Alert
April 7, 2022

COZEN O'CONNOR

# What's Happening in California After McHugh?

On August 30, 2021, the California Supreme Court held in *McHugh v. Protective Life Insurance Company*, 12 Cal. 5th 213, 243, 494 P.3d 24, 43 (2021), that California Insurance Code sections 10113.71 and 10113.72 — which extended grace periods in life insurance policies to 60 days and mandated annual notice of the new right for policyholders to designate a person to receive notice of lapse or termination of the policy for failure to pay premiums — apply not only to policies issued or delivered *after* the effective date of those statutes, January 1, 2013, but also to *policies already in force on that date*.

Based on *McHugh*, on October 6, 2021, the Ninth Circuit decided *Thomas v. State Farm Life Insurance Company*, No. 20-55231, 2021 WL 4596286 (9th Cir. Oct. 6, 2021)(unpub.), holding that "[a]n insurer's failure to comply with these statutory requirements means that the policy cannot lapse" and an insurer could be liable for a death benefit. Shortly thereafter, on October 25, 2021, the California Department of Insurance issued guidance acknowledging *McHugh*, but deferred to "future court decisions" on how to apply it.

By our count, there are now over 50 cases pending against life insurers in California state and federal courts based on alleged violations of Sections 10113.71 and 10113.72. Although many cases were stayed pending *McHugh* and *Thomas*, those cases are now active again, and new cases are being filed regularly.

Typically in these cases, plaintiffs assert claims for death benefit proceeds, claims for damages, and claims for reinstatement, and plaintiffs bring the cases individually or as proposed class actions. Below, we discuss three recent opinions that provide insight into how these cases are progressing post-*McHugh*.

There has been one significant decision denying class action certification. In *Siino v. Foresters Life Ins. & Annuity Co.*, 340 F.R.D. 157 (N.D. Cal. 2022), the named plaintiff claimed that a $100,000 policy was improperly terminated by the defendant insurer. The court found "commonality" satisfied despite the insurer's claim that "class members will still need to prove their own performance, the materiality of the insurer's breach, and actual harm or damage." However, the court agreed with the insurer that the class failed the "predominance" test because the plaintiff could not produce a cognizable class-wide damages model for all but two death benefit claims. The plaintiff has since dropped her damages claims and intends to file a renewed motion for class certification based primarily on declaratory relief.

Relatedly, one of the oldest of these class action cases alleging statutory violations, *Bentley v. United Omaha Life Insurance Co.*, No. 2:15-cv-07870 (C.D. Cal.), is nearing a final settlement following the insurer's unsuccessful appeal. The settlement will consist of an insurer payment to plaintiffs of approximately $2.5 million, representing death benefits and interest on 26 policies. The case had always limited the class to beneficiaries with death benefit claims.

*Siino* shows that future class action practice will focus on substantive defenses and damages theories. These questions will likely not be as quickly resolved outside the death benefit context as they were in *Bentley*.

In *Kelley v. Colonial Penn Life Ins. Co.*, No. 220CV03348FLAEX, 2022 WL 341135 (C.D. Cal. Jan. 3, 2022), the court denied a post-*McHugh* motion to dismiss. The plaintiff in *Kelley* claimed her policy improperly lapsed and should be reinstated, and alleged claims for declaratory judgment, breach of contract, and various California statutory causes of action individually and on behalf of and a proposed class. The court was not swayed by the insurer's arguments that California law did not apply, that the plaintiff's policy was not an individual policy under California law, or that certain

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causes of action (such as breach of contract, unfair competition, and financial elder abuse) would fail as a matter of law. The insurer has now filed an answer, and the case is proceeding to discovery. It remains to be seen whether and how far defendant insurers will be able to push individual defenses, especially at the motion to dismiss stage.

Finally, a case filed in 2017 illustrates some of the issues that can come up in discovery in long-pending California lapse cases. In *Moriarty v. Am. Gen. Life Ins. Co.*, No. 17-CV-1709-BTM-WVG, 2021 WL 6197289 (S.D. Cal. Dec. 31, 2021), discovery had closed before the case was stayed for *McHugh*. In the discovery dispute before the court, the plaintiff sought (1) new information and data to update the insurer's "stale" production from three years prior, (2) new discovery to explore the defendant's compliance with *McHugh*, and (3) disclosure of an attorney memorandum that the defendant relied on in attempting to comply with Sections 10113.71 and 10113.72. The court found no grounds to reopen discovery either based on the plaintiff's showings or *McHugh* and *Thomas*. The court also denied disclosure of the attorney memorandum, finding that the defendant insurer had not divulged enough detail to cause a waiver of privilege. Defendant insurers emerging from stays can rely on *Moriarty* to challenge plaintiffs' attempts at new discovery based on whether they adequately preserved these avenues or whether certain discovery topics were foreseeable before the stay.

There are dozens of other post-*McHugh* lapse cases in California federal and state courts. Most notably, we are starting to see several new plaintiff law firms filing complaints alongside major players who continue to file new cases as well. These developments may change depending on how the California Court of Appeal, Fourth District, rules on remand in *McHugh* on whether plaintiffs must demonstrate that violations caused harm in each individual case. We are continuing to monitor and report on these post-*McHugh* cases.