

California Decisions Kick Off Parade of Life Insurance Lapse Notice Cases

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In our May 2021 issue, we discussed the rise in life insurance policy lapse notice cases in California following the state's 2013 enactment of California Insurance Code sections 10113.71 and 10113.72. These statutes establish a 60-day grace period after a missed premium and require insurers to notify policyowners, as well as persons designated by the policyowners to receive notice, at least 30 days before terminating a policy due to a payment lapse. The laws prevent an insurer from terminating a policy for an unpaid premium absent the requisite 30 days' notice. Whether the laws applied to existing policies was a question that was before the California Supreme Court and the Ninth Circuit Court of Appeals. Both courts have ruled in favor of the policyowner plaintiffs.

In *McHugh v. Protective Life Insurance Co.*, the California Supreme Court reviewed the Court of Appeal's decision that the 2013 lapse laws should apply only to new policies issued after the laws went into effect. The Court of Appeal deferred to interpretations of California state regulators to the effect that the laws applied only to new policies issued after 2013, thereby avoiding retroactive application of law prohibited by California jurisprudence. The California Supreme Court reversed the Court of Appeal's decision, explaining that "[a]pplying the provisions to policies already in effect on [January 1, 2013] does not appear to impose new or different liabilities based on earlier conduct." The court viewed the 2013 lapse laws as not having a "substantial change in the contracting parties' rights or obligations" and thus not entailing retroactive enforcement.

In the wake of *McHugh*, the Ninth Circuit Court of Appeals, in *Thomas v. State Farm Life Insurance Co.*, affirmed a decision by the Southern District of California that had rejected the lapse of two policies and entered summary judgment in favor of the beneficiary. The district court had based its ruling on the fact that the policies had been renewed after the 2013 lapse laws went into effect (avoiding retroactivity). On appeal, however, the Ninth Circuit affirmed the district court on other grounds based on *McHugh*. The court held that under *McHugh*, an insurer's failure to comply with the 2013 lapse laws precluded the policies' lapse. In so doing, the court rejected the insurer's

argument that *McHugh* should not apply absent evidence that the noncompliance with the lapse laws had caused the lapses.

Given these recent decisions, the California 2013 lapse laws de facto apply retroactively. Not surprisingly, three new lawsuits have now been filed in the Northern, Southern, and Central Districts of California, and we expect significant additional litigation to come.

Authored By



Michael N. Wolgin

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