IADC COMMITTEE NEWSLETTER

INSURANCE AND REINSURANCE

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IN THIS ISSUE

Maureen M. Middleton reports on two California anti-lapse statutes that have given rise to many class actions and individual lawsuits, and the troubling case law that is developing as the courts try to apply the statutes, which do not expressly provide a private right of action or guidance as to appropriate damages, among other things.

Can We Ever Say Goodbye in California?

ABOUT THE AUTHOR

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ABOUT THE COMMITTEE

The Insurance and Reinsurance Committee members, including U.S. and multinational attorneys, are lawyers who deal on a regular basis with issues of insurance availability, insurance coverage and related litigation at all levels of insurance above the primary level. The Committee offers presentations on these subjects at the Annual and Midyear Meetings. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:

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In 2012, the California legislature enacted two new statutes, effective January 1, 2013, designed to protect California life insureds[1] from losing coverage due to unpaid premiums. The first, Cal.Ins.Code § 10113.71 (West 2012), pertaining to grace periods and the timing of lapse notices, provides as follows:

> **§ 10113.71. Grace periods not less than 60 days from premium due date; notice of termination of policy**
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> (a) Each life insurance policy issued or delivered in this state shall contain a provision for a grace period of not less than 60 days from the premium due date. The 60-day grace period shall not run concurrently with the period of paid coverage. The provision shall provide that the policy shall remain in force during the grace period.
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> (b)(1) A notice of pending lapse and termination of a life insurance policy shall not be effective unless mailed by the insurer to the named policy owner, a designee named pursuant to Section 10113.72 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.
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> (2) This subdivision shall not apply to nonrenewal.
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> (3) Notice shall be given to the policy owner and to the designee by first-class United States mail within 30 days after a premium is due and unpaid. However, notices made to assignees pursuant to this section may be done electronically with the consent of the assignee.
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> (c) For purposes of this section, a life insurance policy includes, but is not limited to, an individual life insurance policy and a group life insurance policy, except where otherwise provided.[2]

The second statute, Cal.Ins.Code § 10113.72 (West 2013), requires insurers to give applicants notice, in the original California application for coverage, and to give notice to California policy owners annually thereafter, of their right to designated others to receive notices of lapse or termination. The third-party notices are in addition to those sent to the policy owners:

> **§ 10113.72. Individuals to receive notice of lapse or termination of a policy; notification of right to change written designation**
>
> (a) An individual life insurance policy shall not be issued or delivered in this state until the applicant has been

[1] Policies issued in California or issued elsewhere with insureds who subsequently moved to California.

[2] Subsection (c) was added in 2013.

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. The insurer shall provide each applicant with a form to make the designation. That form shall provide the opportunity for the applicant to submit the name, address, and telephone number of at least one person, in addition to the applicant, who is to receive notice of lapse or termination of the policy for nonpayment of premium.

(b) The insurer shall notify the policy owner annually of the right to change the written designation or designate one or more persons. The policy owner may change the designation more often if he or she chooses to do so.

(c) No individual life insurance policy shall lapse or be terminated for nonpayment of premium unless the insurer, at least 30 days prior to the effective date of the lapse or termination, gives notice to the policy owner and to the person or persons designated pursuant to subdivision (a), at the address provided by the policy owner for purposes of receiving notice of lapse or termination. Notice shall be given by first-class United States mail within 30 days after a premium is due and unpaid.

Unfortunately, these statutes have given rise to more questions than answers, spawning 30 or so putative class action lawsuits against many insurers in state and federal courts, as well as non-class litigation. Several of these lawsuits were stayed while the Supreme Court of California took up the question of whether the statutes apply only to policies issued from 2013 forward or to all California policies in force on or after January 1, 2013, regardless of issue date. In McHugh v. Protective Life Ins. Co. 494 P.3d 24, 12 Cal. 5th 213 (2021), the California Supreme Court concluded that the statutes apply to all policies in force on January 1, 2013, regardless of when they were issued, and to all policies issued after that date. It also rejected Protective's argument that the life insurance industry was entitled to rely on guidance sought from the California Department of Insurance, which had advised that the statutes were not retroactive, choosing to give such guidance no weight or deference. The Court reversed the Fourth Appellate District, which had concluded the statutes did not apply to policies issued before 2013, and sent the case back for proceedings consistent with its opinion. On October 25, 2021, the California Insurance Commissioner issued Bulletin 2021-8, advising insurers to comply with the McHugh decision.

On November 29, 2021, the Plaintiffs/Appellants and Protective Life filed their briefs in the Fourth Appellate District, Division One, with arguments centering on the issue of whether a strict liability standard should be applied. Protective Life argued that such a standard would be contrary to precedent and the statutory text, would

result in unfair and absurd consequences and would be inconsistent with the reasons the Supreme Court of California incorporated the statutes into policies issued prior to 2013. The American Counsel of Life Insurers ("ACLI") also filed an amicus brief in support of the industry's position. For now, we wait to see what comes next.

Subsequent to the California Supreme Court's ruling in McHugh, the Ninth Circuit also issued a decision in an individual action supporting a strict liability standard when violations of these statutes are found. Thomas v. State Farm Life Insurance Company, No. 20-55231, 2021 WL 4596286 (9th Cir. Oct. 6, 2021). There, State Farm admittedly did not comply with the statutes, and the District Court granted summary judgment in favor of the plaintiff on her breach of contract claim. On appeal, State Farm's retroactivity argument was eviscerated by the intervening McHugh decision, but it also contended that there was no evidence of causation of damages resulting from its non-compliance. In a 2½ page decision, the Ninth Circuit affirmed the District Court, finding that causation evidence is "not necessary" for the plaintiff to prevail, since non-compliance with the 10113.71 / 10113.72 suffices to prevent a policy from lapsing. Therefore, no compliance, no lapse, regardless of the fact that no premiums were paid.

Whether and to what extent the Thomas decision is cited in any of the putative class actions that have been or will be filed remains to be seen. Arguably, it eliminates the class certification argument that individualized factual issues exist as to whether a particular policyholder would have allowed the policy to lapse if the insurer had complied with one or both of the statutes.

A recent order denying class certificate bears noting. In Siino v. Foresters Life Ins. and Ann. Co., No. 20-cv-02904-JST (N.D.Cal. January 12, 2022), the court denied certification on two bases. First, the court found that Fed. R. Civ. P. 23(b)(2) applies only to claims for declaratory or injunctive relief and cannot be invoked to certify a class action seeking predominantly monetary damages. Second, it found that certification under Fed. R. Civ. P. 23(b)(3) was improper because, while the plaintiff had established the "commonality" prong, she failed to meet her burden of setting forth a viable methodology for calculating damages on a class-wide basis. In Siino, only two of 526 class members were beneficiaries of insureds who had died. The remaining class members were owners of policies whose insureds were still living. The court found that the plaintiff failed to put forth a viable methodology for measuring the alleged damages of the "living" class – which comprised nearly the entire class – on a class-wide basis. As to the dead insureds, however, the court seemed to accept the face amount of the policies as a viable methodology for measuring those class members' damages.

Life insurers, reinsurers and the entities that have relationships with them will continue to closely monitor the cases that construe

Sections 10113.71 and 10113.72, seeking answers to the questions not provided in the statutes or the legislative history. Among these:

- Are private contracts susceptible to statutory revision in California?
- Are causation and damages no longer elements of a claim for breach of a life insurance contract in California when violations of these statutes are alleged?
- Are contracts terminated in violation of the statutes in effect forever, even without the payment of premiums?
- How, if at all, are reinsurers impacted by these cases?
- What if the lapse represents a conscious decision of the policy owner, such as at the end of the policy's terms when premiums will increase?
- What is the statute of limitations for these claims? Is there one, if the result of non-compliance is the determination that the policy never lapsed?
- Is the death benefit the measure of damages for insureds who die subsequent to lapse?
- If so, is the insurer entitled to offset its liability by the amount of unpaid premiums?
- Can the life insurance industry rely on guidance given by its regulator?

As we and our clients wait for the caselaw to develop in this area, we are well-advised to ensure compliance with both statutes for policies in effect on the lives of California insureds on January 1, 2013 and thereafter. The past is the past, as they say, but compliance going forward can reduce or eliminate additional liability under these statutes.

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