No. S259215

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

BLAKELY MCHUGH, *ET AL.*
Plaintiffs-Appellants-Petitioners

v.

PROTECTIVE LIFE INSURANCE COMPANY
Defendant-Respondent.

On Review from the Court of Appeal
Fourth Appellate District, Division One, No. D072863
Appeal from the Superior Court of San Diego County
The Hon. Judith F. Hayes
Super Ct. No. 37-2014-00019212-CU-IC-CTL

CORRECTED APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF RESPONDENT

Kathleen M. Sullivan
(S.B. No. 242261)
QUINN EMANUEL URQUHART
& SULLIVAN, LLP
555 Twin Dolphin Drive, 5th Floor
Redwood Shores, CA 94065
(650) 801-5000
kathleensullivan@quinnemanuel.com

Counsel for Amicus Curiae
Chamber of Commerce of the
United States of America

November 30, 2020

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutory Authorities

Other Authorities

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

BLAKELY MCHUGH, *ET AL*.
Plaintiff-Appellant-Petitioners

v.

PROTECTIVE LIFE INSURANCE
Defendant-Respondent.

On Review from the Court of Appeal
Fourth Appellate District, Division One, No. D072863
Appeal from the Superior Court of San Diego County
The Hon. Judith F. Hayes
Super Ct. No. 37-2014-00019212-CU-IC-CTL

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF SUPPORTING RESPONDENT

Under California Rules of Court, Rule 8.520(f), The Chamber of Commerce of the United States of America respectfully requests permission to file the attached *amicus curiae* brief in support of defendant and respondent Protective Life Insurance.[1]

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

[1] No party or counsel for a party in the pending appeal authored this proposed brief in whole or in part, and no person or entity other than *amicus curiae*, its members, or its counsel made any monetary contribution intended to fund the preparation or submission of this proposed brief. (*See* Cal. Rules of Court, Rule 8.520(f)(4).)

than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

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, including *Maine Community Health Options v. United States* (2020) 140 S.Ct. 1308; *Sonoco Prod. Co. v. Michigan Dep't of Treasury* (2017) 137 S.Ct. 2157; *Hambleton v. Washington Dep't of Revenue* (2015) 136 S.Ct. 318; and *Ford Motor Credit Co. v. Mich. Dep't of Treasury* (2011) 562 U.S. 1178, as well as in the pending Ninth Circuit challenge to the same laws at issue here, *Thomas v. State Farm*

Insurance Co. (S.D.Cal. 2019) 424 F. Supp. 3d 1018, *on review* No. 20-55231, and is thus 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, any reversal of the decision below would have adverse practical effects on the value of insurance contracts and the stability of insurance markets. More generally, reversal of the decision below would 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-Respondent Protective Life Insurance ("Protective Life") that the decision of the Court of Appeal should be upheld 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.

Accordingly, the Chamber respectfully requests that this Court accept and file the attached *amicus curiae* brief.

Dated: November 30, 2020

Respectfully submitted,

QUINN EMANUEL URQUHART & SULLIVAN, LLP

By: */s/ Kathleen M. Sullivan*
Kathleen M. Sullivan

Counsel for Amicus Curiae Chamber of Commerce of the United States of America

AMICUS CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF RESPONDENT

INTRODUCTION

The retroactive application of new statutes and regulations 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 expectations embodied in contracts of insurance and in business contracts more generally.

The Court of Appeal's opinion properly upheld the retroactivity principle and correctly determined that the statutes at issue, California Insurance Code Sections 10113.71 and 10113.72, "apply only to policies issued or delivered after January 1, 2013," *i.e.*, they have no retroactive effect. (*McHugh v. Protective Life Ins.* (*McHugh*) (2019) 40 Cal.App.5th 1166, 1171.) 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.

If the Court of Appeal's decision were reversed, there would 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.

Accepting petitioners' position would also more broadly create a dangerous precedent that private contracts of all types may 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. Any such precedent would have adverse effects on both consumers and businesses in this State extending not only to the insurance market but to other markets more broadly.

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* (2004) 34 Cal.4th 467, 475 ["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."]; *see Aetna Casualty & Surety Co. v. Industrial Acc. Com.* (1947) 30 Cal. 2d 388, 393.) 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.* (*Myers*) (2002) 28 Cal. 4th 828, 841 [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* (2012) 53 Cal.4th 945, 955 [internal quotation marks, emphasis, and citation omitted].)

As the U.S. Supreme Court has emphasized, the rule of law is supposed to "give[] people confidence about the legal consequences of their actions." (*Landgraf v. USI Film Prods.* (1994) 511 U.S. 244, 266.) Laws that retroactively impose new obligations or give new rights to

contracting parties disrupt such confidence because they "change the legal consequences of transactions long closed." (*E. Enters. v. Apfel* (1998) 524 U.S. 498, 548 [Kennedy, J., concurring in part in the judgment, which invalidated 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." (*Ibid.*)

Enforcing the anti-retroactivity principle is important not only for contractual obligations themselves but also for the procedures by which they are administered. Many modern contracts involve procedures for renewal like those at issue here—including apartment leases, licensing contracts, and installment plans. In such contexts, companies rely on the ability to charge consumers monthly or annually and consumers too depend on making periodic rather than up-front payments that might be difficult to afford. If such renewal procedures were subject to the retroactive application of new laws, companies and consumers alike would face damaging uncertainty.

For all these reasons, and under settled precedent presumptively barring the retroactive application of new laws, California Insurance Code Sections 10113.71 and 10113.72 cannot properly be applied 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*, *supra*, 28 Cal.4th at p. 841) that the Legislature intended the statutes to be retroactive. Accordingly, the Court of Appeal was correct to hold (40 Cal.App.5th at p. 783) that the statutes do not apply retroactively to life insurance policies like the one at issue here. The Southern and Central District of California reached the same conclusion in *Thomas*, 424 F.Supp.3d at pp. 1024-25, and *Bentley v. United of Omaha Life Ins. Co.* (C.D.Cal. 2019) 371 F.Supp.3d 723, 732.

The text of Sections 10113.71 and 10113.72 indicates the Legislature intended these provisions 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 properly 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 p. 1171-74.) Since state regulators mandate the approval of all insurance policy forms in order 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 II), the imposition of retroactive obligations would pose a particular threat of

economic disruption to insurance markets and other markets that depend upon procedural contractual certainty.

II. 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*. (3d rev. ed. 2010) *Couch on*

Insurance § 1:2.) 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, any retroactive application of Sections 10113.71 and 10113.72 would threaten to upend insurance policies statewide. Under petitioners' interpretation, those provisions create

new retroactive coverage obligations even where insurers and policyholders expressly agreed in their policy terms that there would be no such coverage if payment lapsed. If the decision below were reversed and Sections 10113.71 and 10113.72 were applied retroactively, insurers would be exposed to considerable losses that would 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 60 years with a set premium for the first 10 years of the policy term. 1 AA 109-13.

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 pp. 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.)

Petitioners' position threatens deleterious effects not only for insurers, but also for consumers of insurance. For example, retroactive application of provisions revising coverage procedures could force insurers 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, adopting petitioners' position 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 affirm the decision of the Court of Appeal.

November 30, 2020

Respectfully submitted,

/s/ Kathleen M. Sullivan

Kathleen M. Sullivan
QUINN EMANUEL URQUHART
& SULLIVAN, LLP
555 Twin Dolphin Drive, 5th Floor
Redwood Shores, CA 94065
(650) 801-5000
kathleensullivan@quinnemanuel.com

CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court Rule 8.520, subd. (c), I hereby certify that, according to the word count feature of the software used, this Amicus Curiae Brief contains 1,992 words, exclusive of materials not required to be counted under Rule 8.520, subd. (c).

November 30, 2020

/s/ Kathleen M. Sullivan
Kathleen M. Sullivan

PROOF OF SERVICE

I am employed in the County of San Mateo, State of California. I am over the age of eighteen years and not a party to the action; my business address is 555 Twin Dolphin Drive, Fifth Floor, Redwood Shores, CA 94065.

On November 30, 2020, I served true copies of the following document described as **Corrected Application for Leave to File *Amicus Curiae* Brief and *Amicus Curiae* Brief of the Chamber of Commerce of the United States of America in Support of Respondent.** I served the document by uploading it to the TrueFiling system on all registered TrueFiling participants, including the attorneys for the Petitioners. I also served the Court of Appeal. The document was transmitted and completed without error.

I served true copies of the same document, in a sealed envelope from my law firm whose address appears above, following our ordinary business practices on the following:

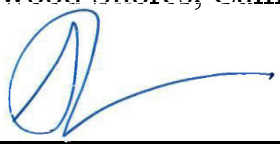
San Diego Superior Court, Central Div.
Hon. Judith F. Hayes
330 W. Broadway. Dept. 68
San Diego, CA 92101

I caused such document to be placed in a Federal Express delivery service package with the appropriate and correct directions as to its delivery and placed the package in the hands of the corresponding delivery service representative to be

delivered in accordance with said directions and receipt for same retained in our files.

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

Executed on November 30, 2020, at Redwood Shores, California.



Sha Londa Castañon