code prospectively. The trial court's application of a "renewal principle" to effectively amend existing policies conflicts with the legislature's intent and should therefore be reversed.

ARGUMENT

I. THE TRIAL COURT'S NOVEL FORMULATION OF A "RENEWAL PRINCIPLE" IGNORES THE VALUE OF THE LONG-TERM GUARANTEES CONTAINED IN THE LIFE INSURANCE CONTRACTS.

Both State Farm policies issued to James Flynn guaranteed to provide life insurance coverage through age 95. (3 E.R. 301-302, 312, 330-333). These contracts between State Farm and Flynn, who was 34 years old at the time he applied, were written to last for potentially 61 years. (3 E.R. 303-305, 330-33). The trial court's novel formulation of the "renewal principle," in which a policy is renewed

and reissued with every monthly premium payment, effectively converted each of these 61-year contracts into a series of *732* monthly insurance contracts. Each of these monthly contracts would be subject to rewriting to include any new mandatory language that the California legislature required in policies "issued or delivered" in California. Courts have long rejected this characterization of life insurance policies as a series of annual or monthly contracts, in favor of recognizing the value of the multiyear or multidecade guarantees contained in the insurance contract. *See New York Life Ins. Co. v. Statham*, 93 U.S. 24, 30 (1876) (life insurance 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"); *see also Burnet v. Wells*, 289 U.S. 670, 679 (1933); *Thomas v. Northwestern Mut. Life Ins. Co.*, 142 Cal. 79, 82, 75 P. 665, 666 (1904)(Payment of premium is a condition subsequent to the insurance contract). Term life insurance policies, like Flynn's policies, are "written for a fixed or specified term and expire[] at the end of the term without retaining cash value." *Minnesota Mut. Life Ins. Co. v. Ensley*, 174 F.3d 977,

982 n.1 (9th Cir. 1999); *see also* Cal. Dept. of Insurance, Life Insurance Guide (2018), http://www.insurance.ca.gov/01-consumers/105-type/95-guides/07-life/life-ins-guide.cfm (" Term Policies provide life insurance for a specified period of time"). During that term, the policy owner has the benefit of life insurance coverage and other valuable guarantees that endure for years. The State Farm policies included the following long-term guarantees:

- A promise that State Farm will provide $500,000 in life insurance coverage for 30 years (through age 64) at a guaranteed level monthly premium of $100.80 (3 E.R. 303-305, 330-331);
- A guarantee that State Farm will provide $500,000 in life insurance coverage from age 64 through age 95, so long as the insured pays the premiums specified in the policies (3 E.R. 304-307, 331);
- An option to convert the term policy into a permanent whole life policy, which the policy owner may exercise within the first five years of the policy, without additional underwriting or evidence of insurability (3

E.R. 311, 337);

- A promise that once the policy has been in force for two years, the policy will pay the full death benefit even if the insured dies by suicide (3 E.R. 312, 338);
- An incontestability clause that provides that the insurer will not contest the validity of the policy for misrepresentation once it has been in force for two years (3 E.R. 312, 338).

These guarantees bound State Farm for years, if not the entire duration of the policies. State Farm could not modify or discontinue any of these promises whenever it received a premium payment. The trial court's characterization of a term policy as a sort of month-to-month insurance contract ignores the value of these extended guarantees, particularly the insurer's assumption of the risk of continuing to provide insurance even if the insured becomes uninsurable due to declining health or advanced age.

The duration and value of the long-term guarantees provided by State Farm's policies refute the trial court's characterization of the policies as a series of one month "renewable" term contracts. A policy owner could not replicate the guarantees of the State Farm

policies by buying a series of one-year or one-month term life insurance policies. The cost of providing insurance increases with age. *See Statham*, 93 U.S. at 30 ("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"). The 30-year level premium guarantee in Flynn's policies took advantage of the long term of the policy to set a premium which spread the anticipated cost of providing insurance over the 30-year term. This guarantee shields the insured from premium increases, even once the actual cost of providing insurance in later years exceeds the guaranteed annual premium. Such annual premiums "are clearly not intended as consideration for the respective years in which they are paid." *Id*. The premiums on a series of one-year contracts, on the other hand, would go up every year along with the insured's mortality risk.

Even if the policy owner could tolerate the uncertainty of increasing premiums, the owner would still bear the risk that the insured may become uninsurable as a result of a change in health. Under the State Farm policies, if the insured suffered a decline in his or her health, the coverage would remain in effect so long as the guaranteed premiums were paid. An owner who purchases new

policies every year, on the other hand, would be unable to acquire coverage or face a massive increase in premiums if the insured suffered a decline in health. The right to convert the term policy into a permanent whole life policy (without any showing of insurability) provides further protection against a decline in health. The owner also would not benefit from the incontestability or suicide clauses, since no policy would be in force long enough for the protection to take effect.

The existence of these long-term guarantees, which bind the insurer throughout the term of the policy, demonstrates that the trial court's analysis relied on a false equivalency between the valuable contract rights under life insurance policies and the short-term coverage afforded by liability and automobile policies.

II. THE TRIAL COURT'S TREATMENT OF EACH PREMIUM PAYMENT AS A RENEWAL DISREGARDED THE CONTRACTUAL OBLIGATIONS BETWEEN FLYNN AND STATE FARM.

While the trial court characterized its order as a straightforward application of the "renewal principle," the decision turns on the novel approach of defining the term "issued" to include "renewal," and then redefining the term "renewal" to include any receipt of premium, regardless of whether the stated term of the policy has expired. In addition to ignoring the long-term guarantees at the core of the life

insurance policy, a "renewal principle" that holds that a life insurance policy is "issued" anew with every premium payment disregards the insurer's inability to renegotiate or reject the new agreement upon each purported renewal.

A. Receipt of Premium During The Term Of A Life Insurance Contract Cannot Be Construed As Consent To Rewriting The Policy.

In enacting sections 10113.71 and 10113.72 of the Insurance Code, the legislature elected to regulate through the creation of new private contract rights, to be inserted in the insurance contract between the parties. Those contracts remain subject to the requirements for contract formation, including mutual assent. *See K.C. Working Chem. Co. v. Eureka-Security Fire & Marine Ins. Co.*, 82 Cal. App. 2d 120, 131, 185 P. 2d 832, 839 (1947)("A contract of insurance must be assented to by both parties either in person or by their agents.") Where an insurer issues or delivers a life insurance policy after the effective date of a statute requiring new mandatory contract terms, that act may be treated as assent to the mandated terms. The same may be true in the case of an automobile or liability carrier, which, after the expiration of the six-month or one-year policy term, elects to continue coverage, whether by reissue, renewal or

acceptance of premium. Once the term of a six-month automobile policy expires, the insurer may offer new terms, increase premium, or simply discontinue the relationship with the insured, subject to regulations that do not apply to life insurance companies. *See Mock v. Michigan Millers Mut. Ins. Co.*, 4 Cal. App. 4th 306, 338 (1992) ("an insurer has no legal duty to renew an insurance policy when its term as expired." (quoting *Travelers Ins. Co. v. Lesher*, 187 Cal. App. 3d 169, 194 (1986)); *See, e.g.* 10 Cal. Code Reg. §§ 2632.1-2648.4 (regulating rates for private automobile insurance policies). Indeed, a liability insurer that objected to new mandatory policy terms could elect to stop doing business in California altogether upon expiration of the term.

In the case of life insurance, however, the insurer is bound to a long-term contract to provide insurance coverage. The acceptance of premium cannot reflect the life insurer's assent to the addition of new contract terms, because the insurer does not have any discretion to alter or discontinue coverage so long as premium is paid. The acceptance of premium merely reflects the insurer's continued compliance with the existing terms of a contract.

B. The Authority Cited By The Trial Court Does Not Support A Broad Rule That Treats All Premium Payments As "Renewals."

In deciding that Flynn's monthly premium payment "functioned in the main as renewal payments," the trial court relied primarily on *Argonaut Ins. Co. v. Colonial Ins. Co.*, 70 Cal. App. 3d 608 (1977).[4] The specific facts, policies and statutes at issue in *Argonaut* show why that decision should not be read broadly to characterize every premium payment on any type of insurance policy as a form of renewal. The *Argonaut* case did not involve the insertion of mandatory policy language into an existing insurance contract. Instead, it dealt with a dispute between two insurers – Colonial and Fireman's – involving the application of a newly-enacted statute that determined the priority of policies when more than one policy covered the same motor vehicle. *Id.* at 617 (citing Cal. Ins. Code §11580.9(d)). The statute specified that it applied to policies "issued or *renewed*" after the effective date. *Id.* at 618 (citing Stats. 1970, ch. 300, § 8, p. 577; emphasis added). Colonial argued that the statute did

[4] Although the trial court also cited to the decision in *Bentley v. United of Omaha Life Ins. Co.* to support its characterization of premium payments as renewals, that decision also relied exclusively on *Argonaut* to reach the same conclusion. *Bentley v. United of Omaha Life Ins. Co.*, 371 F. Supp.3d 723, 735 -736 (C.D. Cal. 2019).

not apply to its policy because it did not specify a termination date; the policy was effective "until cancelled." *Id.* Because the policy never expired, Colonial argued that it was never "renewed" and therefore never subject to the new statute. *Id.* Colonial retained the ability to change the terms of the policy, however, by issuing endorsements (which the insured could accept by continuing to pay premium) instead of issuing a new policy. *Id.* The Court agreed with Fireman's, which argued that the legislature, knowing that liability policies generally have a term of one year, intended that the new statute would take effect no later than the one-year anniversary of any liability policy. *Id.* Fireman's also pointed to Section 660 of the Insurance Code, which provided that policies insuring motor vehicles with no fixed expiration date be deemed to be written for one-year periods. *Id.* at 620. In light of the specific insurance policies and the statute at issue, the Court held that it would defeat the intent of the statute if liability insurers could avoid its effect through the pretense of issuing a policy without any specific term, but subject to cancellation or amendment every month. *Id.*

Argonaut did not announce a general rule that every premium payment operates as a "renewal," which in turn is equivalent to a new

"issue" of an insurance policy.[5] None of the factors that supported the holding in *Argonaut* is present in this case. The State Farm policies had a specific term – until the first policy anniversary after the insured's 95th birthday in 2069. (E.R. 312). The length of the term is not an artifice to avoid regulations but reflects a long-term, valuable commitment to the insured. Life insurance policies do not have a standard duration – the policy may guarantee coverage for a year, several decades, or for a lifetime. There is therefore no reason to assume that the legislature, when it enacted Sections 10113.71 and 10113.72, had any expectation that life insurance policies would expire or renew within a year, so that all existing policies would be replaced by new ones "issued or delivered" in the near future. Absent such an expectation or legislative intent, there is no need for the court to adapt the "renewal principle" to insert language into contracts that were never intended to be covered by Sections 10113.71 or 10113.72

---

[5] While the Court below analogized Flynn's policies to the liability policies in *Argonaut* because the policies would be cancelled if premium was not paid, that "distinction" is common to most insurance products – if the policy owner breaches the contract by failing to pay premium, insurers generally have the right to terminate the policy. As discussed *supra*, the courts have characterized the payment of life insurance premium as a condition subsequent to the long-term insurance contract. *See Thomas,* 142 Cal. at 82, 75 P. at 666.

of the Insurance Code.

III. SUBJECTING LIFE INSURANCE POLICIES TO REWRITING WITH EVERY PREMIUM PAYMENT WILL YIELD INCONSISTENT RESULTS AND FRUSTRATE THE PARTIES' ABILITY TO RELY ON THE WRITTEN TERMS OF THE INSURANCE CONTRACT.

A core principle of the regulation of life insurance in California is that the entire policy is contained in the written contract, so that insurer and insured can determine their rights without needing to refer to intervening statutes or other unattached documents. California's regulatory scheme encourages the parties to rely on the written insurance contract as the sole source of their rights and obligations:

> Every policy of life, disability, or life and disability insurance issued or delivered within this State on or after the first day of January, 1936, by any insurer doing such business within this State shall contain and be deemed to constitute the entire contract between the parties and nothing shall be incorporated therein by reference to any constitution, by–laws, rules, application or other writings, of either of the parties thereto or of any other person, unless the same are indorsed upon or attached to the policy; and all statements purporting to be made by the insured shall, in the absence of fraud, be representations and not warranties. Any waiver of the provisions of this section shall be void.

Cal Ins. Code § 10113. The legislature's approach of requiring mandatory language in policies as they are issued (as opposed to simply imposing new obligations outside the contract) is consistent

with the goal of relying on the insurance contract as the primary, if not exclusive, source of the rights and obligations between insurer and insured. Instead of imposing direct statutory obligations on the parties, statutes mandating the inclusion of language in policies create enforceable contract rights, which can be readily determined by reference to the policy. Under the trial court's interpretation of the "renewal principle," however, the policy would cease to be a self-contained document, as it would incorporate new statutory language with every annual or monthly "reissue" without any corresponding change to the document itself.

The confusion that would result from a rule that permits ongoing modification of insurance policies with each premium payment is even more apparent when viewed in the broader context of all available life insurance products and policy owner behavior. Unlike liability and automobile policies, life insurance policies create valuable property rights that can be moved from state to state, assigned multiple times, and used for a variety of purposes. Application of a "renewal principle" to the full spectrum of available life insurance products and likely policy owner behavior will yield inconsistent and unpredictable results that will undermine the

reliability of the policy language without furthering any discernable legislative purpose.

A. A Rule That Links The Amendment Of Life Insurance Policies To The Payment Of Premium Yields Inconsistent And Unpredictable Results When Applied In The Broader Context Of All Life Insurance Products.

Application of a "renewal principle" that subjects life insurance policies to potential rewriting with every premium payment may seem superficially workable in the limited context of the specific policies at issue in this case. Application of the same concept to the broader spectrum of all life insurance policies would yield inconsistent and unworkable results, however. In the case of permanent life insurance products such as universal life, premium payments are made that are not necessary to keep the policy in force. Policy owners who want to build up a cash value may elect to front-load the policy with a single initial premium or a funding plan over several years. Universal life policies have no regular minimum premium requirements. *See* 8 New Appleman on Insurance Law Library Edition §81.02 (2020). The policy owners may still elect to skip payments without losing coverage. In most universal life policies, the policy remains in effect so long as the accumulated value (or surrender value) is sufficient to

cover the monthly deduction. *Id.* Policy owners will often create a premium payment plan, which may involve planned monthly payments or a series of larger payments at the outset to fund the cash value of the policy. None of these premium payment scenarios presents a "renewal," even as defined by the trial court, because the premium payments were not necessary to continue the policy in place.

Limiting "renewals" to those premium payments necessary to prevent the lapse of the contract would not yield more consistent results. The need for additional premium payments depends on the insured's choices in funding the policy. While some policy owners may choose to fund the policy with the intent of accumulating cash value, others may elect to pay the minimum premium necessary to sustain the policy. Under the trial court's erroneous characterization of life insurance policies, those owners who contribute only the minimum payment would be "renewing" the policy every month or year. If these minimum payments were treated as "renewals," however, one policy would be subject to regular "reissue" every month while the other would continue unaffected, based solely on the policy owners' choices in funding their policies. In other words, two identical policies issued on the same day, containing identical

language, could end up with different terms over time as a result of purported "renewals" through premium payments. There is no reason to believe that the legislature intended such an inconsistent result.

B. The Trial Court's Formulation Of The "Renewal Principle" Does Not Account For The Portability And Assignability Of Life Insurance Policies.

Life insurance policies create valuable property rights which, unlike liability or automobile policies, are both portable and assignable. Because Flynn never left California, the trial court did not address how its "renewal principle" would apply when the policy owner leaves the state or when the policy itself changes hands.[6] A policy owner who moves to a different state does not need to obtain a new life insurance policy. Policy owners may also sell, pledge or assign their rights under the contract to third parties without the need for reissue. Application of the trial court's ruling to these scenarios demonstrates why life insurance policies are incompatible with the "renewal principle."

[6] The trial court also did not address how its "renewal principle" would apply where the owner of the policy was not the insured, such as where an employer located in another state obtains a policy insuring a key employee in California.

(1) Under The Trial Court's Formulation Of The "Renewal Principle," The Contents Of A Life Insurance Policy Will Vary Depending On Whether The Policy Owner Moves or Remains In The State.

The trial court's holding that a policy is reissued and subjected to the latest California policy requirements with every premium payment assumes that the policy owner will remain in California. In reality, many policy owners will move to different states over the course of a 20- or 30-year term of coverage. Others will move to California from other states, bringing their policies with them.[7] Application of the trial court's formulation of the renewal principle will yield even more unpredictable results in these instances. For example, under the trial court's formulation of the renewal principle, the term life insurance contract of a policy owner who moves from Michigan to California would be silently amended to include the lapse notice requirements of Sections 10113.71 and 10113.72 on the first month the policy owner pays his or her monthly premium in

[7] According to the Census Bureau, over 7.5 million residents (about 2.3% of the total U.S. population) moved from one state to another in 2018. *See* State-to-State Migration Flows: 2018, available at https://www.census.gov/data/tables/time-series/demo/geographic-mobility/state-to-state-migration.html This annual statistic becomes much more significant when considered over the full term of a life insurance policy, which may be several decades.

California. If, after five years, the owner moves back to Michigan (or any of the other 48 states that have not adopted the trial court's version of the "renewal principle"), the insurance contract will remain secretly amended to include language mandated by California.

Alternatively, if other states did adopt the trial court's formulation, policy owners could unwittingly lose protections under California statutes when they change residence. For example, a policy issued in California after January 1, 2013 must provide for a 60-day grace period. Ins. Code. §10113.71(a)(1). Under the trial court's "renewal principle" if the policy owner moved to New Jersey or Oklahoma, that grace period would be reduced to 30 days or a month. N.J. Stat. § 17B:25-3; 36 Okl. St. § 4003. Relying on the policy itself, and any legislative or regulatory requirements that applied on the date of issue, avoids both confusion and the unintended erosion of contract rights.

(2) The "Renewal Principle" Will Impair The Policy Owner's Right To Assign The Policy.

The trial court's reasoning assumes that the "applicant" and the "policy owner" will be the same person throughout the duration of the contract. In reality, the identity and location of the "policy owner" may change throughout the life of the policy. Life insurance policies

create valuable contract rights that may be sold, pledged, or otherwise assigned. (3 E.R. 312) While the policy continues to insure the original insured, the rights under the contract may be transferred multiple times during the insured's life, among owners in multiple states.[8] Under the trial court's formulation, that policy may be rewritten multiple times as the policy changes hands, destroying any hope of relying on the written contract to define the obligations of the parties. Anyone seeking to purchase a life insurance policy will need to determine the "provenance" of the policy over time to obtain a realistic assessment of the value of the policy. This additional burden degrades the value of the owner's right to assign the contract.

IV. THE TRIAL COURT'S FORMULATION OF THE RENEWAL PRINCIPLE DOES NOT FURTHER ANY RECOGNIZABLE LEGISLATIVE INTENT.

A principle that silently rewrites life insurance contracts depending on the timing of payment, the type of policy, or whether and when the policyholder moves from one state to another, undermines the ability of policy owners and insurers to rely on the integrated insurance contract to determine their respective contractual

---

[8] The trial court's opinion offers no guidance as to when a policy is "renewed" in California in cases where the insured and current policy owner reside in different states.

rights. There is no basis to presume that the legislature intended to invite this chaos, however.

In its decision, the trial court acknowledged the presumption against retroactive application under California law. *Thomas v. State Farm Life Ins. Co.*, 424 F. Supp. 3d 1018, 1024 (S.D. Cal. 2019). Indeed, the trial court recognized that the presumption could only be overcome 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." *Id.* (quoting *Quarry v. Doe I*, 53 Cal. 4th 945, 955, 272 P. 3d 977 (2012)(emphasis added)). In spite of this high bar, the trial court concluded that while the legislature did not intend to disrupt existing contracts immediately through retroactive legislation, it nevertheless intended to achieve the same result only a month or a year later, once a premium was paid.

When the legislature intends to apply new rules to existing contracts, it will make that intention clear. *See Bullard v. California State Auto Ass'n*, 129 Cal. App. 4th 211, 217, 28 Cal. Rptr. 3d 225, 229 (2005). Here, however, the legislature elected to regulate by mandating the inclusion of policy provisions, using "issued and

delivered" language that is commonly understood by all parties, including insurers, legislators, regulators and the courts, to apply prospectively to policies issued after the effective date. *See Ball v. Cal-State Auto Ass'n Inter-Ins. Bureau*, 201 Cal. App. 2d 85, 87, 20 Cal. Rptr. 31, 32 (1962) ("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.") Had the legislature actually intended to merely postpone the rewriting of existing policies by a month or year until the next payment of premium, it would have presumably made that intent clear, instead of leaving the courts to tease out that result by analogy to automobile and liability cases, relying on a principle that has never been mentioned by name by any California appellate court.

CONCLUSION

For the above reasons and the reasons stated in the briefs of Appellant State Farm Life Insurance Company, ACLI joins in the Appellant's request that the Court reverse the trial court's judgment in favor of plaintiff.

DATED: July 6, 2020.

ALSTON & BIRD LLP

By /s/ Thomas A. Evans
THOMAS EVANS

Attorneys for Amicus Curiae
American Council of Life Insurers

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf

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

I am the attorney or self-represented party.

This brief contains 5,264 **words**, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

- ○ complies with the word limit of Cir. R. 32-1.
- ○ is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.
- ◉ is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).
- ○ is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.
- ○ complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one):*
  - ○ it is a joint brief submitted by separately represented parties;
  - ○ a party or parties are filing a single brief in response to multiple briefs; or
  - ○ a party or parties are filing a single brief in response to a longer joint brief.
- ○ complies with the length limit designated by court order dated ______.
- ○ is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature /s/Thomas A. Evans **Date** Jul 6, 2020

*(use "*s/[typed name]*" to sign electronically-filed documents)*

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov