

S. Ct. Case No. S259215

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

BLAKELY McHUGH, et al.
Plaintiffs/Appellants,

v.

PROTECTIVE LIFE INSURANCE COMPANY
Defendant/Respondent.

After Decision by the Court of Appeal
Fourth Appellate District, Div. One (D072863)
(Superior Court of San Diego County, Hon. Judith F. Hayes
37-2014-00019212-CU-IC-CTL)

**APPLICATION FOR LEAVE TO FILE,
AND SUBMISSION OF, BRIEF BY *AMICUS CURIAE*
CALIFORNIA ADVOCATES FOR NURSING HOME REFORM, INC.,
IN SUPPORT OF APPELLANT BLAKELY MCHUGH, ET AL.**

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CERTIFICATE OF INTERESTED PARTIES

Pursuant to California Rule of Court, rule 8.208, California Advocates for Nursing Home Reform, Inc. certifies that it is a non-profit organization which has no shareholders. As such, *amicus* and its counsel certify that *amicus* and its counsel know of no other person or entity that has a financial or other interest in the outcome of the proceeding that the *amicus* and its counsel reasonably believe the Justices of this Court should consider in determining whether to disqualify themselves under canon 3E of the Code of Judicial Ethics.

Respectfully submitted,

Dated: November 30, 2020

Law Offices of Daniel D. Murphy

By: *Daniel D. Murphy*
Daniel D. Murphy

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Home Reform, Inc.

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APPLICATION FOR LEAVE TO FILE *AMICUS BRIEF*

Under California Rules of Court, rule 8.200(c), California Advocates for Nursing Home Reform, Inc. (“CANHR”) requests permission to file the attached brief as *amicus curiae* in support of the position of Petitioner Blakely McHugh, et al.

STATEMENT OF INTEREST OF THE *AMICUS CURIAE*

Since 1983, CANHR, a non-profit corporation with approximately 3000 members, has been advocating for the rights of the elderly and infirm in California, and for their families. CANHR’s work on behalf of the interests of the elderly takes many forms and includes dissemination of information concerning legal rights to redress elder neglect or abuse, participation in the legislative process to advance the interests of the elderly, and training legal services and consumer lawyers to enable them to provide competent and informed assistance to the elderly and their families.

In selected cases CANHR has participated as *amicus curiae* in matters of concern to the elderly residing in institutional care settings. Principally, this effort has led to the filing of briefs in cases seeking clarity in the California Supreme Court and other reviewing courts with respect to issues which arise in litigation against licensed and unlicensed providers of health care services to the elderly. Such cases where CANHR has submitted briefs have included *Delaney v. Baker* (1999) 20 Cal.4th 23, *Barris v. County of*

Los Angeles (1999) 20 Cal.4th 101, *College Hospital v. Superior Court* (1994) 8 Cal.4th 704, *Covenant Care v. Superior Court* (2004) 32 Cal.4th 771, *California Association of Health Facilities v. Department of Health Services* (1997) 16 Cal.4th 284, *Hogan v. Country Villa Health Services* (2007) 148 Cal.App.4th 259, *Norman v. Life Care Centers of America* (2003) 107 Cal.App.4th 1233, and others.

CANHR was involved in drafting Assembly Bill 1747, which sought to address the historical problem of elders suffering from cognitive impairment or infirmity or death, having their life insurance policies lapse because of falling behind and missing their required payments. CANHR views the practice of forfeiting the right to benefits for an unintentional lapse in premium payments to be both anti-consumer and unethical. As a matter of public policy, CANHR believes that it is necessary to require insurance companies to allow senior clients to avoid unintended forfeiture of their right to the benefit of a bargain they have been paying into for cases decades. CANHR believes that legislation is the only way to achieve this since the insurance industry has minimal incentive to self-regulate effectively.

When Assembly Bill 1747 (AB 1747) was signed into law, it created the requirement that insurance companies selling life insurance policies provide a sixty-day (60) grace period that does not run concurrently with a period of paid overage. AB 1747 also requires insurers to provide their

policyholders with a form suggesting they designate a specific person to be notified in the event of delinquent payments that could cause the policy to lapse and terminated.

Under California Rules of Court, rule 8.200(c)(3), CANHR submits the following additional information:

No party or counsel for a party authored (in whole or in part) the attached brief, and no party or counsel for a party has made a monetary contribution to fund or intended to fund the preparation or submission of the attached brief.

Petitioners' Opening Brief on the merits fails to adequately address the issues in this case. Additional briefing is necessary for a full discussion of the issues. CANHR has a broad and long-standing interest in this developing area of law. CANHR's views should assist the court in resolving this case.

Respectfully submitted,

Dated: November 30, 2020

Law Offices of Daniel D. Murphy

By: *Daniel D. Murphy*
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AMICUS BRIEF OF CANHR

ARGUMENT

The argument posited by Protective Life Insurance (hereinafter “Respondent”) that Insurance Code, sections 10113.71 and 10113.72, are ambiguous is misconceived and without foundation in the law.

I.

**AB 1747 WAS ENACTED TO PROTECT ELDERLY
AND INCAPACITATED CITIZENS OWNING A LIFE INSURANCE
PRODUCT FROM UNNECESSARY FORFEITURES.**

Assembly Bill (“AB”) 1747 was approved by the California Governor and filed with the Secretary of State on September 14, 2012, and became effective January 1, 2013. (See Assem. Bill. Hist. (2011-2012 Reg. Sess.) AB 1747.) AB 1747 developed Insurance Code, sections 10113.71 and 10113.72, provisions that require every life insurance policy issued or delivered in California to contain a provision for a grace period of not less than 60 days from the premium due date, and that the policy remains in force during the 60-day grace period. (See Assem. Bill No. 1747 (2011-2012 Reg. Sess.) introduced Feb. 17, 2012.)

AB 1747 requires an insurer to give the applicant for a life insurance policy the right to designate at least one person, in addition to the applicant, to receive notice of the lapse or termination of a policy for nonpayment of premium; requires an insurer to provide each applicant with a form, as

specified in the language of the bill, to make the designation; and to notify policy owners annually of the right to change the designation. (*Id.*)

AB 1747 also prohibits a notice of pending lapse and termination from being effective unless mailed by the insurer to the named policy owner, a named designee for an individual life insurance policy, and a known assignee or other person having an interest in the individual life insurance policy at least 30 days prior to the effective date of termination if termination is for nonpayment of premium. (*Id.*)

Long before AB 1747 was introduced into legislation, CANHR was concerned about the plight of seniors whose life insurance policies were lapsing due to their missing premium payments. Many of the missed payments could be attributed to a senior's decline in cognitive abilities, infirmity, or depression triggered by an overwhelming life event. CANHR's concern, as a senior consumer advocate organization, was over the inherent unfairness of the insurance industry's practice of profiting from lapsed policies. CANHR's point of view has always been that whenever lapses were unintentional on the part of the senior consumer, the insurance industry should not automatically be allowed to take advantage of those lapses and "pocket" years of premium payments and simply walk away from any obligation pay anything to the "former clients."

CANHR became active in the crafting of AB 1747 because CANHR's mission is to protect senior consumers. Long before AB 1747 was introduced

into legislation, CANHR was concerned about the plight of seniors whose life insurance policies were lapsing due to their missing premium payments. CANHR's concern was that missed payments could be attributed to the decline in a policyholder's cognitive abilities, infirmity, or depression triggered by an overwhelming life event. As a senior consumer advocate organization, CANHR was concerned over the inherent unfairness of the insurance industry's practice of profiting from lapsed policies.

CANHR believes that whenever lapses were unintentional on the part of the senior consumer, the insurance industry should not be allowed to take advantage of those lapses and unfairly reap the harvest from the years of premium payments. CANHR believes that the insurance industry should be obligated to take measures to ensure that a delinquent premium payment does not equate to an affirmative intent to terminate a life insurance policy. AB 1747 addressed CANHR's concerns.

The insurance industry initially opposed AB 1747 voicing concern about the costs of implementing AB 1747. They feared it would be a nearly impossible time consuming, and too costly task for the industry to contact their thousands of senior clients to notify them with a suggestion to consider appointing a designated party. As a proponent of the bill, CANHR argued that the most cost-efficient and practical way for the industry to comply with the statutory reforms would be to include the notification in a form along

with the annual premium statements being mailed to the policyholders in the ordinary course of business. Confronted with this simple solution, the industry dropped that argument. It should be noted that there was no formal opposition after it was voted off of the Assembly Floor and passed into the Senate. (See Assem. Bill. Hist. (2011-2012 Reg. Sess.)

Protective Life Insurance (hereinafter PLIC) and other insurance companies sell their products with a promise that life insurance policies are a means of protecting one's estates and for providing for loved ones when their clients are unable to do so, because of death. "Lapse Profits" are were PLIC and other insurance companies reap windfalls when incapacitated policy holders (who may have spent thousands of dollars in premiums) miss a premium payment. CANHR views this practice as an appalling way to make a profit and was the reason why CANHR became active in supporting and crafting AB 1747. The purpose of AB 1747 meant to correct the practice of the forfeiture of a senior's legacy where, through no fault of their own, a policy holder had become too infirmed or incapacitated to "properly maintain" their contractual obligation to respond to requests for a payment in a timely manner. The success of AB 1747 was that it created a procedure for protecting seniors who had no intent on lapsing their life insurance and suffering forfeit of all of their rights to get the benefit of the bargain they had been paying towards for, in some instances, decades.

Protective Life Insurance, who played no part in the drafting, crafting or legislative process, would have the court believe that the legislature never intended that AB 1747 was to be retroactive. That is mere conjecture based with no underlying factual basis. The reason AB 1747 was necessary in the first place was because the insurance industry was not doing enough to protect their long-term clients against unintended lapses. When AB 1747 was introduced into legislation the industry lobby groups fought it. Since they wouldn't have been able to succeed with an argument that, as good public policy, they shouldn't be required to advise their clients to protect themselves against unintended lapses, they argued over the costs for notifying current policy holder. That argument was put to rest with the realization that the costs of notifications in a form along with the annual premium statements being mailed to the policyholders in the ordinary course of business would be de minimus.

The purpose of AB 1747 was to offer protection against unintended lapses for those who had been paying premiums for years and year. If AB 1747 was not meant to be retroactive then there would have been no protection for those consumers.

CANHR notes that Assembly Committee On Insurance final Floor Analysis of August 14 Page 2 states that, "According to the author, the bill **provides consumer safeguards from which people who have purchased**

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

Since the legislative record does not explicitly state that AB 1747 was not meant to be retroactive, it must be concluded that there was no such intention on the part of the legislators. “Those who write statutes seek to solve human problems.” (*Burris v. Superior Court* (2005) 34 Cal.4th 1012, 1017.)

PLIC seeks to protect its financial windfalls from lapsed policies at the expense of their deceased clients’ beneficiaries. Lapsed policies leave nothing for clients who ~~had~~ for years had ~~been~~ dutifully been paying their premiums. What PLIC is asking the court for is not only intrinsically unfair to their policyholders, it is also what AB 1747 sought to eliminate.

In the Chamber of Commerce of the United State of America (Chamber) Amicus Curiae Supporting Appellant, Page 12, the Chamber states that if Sections 10113.71 and 10113.72 are applied retroactively, insurers will be exposed to **considerable losses** (emphasis added). By this admission, Chamber acknowledges that should the Court not rule for retroactivity, there will be **considerable financial harm** to their clients. (Emphasis added).

Further, on Page 13, Chamber choses to bring to the Court's attention that, in 2018, there were over 226 million life insurance policies in effect, and Californians paid over \$17.6 billion in life insurance premiums which represents more than one-tenth of national life insurance premiums. This data point only illuminates part of the equation. What's missing from Chamber's Amicus is the annual number of senior policyholder policy lapses and the amount of profit the industry realizes from these lapses when the lapses extinguish the insurers' obligation to settle with their client's beneficiaries.

II.
THE LEGISLATIVE HISTORY OF AB 1747 REVEALS THAT
THE LEGISLATURE INTENDED THESE CONSUMER
PROTECTIONS FOR OWNERS OF ALL CALIFORNIA
LIFE INSURANCE PRODUCTS.

The legislative history of Assembly Bill 1747 reveals that the

legislature intended these new protections from forfeiture be available to all owners of life insurance policy products. (See Assem. Bill. Hist. (2011-2012 Reg. Sess.) AB 1747.)

On June 13, 2012, the Senate Insurance Committee held a hearing on Assembly Bill 1747, which had passed out of the Assembly on a vote of 51-24. (*Id.*) The Committee issued a report on the Bill before passing the Bill out of Committee on a vote of 9-0. (See Assem. Com. on Ins., Analysis of AB 1747 (2012 Reg. Sess.) as amended Jun. 13, 2012.) In that report, the purpose of the bill was explained:

Purpose of the bill: To provide consumer safeguards from which people who have purchased life insurance coverage, especially seniors, would benefit. Under existing law, individuals can easily lose the critical protection of life insurance if a single premium is accidentally missed (even if they have been paying premiums on time for many years). **The protections provided by AB 1747 are intended to make sure that policy owners have sufficient warning that their premium may lapse due to nonpayment.**

(*Id.* (emphasis added).)

Prior to the Senate Insurance Committee on April 26, 2012, the Assembly Committee on Insurance held a hearing on the Bill and also issued a report, before passing the Bill out of Committee on a vote of 8-3. (See Assem. Com. on Ins., Analysis of AB 1747 (2012 Reg. Sess.) as amended

Apr. 26, 2012.) In that report, the purpose of the bill was explained:

Purpose. According to the author, **the bill provides consumer safeguards from which people who have purchased life insurance coverage, especially seniors, would benefit.** Under existing law, individuals can easily lose the critical protection of life insurance if a single AB 1747 Page 2 premium is accidentally missed (even if they have been paying premiums on time for many years). If an insured individual loses coverage and wants it reinstated, he or she may have to undergo a new physical exam and be underwritten again, risking a significantly more expensive, possibly unaffordable premium if his or her health has changed in the years since purchasing the policy. Therefore, the protections provided by AB 1747 were intended to make sure that policyholders have sufficient warning that their premium may lapse due to nonpayment.

(Id. (emphasis provided).)

These statutory protections were enacted to protect the elderly owner of a life insurance product from the problems caused by his/her illness making his/her awareness of making the policy payment where renewal time for the policy coincides with the illness or sudden death of the owner of the policy. Where, under those circumstances, the elder fails to make that one payment, the entire contract is terminated and the loss borne entirely by the elderly owner.

Section 10113.71 was expressly intended to protect the life-long investments in policies beyond the contestability period. PLIC's

interpretation would mean that the Legislature only intended to protect “current” California policyholders who might live until twenty or thirty years from now, not the hundreds or possibly thousands who had purchased their policies prior to the enactment of AB 1747.

Nothing in the Legislative History indicates such an intent.

III.

AB 1747's LEGISLATIVE HISTORY COMPELS THE INTERPRETATION THAT THE MINIMUM 60-DAY GRACE PERIOD AND MINIMUM 30-DAY WRITTEN NOTICE OF LAPSE REQUIREMENTS APPLY TO ALL POLICIES ISSUED OR DELIVERED IN CALIFORNIA AT ANY TIME.

Assuming, *arguendo*, that Sections 10113.71 and 10113.72 are ambiguous, which CANHR contends are not, the statutes’ Legislative History suggests that the intent was that the statutes apply to all life policies and that they provide protections to policyholders who had been paying premiums in order to avoid the loss of their important life insurance benefits.

Courts consider legislative histories as extrinsic aids to help elucidate legislative intent. (*City of San Jose v. Superior Court* (1993) 5 Cal.4th 47, 54; see, e.g., *Jevne v. Superior Court* (2005) 35 Cal.4th 935, 948 (considering report by Assembly Committee on Judiciary and Senate floor analysis in determining legislative intent); see also *District of Columbia v. Heller* (2008) 554 U.S. 570 (“legislative history” refers to pre-enactment statements of

those who drafted or voted for law; it is persuasive not because it reflects general understanding of legislation, but because legislators who read or heard those statements presumably voted with that understanding).) A court may look to a legislative history to confirm its reading of the text of a statute, even if that history is not strictly necessary to an understanding of the statutory language. (*Samantar v. Yousuf* (2010) 560 U.S. 305, n.9.)

As shown in the AB 1747's Legislative History, the purpose of AB 1747 was to "provide consumer safeguards from which people who have purchased life insurance coverage, especially seniors, would benefit." [1 AA¹ 610, 615, 672.] AB 1747 was intended "to add additional procedural protections to a policy owner in order to avoid lapse." [1 AA 615, 619, 675.]

As stated in one of the Assembly Committee Background Information Sheets on AB 1747, in response to why the bill was needed:

This bill provides consumer safeguards from which people who have purchased life insurance coverage, especially seniors, would benefit. Under existing law, individuals can easily lose the critical protection of life insurance if a single premium is accidentally missed (even if they have been paying premiums on time for many years). If an insured individual loses coverage and wants it reinstated, he or she may have to undergo a new physical exam and be underwritten again, risking a significantly more expensive, possibly unaffordable premium if his or her health has changed in the years since purchasing the Policy.

¹ All references to "AA" refer to the Appellants' Appendix, abbreviated as ([volume] AA [page]).

[1 AA 610-11, 672 (emphasis added).]

Nowhere in the Legislative History for AB 1747 is there an indication, explicit or implied, that the new statutes would only be applied to newly issued policies.

On the other hand, the history does indicate that the statutes would require that the grace period and notice requirements apply to all individual life policies, and that, in essence, these consumer protections would help existing policyholders immediately. Throughout the history, the committee reports, analyses and letters, it is stated that the bill would help avoid lapses to **“people who faithfully paid their life insurance policies for years.”** [1 AA 629, 634, 693 (emphasis added).] It is no coincidence that this comment, or similar, is found throughout the history, which indicates the Legislature's clear intent to protect consumers who have paid life insurance premiums for years. The use of the term "have been paying" is also significant. [1 AA 630, 672, 692.]

This language is in the present perfect progressive tense, which describes conduct that began in the past, continues in the present, and may continue into the future. If the Legislature intended these provisions to only apply to new policyholders, (1) such an exception or limitation would be found somewhere in the history; and (2) comments would have included language indicating application to only newly-issued policies. More

importantly, if Section 10113.71 was only found to apply to newly-issued policies, it would have no benefit to policyholders, especially seniors, who, after paying premiums for years, would have been the beneficiaries, and thus, the purpose of the bill.

Furthermore, it is a universally-recognized legal principal that any kind of contractual forfeitures, especially of life insurance policies, are not favored. In fact, “[t]hey are often the means of great oppression and injustice” and where an insurer has agreed to accept late payment, “the courts should be liberal in construing the transaction in favor of avoiding a forfeiture.” (*Knickerbocker Life Ins. Co. v. Norton* (1878) 96 U.S. 234, 242.) “Forfeiture of a policy will be avoided on any reasonable showing.” (*Klotz v. Old Line Life Ins. Co. of Amer.* (N.D. Cal. 1996) 955 F.Supp. 1183, 1188.)

Such application would essentially create two classes of policies. Those that are afforded no notice of lapse, a limited grace period and no right at any time to designate someone to receive those notices, and those that are provided these important protections against unnecessary lapse. The application would also allow insurers to unfairly impose new reinstatement requirements and effects often without policyholders or beneficiaries having any understanding of what has occurred.

Finally, simple common sense would reject PLIC’s argument on its

face. How does only applying these reforms to newly-issued or newly-delivered policies address the consumer protections which AB 1747 was clearly meant to address? The elderly seldom buys new insurance policies. Once their policies lapse, it is virtually impossible for a senior, who is in the end stage of life and suffering irreversible infirmities, to obtain an affordable life insurance policy replacement. In such instances, the insurer succeeds in gaining a lapse profit.

IV. CONCLUSION.

The equities and the important public policy objectives implicated by the questions before this Court compel the enforcement of the legislative remedy created by the statutory law created by Assembly Bill 1747. If these protections are not strictly required to effectuate a lapse or termination of coverage, these protections will be emasculated by needless litigation over the conduct of deceased policyholders.

To permit PLIC to keep the financial benefit from the unintended lapse of the life insurance contract which their now-deceased client paid for, would be to sanction and promote this unfair insurance industry practice. Simply put, PLIC seeks to have the Court sanction that which the legislature intended to prevent from happening.

Guided by the enactment of the statutory life insurance industry reforms represented by Assembly Bill 1747 in 2013, this Court must uphold those consumer protections enacted by the legislature to stop the practice by the life insurance industry in California of continuing to profit from the unintended lapses of their own clients' due to ill health, declining physical and mental abilities.

Respectfully submitted,

Dated: November 30, 2020

Law Offices of Daniel D. Murphy

By: *Daniel D. Murphy*
Daniel D. Murphy

Attorneys for Amicus Curiae
California Advocates for Nursing
Home Reform, Inc.

CERTIFICATE OF LENGTH OF BRIEF

I, Daniel D. Murphy, declare under penalty of perjury under the laws of the State of California that the word count for this Brief, excluding Tables of Contents, Tables of Authority, Proof of Service, and this Certification is less than 3,039 words as calculated utilizing the word count feature of the Microsoft Word software used to create this document.

Respectfully submitted,

Dated: November 30, 2020

Law Offices of Daniel D. Murphy

By: *Daniel D. Murphy*
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PROOF OF SERVICE

I, Daniel D. Murphy, declare as follows:

I am a resident of the State of California, residing or employed in San Francisco, California. I am over the age of 18 years and am not a party to the above entitled action. My business address is Stadtmuller House, 819 Eddy Street, San Francisco, California 94109-7701, and my electronic service address is elderabuse@aol.com.

On November 30, 2020, true copies of **APPLICATION FOR LEAVE TO FILE, AND SUBMISSION OF, BRIEF BY AMICUS CURIAE CALIFORNIA ADVOCATES FOR NURSING HOME REFORM, INC., IN SUPPORT OF APPELLANT BLAKELY MCHUGH, ET AL.** were served on the interested parties in this action by electronically serving the above named documents as follows:

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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 San Francisco, California.

Daniel D. Murphy

Daniel D. Murphy

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **McHUGH v. PROTECTIVE LIFE
INSURANCE**

Case Number: **S259215**

Lower Court Case Number: **D072863**

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3. I served by email a copy of the following document(s) indicated below:

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

11/30/2020

Date

/s/Daniel Murphy

Signature

Murphy, Daniel (129100)

Last Name, First Name (PNum)

Law Offices of Daniel D. Murphy

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