

Agenda

CEFLI Compliance & Ethics Committee Meeting
Wednesday, August 21, 2019
2 PM EDT/1 PM CDT/12 Noon MDT/11 AM PDT
Dial In: (800) 239-9838
Passcode: 3646069

- I. **Welcome and Introduction.** **Donald J. Walters**
 - A. Antitrust Statement.
- II. **Approval of Minutes – July 31, 2019 Meeting.** **The Committee**
- III. **Issues for Review.** **The Committee**
 - A. Personal Authentication Procedures.

Life insurance companies receive numerous service requests concerning their life insurance policies and annuity contracts. One of the issues that arises with respect to acting upon these service requests is a need to verify the authenticity of the individual making the request.

Companies employ a variety of strategies to verify the authenticity of individuals making policy/contract service requests. Some companies require a signature to be notarized by a Notary Public. Others require a signature to be verified through a Medallion Guaranty offered through a bank or other financial institution. Other companies may employ different authentication procedures for transactions that exceed a certain dollar threshold.

The Committee will be asked to discuss their strategies to verify the authenticity of individuals submitting service requests concerning life insurance policies and annuity contracts.

- B. California Consumer Privacy Act - Timing of Compliance Strategies.

The California Consumer Privacy Act (the “CCPA”) is one of the most sweeping privacy laws ever enacted in the United States. Over the past several months, life insurance companies and other organizations have been analyzing the requirements of the CCPA to determine its applicability to their respective organizations.

However, questions remain regarding the timing of strategies designed to comply with the requirements of CCPA. Some companies have completed their analysis

and are putting into place compliance strategies currently. Other companies, however, are reportedly taking a “wait-and-see” approach to CCPA compliance given the possibility of certain amendments under consideration in the California legislature that could modify CCPA’s requirements.

The Committee will be asked to discuss the timing of their compliance strategies to meet the requirements of the California Consumer Privacy Act.

C. Texas Data Match Compliance.

The State of Texas requires financial institutions conducting business in the state to participate on a quarterly basis in the exchange of information with Texas regulatory authorities to match accounts owned by delinquent child support obligors. (See, copy Texas Administrative Code Section 55.553 attached.)

This compliance requirement presents unique challenges as it relates to systematic withdrawals from various life insurance policies and annuity contracts.

It is anticipated that, over the next several years, other states will introduce similar requirements to provide routine data match checking to identify accounts owned by delinquent child support obligors.

The Committee will be asked to discuss strategies to comply with the requirements of Texas Data Match reporting obligations by financial institutions to identify accounts owned by delinquent child support obligors.

D. Household Assets - Variable Product Suitability.

FINRA Rule 2111 (Suitability) requires firms and associated persons to have a reasonable belief that a recommendation is suitable based upon reasonable efforts to ascertain the customer’s investment profile. FINRA Rule 2111 notes that a customer’s investment profile may include but is not limited to the customer’s age, other investments, financial situation and needs, tax status, investment objectives, investment experience, investment time horizon, liquidity needs, risk tolerance and any other information the customer may disclose.

When life insurance companies offer variable products, some life insurance companies ask customers to complete the suitability information form that may, in some instances, ask customers to estimate their “household assets.”

While this information may be useful in conducting a suitability analysis, a question has been presented concerning whether requesting information concerning “household assets” for purchase of a variable product offered by a life

insurance company may be a unique practice requested by relatively few life insurance companies or whether requesting information concerning “household assets” is a more widespread practice throughout the life insurance industry.

The Committee will be asked to discuss whether they request customers to report their household assets as part of suitability information used to offer a recommendation concerning the purchase of a variable product offered through a life insurance company.

E. California - Notification of Pending Lapse - Life Insurance Policies.

California Insurance Code § 10113.72(c) requires insurers to provide notice of a pending lapse of a life insurance policy at least 30 days prior to the effective date of the lapse. Notice shall be given by first class US Mail within 30 days after a premium is due and unpaid. This provision of California law became effective on January 1, 2013. (See copy attached.)

However, several life insurers have been parties to class-action litigation concerning whether the lapse notice requirement applied solely to policies issued on or after January 1, 2013.

In February 2019, the US District Court for the Central District of California in the matter of *Bentley v. United Omaha Life Insurance Company* ruled that the notice provision did apply to all policies that were “renewed” on or after January 1, 2013, regardless of when they were issued. A premium payment was considered a “renewal” for this purpose. (See copy attached.)

The Committee will be asked to discuss their company’s compliance strategies with respect to providing policy owners with lapse notifications consistent with the requirements of California Insurance Code §10113.72(c); even for policies issued before January 1, 2013 that have been “renewed” through premium payments.

F. IRS Private Letter Ruling - Tax Treatment of Advisor Fees from Non-Qualified Annuities.

On August 9, the IRS issued a Private Letter Ruling (PLR) concluding that the payment of an advisory fee from a variable, fixed indexed, or hybrid non-qualified annuity can be structured to not give rise to a taxable distribution. This IRS ruling conforms the tax treatment of advisory fees from non-qualified accounts to those of qualified accounts such as 401(k)s, 403(b)s and IRAs.

The PLR confirms that, in order to be eligible for this favorable tax treatment, advisory fees for the non-qualified annuity cannot exceed 1.5% of its cash value.

The PLR applies only to fee-based non-qualified annuities where the advisor does not receive a commission.

The PLR has raised several associated questions:

- *Could the PLR apply to any nonqualified contract or would the nonqualified contract have to stipulate that the contract was designed specifically for advisers?*
- *Will insurers be required to apply a specific distribution code to the disbursement to identify it as a non-taxable distribution or could they remit the fee to the adviser without reporting the distribution?*

The Committee will be asked to discuss compliance strategies related to the recent IRS PLR noting that payment of an advisory fee from certain non-qualified accounts would not be treated as a taxable distribution.

G. Regulation Best Interest - Recommendation.

Over the next several months, the Committee will review various issues associated with the SEC's Regulation Best Interest.

This month, a question has been presented concerning the interpretation of the term "recommendation" under Regulation Best Interest.

Specifically, a question has been posed concerning whether a life insurance company that offers only proprietary products through captive agents licensed through an affiliated broker-dealer will give rise to a "recommendation" when offering the life insurance company's variable annuity product to a customer.

The Committee will be asked to discuss their interpretation of the term "recommendation" under Regulation Best Interest when only offering proprietary products (such as a variable annuity) through captive agents licensed to an affiliate broker-dealer.

H. Verification of Annuity Training Requirements.

The current version of the NAIC Suitability in Annuity Transactions Model Regulation requires producers to complete a four-hour continuing education training course approved by the Department of Insurance before soliciting the purchase of annuity products.

A question has been presented concerning the methods companies may use to confirm completion of this annuity training requirement by their producers.

Though databases exist to confirm whether a producer is licensed, it appears that no central database exists to report completion of continuing education training requirements by producers.

The Committee will be asked to discuss their practices to confirm that their producers have completed continuing education training requirements.

I. Beneficiary Information.

Life insurance companies request information concerning beneficiaries of life insurance policies and annuity contracts; especially, in light of recent enhanced practices associated with unclaimed property.

In requesting information concerning beneficiaries, companies may employ a variety of strategies to obtain this information including: (1) Adding additional language to the product application, or (2) adding a supplemental form to the product application.

The Committee will be asked to discuss any unique practices their companies may have employed to obtain information concerning beneficiaries of life insurance policies and annuity contracts and, if a supplemental form was used for this purpose, was it filed?

J. Customer/Producer Signature Requirements on Disclosure Forms.

Company practices may vary with respect to whether they require a customer and/or a producer to sign certain disclosure forms to acknowledge receipt/delivery.

1. New York - Regulation 60.

New York Regulation 60 requires a Disclosure Statement to be provided to a customer in the event of a replacement transaction.

Some companies require both the customer and the producer to sign the Disclosure Statement whereas other companies may only require the producer to sign the Disclosure Statement.

The Committee will be asked to discuss their practices with respect to obtaining signatures to confirm compliance with the Disclosure Statement requirement under New York Regulation 60.

2. California - Notice Regarding Standards for Medi-Cal Eligibility.

California law requires a notice to be provided to all customers age 65 or over concerning the treatment of products under California's eligibility to receive Medi-Cal benefits. The notice must be signed and returned with the application.

In addition to requiring the customer's signature, some companies have also required the signature of a legal representative for the senior customer. However, other companies may only require the customer's signature on the Medi-Cal eligibility notice.

The Committee will be asked to discuss their company's practices with respect to requiring signatures on Notices of Medi-Cal eligibility as required under California law.

K. NYDFS Regulation 187.

1. Annuity Compliance Implementation Issues.

New York Regulation 187 became effective for annuity products on August 1, 2019.

Now that companies have had an opportunity to implement their compliance strategies, interest has been expressed in determining how the implementation process is taking place at various companies.

The Committee will be asked to discuss any implementation issues that may have arisen with respect to pursuing strategies to comply with the annuity product requirements of New York Regulation 187 which became effective August 1, 2019.

2. Life Insurance Compliance Strategy Issues - Internal Suitability Review Processes.

As a result of the NAIC Suitability in Annuity Transactions Model Regulation, many life insurers have established internal suitability review processes to identify transactions that may warrant a more heightened review as part of their overall suitability review process.

Given the recent amendments to Regulation 187, a question has been presented with respect to whether life insurers will establish separate, unique suitability review processes for purposes of life insurance policies or whether they anticipate incorporating life insurance policies into their existing annuity suitability review processes. Moreover, questions have

been presented concerning where the suitability review process for life insurance products will reside within a life insurance company.

The Committee will be asked to discuss their strategies to conduct internal suitability review processes for life insurance products and, if so, where the suitability review process will reside within their company.

IV. Reporting Items.

CEFLI Staff.

A. NAIC Annuity Suitability Working Group.

The NAIC Annuity Suitability Working Group met in person at the NAIC Summer National Meeting in New York City on Saturday, August 3.

The Working Group plans to develop a final draft for approval by the NAIC at its fall National Meeting in Austin, Texas on December 7-10.

CEFLI Staff will provide a brief report concerning the Working Group's proposed strategy.

B. New Hampshire Law to Protect Elderly Investors.

New Hampshire recently passed a law, similar to those enacted in other states, that will allow registered representatives and investment advisers to delay disbursement of funds from an investment account for a limited period of time if they reasonably believe it could result in the financial exploitation of a vulnerable adult. The new law becomes effective September 8. (See copy attached.)

If an investment firm or its representative delays the disbursement of client funds due to a reasonable suspicion of financial exploitation, the firm or individual must follow certain procedures. This includes notifying the Bureau, notifying affected parties (except for parties believed to have engaged in the exploitation), and reviewing the proposed disbursement.

C. FINRA Launches Regulation Best Interest Webpage.

FINRA recently issued Regulatory Notice 19-26 which announced the launch of a Regulation Best Interest webpage that will allow broker-dealers to comply with the new regulation. (See copy attached.)

FINRA stated that it will issue written and online content to assist broker-dealers to assist firms in their implementation efforts.

The webpage indicates that FINRA will be reviewing its rules to determine whether they align with the SEC's rulemaking as FINRA will examine and enforce Regulation Best Interest.

- D. Labor Department Nominee Eugene Scalia Will Most Likely Have to Recuse Himself from Investment Advice Rulemaking.

President Trump's nominee to serve as Secretary of the US Department of Labor, Eugene Scalia, will most likely have to recuse himself from any investment advice rulemaking, such as the DOL Fiduciary Rule, given that he handled various challenges to the DOL Fiduciary Rule while in private practice.

Government ethics rules generally prevent officials from participating in issues they were involved in while in the private sector to guard against potential conflicts of interest.

- E. FINRA to Expand Examination Cycle for Small Broker Dealers.

In an interview with a FINRA Board Member, it was reported that FINRA will expand its examination cycle from two years to four years for small broker-dealers with a "clean" disciplinary history.

V. CEFLI Activities.

- A. 2019 CEFLI Annual Conference and Compliance Leadership Forum - Nashville, Tennessee - September 11-13.

Registration is now open for the 2019 CEFLI Annual Conference and Compliance Leadership Forum which will be taking place at the JW Marriott Hotel in Nashville, Tennessee on September 11-13.

More information concerning the 2019 CEFLI Annual Conference and Compliance Leadership Forum can be found via CEFLI's website.

We hope you will be able to join us!

VI. Next Meeting.

The next meeting of the Committee is scheduled to take place:

September 25, 2019 - 2 PM EDT/1 PM CDT/12 Noon MDT/11 AM PDT

The Committee will hold its remaining 2019 meetings as follows:

October 16, 2019 - 2 PM EDT/1 PM CDT/12 Noon MDT/11 AM PDT

November 13, 2019 - 2 PM EST/1 PM CST/12 Noon MST/11 AM PST
December 18, 2019 - 2 PM EST/1 PM CST/12 Noon MST/11 AM PST

Please mark your calendar and plan to join us!

VII. Other Business.

The Committee will be asked to identify and discuss any other business to be brought before the Committee.

DRAFT

**Minutes
Meeting of the
CEFLI Compliance & Ethics Committee
July 31, 2019
2 PM EDT/1 PM CDT/11 AM PDT**

A meeting of the CEFLI Compliance & Ethics Committee (the "Committee") was held via conference call on Wednesday, July 31, 2019 at 2 PM EDT/1 PM CDT/11 AM PDT.

The following CEFLI member company representatives participated in the meeting:

Ro Adebisi, Thrivent Financial
Molly Akin, Ohio National
Dwain Akins, American National
Marcie Allen, Texas Life Insurance Co
Renee Ambros, CNO Financial
Lisa Arechavaleta, Athene
Shannon Aussieker, Country Life Insurance Company
Cindy Belmore, MassMutual
Nicole Blakne, State Farm
Kate Blalock, Western & Southern Financial
Diane Boyette, Southern Farm Bureau Life Insurance Comp
Vickie Bulger, Primerica
Laura Bullard, Foresters Financial
Alayna Cook, MassMutual
Steve Corbly, The Cincinnati Life Insurance Company
Allison Corrado, Lombard International
Jacquie Crader, Cuna Mutual Group
John Cunningham, Fidelity Investments
Michele Kulish Danielson, American Enterprise
Bruce Etchbach, Texas Life Insurance
Paula Gentry, The Cincinnati Life Insurance Company
Jim Golembiewski, Sagicor
Brooks Graves, Southern Farm Bureau Life Insurance
Rita Femani, Pacific Life Insurance
Toba Fryer, John Hancock
Patricia Harrigan, Wilton Re
Steve Harris, Lincoln Financial Group

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Carla Heuermann, Illinois Mutual Life Insurance Company
Lisa Holland, State Farm
Nathan Huss, Sammons Financial Group
Jill Jones, Bankers Fidelity
Natalie Jones, Guggenheim Life
Martin Karp, Oxford Life Insurance
De Keimach, Delaware Life Insurance Company
Chris Kirby, Foresters Life Insurance and Annuity
Nate Kolle, Securian
Mark Lasswell, Ameriprise
Brian Leary, Fidelity Investments
Laurie Lewis, Amica
Kathy Mangum, Southern Farm Bureau Life Insurance
Jean McKinnon, Assurity Life Insurance Company
Genevieve Messina, Global Atlantic Financial Group
Kaylie Milazzo, Lombard International
Dave Milligan, American Equity
Morgan Milner, Modern Woodmen of America
Sally Murphy, USAA
Deb Naegele, The Cincinnati Life Insurance Company
Jim Odland, Thrivent Financial
Debbie Patteson, USAA
Lisa Perry, USAA
Megan Phillips, Principal
Dan Reinecke, Gerber Life Insurance
Michael Roberson, Pacific Guardian Life
Michelle Ross, Lombard International
Sally Roudebush, Lincoln Heritage Life Insurance Company
Heather Russo, Illinois Mutual
Cara St. Martin, Allianz
Rania Sarkis, Pacific Life Insurance
Kyle Schwab, USAA
Ryan Schwoebel, Protective Life
Alison Soderberg, Lombard International
Carla Strauch, Thrivent Financial
Jill Terry, The Cincinnati Life Insurance Company
Bill Turner, American Fidelity
Catherine Valeri, Global Atlantic
Laura Vanlaningham, Illinois Mutual
John Vitou, Jackson National
Natalie Wagner, Global Atlantic
Rochelle Walk, Wilton Re
Michelle Walker, Woodmen Life
Michelle Ward, Erie Family Life
Chris Wilkie, Baltimore Life
Larry Welch Citizens Inc.

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Stacey White, American National Insurance Company
Jill Williams, Sammons Financial Group

Mallory Bennett, Kelly Ireland and Donald Walters of CEFLI also participated in the meeting.

I. Welcome and Introduction.

The meeting began with a recitation of CEFLI's anti-trust statement.

II. Approval of Minutes – May 15 and June 13, 2019 Meetings.

On motion, duly made and seconded and unanimously carried, the Committee: RESOLVED, that, the Minutes of the May 15 and June 13, 2019 meetings are hereby approved.

III. Issues for Review.

A. NYDFS Regulation 187.

The Committee was asked to discuss the key compliance challenges their companies may have encountered when developing appropriate compliance strategies to address the annuity requirements of Regulation 187.

A Committee member indicated that one of the biggest changes has been training sales representatives on the difference between suitability and best interest, in particular when dealing with issues where life insurance and securities intersect, and more than one product might be suitable for a consumer. To assist with training, the company is providing materials that examine different case studies and product comparisons.

Several Committee members reported a major challenge has been developing completely new forms for collecting suitability information for life insurance.

Another Committee member suggested that defining what an in-force transaction is under the Regulation has been a significant challenge as well as how to monitor in-force transaction activity across a field force that sells both proprietary and non-proprietary products.

A Committee member mentioned a recent LICONY webinar that addressed questions concerning situs issues, and while not specifically dealing with Regulation 187 issues, it appears from the conversation that Regulation 187 will be triggered in many situations involving contracts sold to NY residents; even when the situs of the contract is a state other than NY.

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B. Utah House Bill 55 - Section 31 A-21-311 (1)(a) – Delivery of Policy or Certificate.

The Committee was asked to discuss how they may interpret the phrase “the date on which the coverage is effective” under Utah Insurance Code Section 31 A-21-311 (1)(a) and whether companies now require delivery receipts to be completed in Utah in light of the new delivery requirements under Utah law.

A Committee member indicated that their process would consider the coverage effective on the date that the policyholder accepted delivery, not necessarily tied to a signature (application suggests acceptance).

Another Committee member indicated that their non-electronic process requires a delivery receipt; and when it is not obtained, the producer is charged a fee and the contract is sent via courier to the owner.

A Committee member reported that their process is dependent of the type of distribution method. Products sold by insurance producers are issued with a delivery receipt and there is a follow-up process to get the signed delivery receipt. If not received after 60 days, delivery is considered to have begun at date of issue. If the receipt is not received, a contract will be sent via courier so that delivery can be tracked. For products sold through BDs and Bank distribution, the contract is sent via courier with a signature requirement and no delivery receipt is requested.

C. Monitoring Independent Agents Sales Devices.

The Committee was asked to discuss appropriate compliance strategies to monitor producer use of electronic media and other sales devices; especially, with respect to independent agents.

A Committee member indicated that they have put encryption requirements in place that require client information to be treated as confidential so that producers must prove that they can keep such information confidential on their devices.

Another Committee member reported they have a bring-your-own-device policy that requires the downloading of updates; and, if updates are not downloaded in a timely fashion, the producer’s connection to the network will become inoperative.

A Committee member indicated that they use Hearsay (a vendor) to monitor online (e.g., text) activity.

D. Texas House Bill 207.

The Committee was asked to discuss their compliance strategies to meet the annual illustration requirements under Texas House Bill 207. Specifically, will companies be applying the annual illustration requirements to all existing policies or only those policies issued after September 1, 2019?

A Committee member reported that they intended to provide a notice on annual statements reminding policyholders that they can request an in-force illustration if they would like one.

Other Committee members indicated that they are currently researching this issue and its applicability to in-force policies.

E. Use of CFP Designation by Advisers who Sell Insurance Products.

The Committee was asked to discuss company practices with respect to allowing/prohibiting insurance producers from using the CFP designation and acting in a fiduciary capacity.

A Committee member reported that, while they do not yet have a policy in place, they are aware that the CFP Board considers the designation to carry the fiduciary standard and that it is applicable to insurance products.

Another Committee member indicated that they have asked all their producers to drop the use of CFP.

F. AML Training.

The Committee was asked to discuss their experiences with various vendors providing AML-related compliance services.

A Committee member reported that they created their own AML training in-house.

Another Committee member indicated satisfaction with LIMRA's AML training. And another Committee member reported using the ACAMS training modules for AML.

IV. Reporting Items.

A. NAIC Annuity Suitability Working Group.

CEFLI Staff reported that the NAIC Annuity Suitability Working Group continues to meet to explore possible modifications to the NAIC Suitability in Annuity Transactions Model Regulation.

The Working Group met in person on Thursday, June 20 in Columbus, Ohio and also met via two conference calls over the past several weeks in anticipation of their next in-person meeting to be held at the upcoming NAIC Summer National Meeting in New York.

CEFLI will monitor these developments and provide updated information, as appropriate.

B. SEC Risk Alert - RIA Supervision of Staff with Disciplinary Histories.

CEFLI staff reported that the SEC Office of Compliance and Inspections and Examinations recently released a Risk Alert recommending that RIA's increased supervision of staff with disciplinary histories.

C. FINRA to Expand Use of Machine Learning for Market Surveillance.

CEFLI Staff reported that FINRA recently announced it will expand use of machine learning for market surveillance purposes.

FINRA plans to increase its use of artificial intelligence to handle easier to detect instances of fraud.

This is an interesting development in light of the fact that regulators are becoming more sophisticated in their use of technology to conduct market surveillance activities.

D. Vermont Creates Restitution Fund for Investors.

CEFLI Staff reported that Vermont regulators recently announced the establishment of a restitution fund for investors.

The fund will be funded by a percentage of money derived from settlements of enforcement actions.

E. Personnel Matters.

1. US Department of Labor Secretary Acosta Resigns.

CEFLI Staff reported that the recent resignation of Department of Labor Secretary Alexander Acosta puts into question the DOL's published timeline for completion of work on a new fiduciary rule by September.

Patrick Pizzella, Acosta's Deputy, has been named as the Acting Secretary. President Trump has nominated Eugene Scalia to replace Acosta as Labor Secretary.

2. NYDFS - James Regalbuto Promoted to Deputy Superintendent for Insurance.

CEFLI staff reported that NYDFS Superintendent Linda Lacewell announced that James Regalbuto has been promoted to Deputy Superintendent for Insurance. (Mr. Regalbuto was previously Deputy Superintendent for Life Insurance.)

3. US Senate confirms Allison Lee as SEC Commissioner.

CFLI staff reported that the U.S. Senate confirmed Allison Lee, a Democrat, to serve as SEC Commissioner. Ms. Lee fills the last remaining vacancy on the Commission which is now at full strength.

V. CEFLI Activities.

A. 2019 CEFLI Annual Conference and Compliance Leadership Forum - Nashville, Tennessee - September 11-13.

Registration is now open for the 2019 CEFLI Annual Conference and Compliance Leadership Forum which will be taking place at the JW Marriott Hotel in Nashville, Tennessee on September 11-13.

The "early bird" registration discounted rate expires on August 9 and the cutoff date for hotel reservations is August 20.

More information concerning the 2019 CEFLI Annual Conference and Compliance Leadership Forum can be found via CEFLI's website.

B. Antifraud Webinar - Tuesday, August 13 - 1 PM EDT.

CEFLI will conduct the next session in its Educational Webinar Series on Tuesday, August 13 at 1 PM EDT.

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The focus of the webinar will be on current antifraud compliance strategies.

C. CEFLI Membership Satisfaction Survey.

CEFLI recently released its 2019 member satisfaction survey questionnaire to all member companies.

We are asking that responses to the Survey be submitted not later than close of business on Monday, August 12, 2019.

VI. Next Meeting.

The Committee will hold its next meeting on August 21, 2019 - 2 PM EDT/1 PM CDT/12 Noon MST/11 AM PDT.

The Committee will hold further 2019 meetings as follows:

September 25, 2019 - 2 PM EDT/1 PM CDT/12 Noon MST/11 AM PDT
October 16, 2019 - 2 PM EDT/1 PM CDT/12 Noon MST/11 AM PDT
November 13, 2019 - 2 PM EST/1 PM CST/12 Noon MST/11 AM PST
December 18, 2019 - 2 PM EST/1 PM CST/12 Noon MST/11 AM PST

Please mark your calendar and plan to join us!

VII. Other Business.

There being no additional business the meeting was adjourned.

Texas Administrative Code Section 55.553

SECTION 55.553. Financial Institution Data Match Reporting Requirements _

Latest version.

- (a) A financial institution doing business in the State shall participate on a calendar quarter basis in the exchange of data with the Title IV-D agency or its agent, matching the names of delinquent child support obligors with the names of account holders and providing information from matched account owner records on all accounts owned by the delinquent child support obligor. A financial institution must share the required information with the Title IV-D agency using data specifications approved by the federal Office of Management and Budget (OMB Control No: 0970-0196) on March 5, 1999, in one of two methods:
 - (1) Match Method 1 ("all accounts method"): A financial institution shall submit to the Title IV-D agency or its designated agent an account file and total record on a quarterly basis and within fourteen days of the end of the week designated by the financial institution; or
 - (2) Match Method 2 ("matched accounts"): A financial institution shall conduct a data match against an inquiry file supplied by the Title IV-D agency, OCSE, or authorized agent on all customer accounts maintained by the financial institution. The financial institution must provide an account file on all accounts that were matched with the inquiry file. The financial institution must submit the total record to the Title IV-D agency, OCSE, or authorized agent within forty-five (45) days of its receipt of the inquiry file. The financial institution shall destroy, erase, or return the inquiry file to the Title IV-D agency or OCSE within forty-five (45) days of its receipt of the inquiry file.
- (b) Financial institutions may contract with reporting agents (also known as service agents, service providers, or transmitters). If a financial institution chooses to contract with a service provider to report information for the financial institution, the financial institution, rather than the service provider, must sign the memorandum of agreement and the financial institution remains responsible for compliance with the law.
- (c) Financial institutions conducting data matches with the Title IV-D agency that choose to use a reporting agent/transmitter must inform the Title IV-D agency by completing the appropriate section on the memorandum of agreement. The Title IV-D agency must be informed of the institution's decision to use an agent/transmitter in order to ensure the confidentiality of data. Similarly, if an institution wishes the Title IV-D agency to send the match file to a recipient whose Federal Employer Identification Number (FEIN) is different from the institution, the Title IV-D agency must be notified.
- (d) Multi-state financial institutions that choose to use a reporting agent/transmitter must inform OCSE by completing the appropriate section on the memorandum of agreement. OCSE must be informed of the institution's decision to use an agent/transmitter in order to ensure the confidentiality of data. Similarly, if an institution wishes OCSE to send the data match file to a recipient whose Federal Employer Identification Number (FEIN) is different from the institution, OCSE must be notified.

California Insurance Code § 10113.72(c)

(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.



Neutral

As of: July 22, 2019 6:33 PM Z

[Bentley v. United of Omaha Life Ins. Co.](#)

United States District Court for the Central District of California

February 21, 2019, Decided; February 21, 2019, Filed

Case No. CV 15-7870-DMG (AJWx)

Reporter

371 F. Supp. 3d 723 *; 2019 U.S. Dist. LEXIS 63632 **

JENNIFER BENTLEY, Plaintiff, v. UNITED OF OMAHA LIFE INSURANCE COMPANY, et al., Defendants.

Prior History: [Bentley v. United of Omaha Life Ins. Co., 2016 U.S. Dist. LEXIS 195183 \(C.D. Cal., June 22, 2016\)](#)

Core Terms

policies, Statutes, renewal, notice, effective date, lapsed, terminated, premium, policyholder, premium payment, insurer, life insurance policy, Annual, Designate, interest rate, summary judgment, judicial notice, death benefit, asserts, nonpayment of premium, insurance policy, Designee, beneficiary, contends, Parties, argues, anniversary date, provides, statutory interpretation, cash value

Counsel: **[**1]** For Jennifer Bentley, as trustee of the 2001 Bentley Family Trust, and others similarly situated, Plaintiff: Christopher Pitoun, LEAD ATTORNEY, Hagens Berman Sobol Shapiro LLP, Pasadena, CA USA; David S Klevatt, PRO HAC VICE, Klevatt and Associates LLC, Chicago, IL USA; Jason A Zweig, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Chicago, IL USA; John P Bjork, Joseph M Vanek, Matthew T Slater, Mitchell H Macknin, Paul E Slater, PRO HAC VICE, Sperling and Slater PC, Chicago, IL USA; Steve W Berman, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Seattle, WA USA.

For United of Omaha Life Insurance Company, Defendant: Jenny H Wang, LEAD ATTORNEY, Hinshaw and Culbertson LLP, Larry Mark Golub, Martin E Rosen, Hinshaw and Culbertson LLP, Los Angeles, CA USA.

Judges: DOLLY M. GEE, UNITED STATES DISTRICT JUDGE.

Opinion by: DOLLY M. GEE

Opinion

[*725] ORDER RE CROSS-MOTIONS FOR SUMMARY JUDGMENT [147] [148] AND DEFENDANT'S ORDER TO SHOW CAUSE [165]

This matter is before the Court on Plaintiff Jennifer Bentley's motion for summary judgment and Defendant United of Omaha Life Insurance Company's ("United") cross-motion for summary judgment [Doc. ## 147, 148]. Having duly considered the written submissions filed in support of and in opposition **[**2]** to the motions, the Court now renders its decision. For the reasons set forth below, the Court GRANTS Plaintiff's motion for summary judgment and DENIES Defendant's cross-motion for summary judgment.

The central issue presented in these motions is whether United breached its agreement with policyholders when it terminated life insurance policies included in Plaintiff's Class definition because prior to terminating these policies, it failed to provide the requisite notices under [Cal. Ins. Code §§ 10113.71](#) and [10113.72](#) (the "Statutes"). The Statutes' effective date is January 1, 2013 ("Effective Date").

I.

PROCEDURAL HISTORY

On October 7, 2015, United removed this case to federal court from Los Angeles **[*726]** County Superior Court. [Doc. #1.] During the two and a half years that this case has been pending before this Court, United has filed various motions, all of which the Court denied to varying degrees. See Order Re Defendant's Motion to Dismiss FAC ("June 22, 2016 Order") [Doc. # 27]; Order

Re Defendant's Motion for Certification of Court's Order ("Sept. 14, 2016 Order") [Doc. # 46]; Order Re Defendant's Motion to Dismiss TAC ("Aug. 8, 2017 Order") [Doc. #107]; Order Re Defendant's Motion to Deny Class Certification ("January [**3] 4, 2018 Order") [Doc. # 119].

The Court granted class certification on May 1, 2018 ("May 1, 2018 Order"). [Doc. # 132.] The Court then revised the Class definition two subsequent times. Order Re Plaintiff's Motion to Compel ("July 13, 2018 Order") [Doc. #153]; Order re Plaintiff's Motion for Clarification ("Aug. 8, 2018 Order) [Doc. # 158]. The operative Class definition reads as follows:

All beneficiaries who made a claim, or would have been eligible to make a claim, for the payment of benefits on life insurance policies renewed, issued or delivered by United of Omaha Life Insurance Company ("Omaha") in the State of **California** that ***lapsed*** or were terminated by Omaha for the nonpayment of premium after January 1, **2013** (and which were not affirmatively cancelled by the policyholder), and as to which policies the policyholder(s) did not receive one or more of the notices of the right to designate under [Section 10113.72 of the California Insurance Code](#).

Aug. 8, 2018 Order at 1. [Doc. # 158.]

On June 15, 2018, Bentley and United filed cross-motions for summary judgment ("MSJ"). [Doc. ## 147, 148.] The Motions have been fully briefed, including supplemental briefing filed after the October 26, 2018 hearing on the Motions. [Doc. ## 151, 152, [**4] 161, 162, 169, 170.]

II.

REQUEST FOR JUDICIAL NOTICE

United requests that the Court take Judicial Notice of the following documents:

- Exhibit 8: The internet-based System for Electronic Rate and Form Filing, referred to in the insurance regulatory industry by its acronym, "SERFF," which is found on the website of the California Department of Insurance ("DOI").
- Exhibit 9: Documents produced by the DOI pursuant to United's Public Records Act request for documents relating to the prospective application of Insurance Code statutes enacted pursuant to

California Assembly Bill 1747 of 2012.

- Exhibit 10: Letters between the DOI and counsel for Plaintiff regarding the denial of her claim by United, as produced by Plaintiff in this action, setting forth the position of the DOI that the Statutes do not apply to her claim since the life insurance policy United issued to Eric Bentley was issued prior to the effective date of the Statutes.

- Exhibit 11: The First Amended Complaint in *Moriarty v. American General*, pending in the United States District Court for the Southern District of California, Case No. 3:17-CV-01709-BTM-WVG, filed October 19, 2017.

- Exhibit 12: The First Amended Complaint in *McHugh [**5] v. Protective Life Insurance Company*, San Diego Superior Court, Case No. 37-2014-00019212-CU-IC-CTL, filed on or about January 9, 2015.

[*727] • Exhibit 13: The Complaint in *Rosen v. Pacific Life Insurance Company*, Orange County Superior Court, Case No. 30-2015-00774924, filed March 4, 2015.

- Exhibit 14: The Complaint in *Mojgan Gholamnejad v. Pruco Life Insurance Company*, United States District Court for the Northern District of California, Case No. 5:16-cv-06151-BLF, filed October 25, 2016.

- Exhibit 15: The Joint Case Management Conference Statement in *Mojgan Gholamnejad v. Pruco Life Insurance Company*, United States District Court for the Northern District of California, Case No. 5:16-cv-06151-BLF, filed February 15, 2017.

- Exhibit 16: The Second Amended Complaint in *Fernando Matos v. Jackson National Life Insurance Company*, United States District Court for the Central District of California, Case No. 2:17-cv-04010-AB-SS, filed July 5, 2017.

See United Request for Judicial Notice [Doc. # 148-9]; United App'x of Exhibits [Doc. # 148-4], Exs. 1-8 [Doc. # 148-5], and Exs. 9-16 [Doc. # 148-6].

[Federal Rule of Evidence 201](#) enables a court to take judicial notice of adjudicative facts. A fact may be judicially noticed if it [**6] is "not subject to reasonable dispute." [Fed. R. Evid. 201\(b\)](#). "Facts are indisputable, and thus subject to judicial notice, only if they are either

'generally known' under [Rule 201\(b\)\(1\)](#) or 'capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned' under [Rule 201\(b\)\(2\)](#)." [United States v. Ritchie](#), 342 F.3d 903, 909 (9th Cir. 2003). "Under [Rule 201](#), [a] court can take judicial notice of public records and government documents available from reliable sources on the Internet, such as websites run by governmental agencies." [U.S. ex rel. Modglin v. DJO Glob. Inc.](#), 48 F. Supp. 3d 1362, 1381 (C.D. Cal. 2014) (collecting cases).

A court may also take judicial notice of court filings and other matters of public record. [Harris v. Cnty. of Orange](#), 682 F.3d 1126, 1132 (9th Cir. 2012) (noting that a court may take judicial notice of "undisputed matters of public record"); see also [Reyn's Pasta Bella, LLC v. Visa USA, Inc.](#), 442 F.3d 741, 746, n.6 (9th Cir. 2006) (taking judicial notice of pleadings, memoranda, and other court filings). A court can also appropriately take judicial notice of copies of "records and reports of administrative bodies." [Ritchie](#), 342 F.3d at 908.

The Court DENIES United's requests for judicial notice for the reasons set forth below.

The Court DENIES United's request as to Ex. 8 because it is moot. The Court previously granted United's judicial notice request as to Ex. 8.¹ Sept. 14, 2016 Order at 2.

The Court DENIES United's request as to Ex. 9. United previously offered Ex. 9 in its [*7] MTD and the Court denied its request because the Court saw "no reason to deem private one-on-one communications between individual DOI employees and members of the public as 'matters of public record.'" Aug. 8, 2017 Order at 2; see also [Fed. R. Evid. 803\(8\)](#). Additionally, absent the public records exception to the hearsay rule, the Court sustains Bentley's objection that Ex. 9 is hearsay. The Court disagrees with United's [*728] argument that it only cites the document to show that the DOI opinion of the Statutes exists and not for the truth of the matter. See United's Reply at 4. [Doc. 162-1.] To the contrary, United refers to the DOI's application of the Statutes in its MSJ to support its argument that the Statutes should only apply to policies issued or delivered after the Effective Date.

¹ Additionally, the Court maintains its previous determination that the SERFF documents do not support United's argument that the Statutes do not apply here because the SERFF documents did not interpret or comment on the Statutes. *Id.* at 4.

The Court DENIES United's request as to Ex. 10. The Court SUSTAINS Bentley's hearsay objection on the same grounds as it did for Ex. 9.

Ex.11 through Ex. 16 are court filings and therefore matters of public record that are not reasonably disputed. See [Ritchie](#), 342 F.3d at 909. Nonetheless, the Court SUSTAINS Bentley's relevance objection because Exs. 11-16 are complaints, which merely describe the plaintiffs' causes of action, not the courts' reasoning [**8] and interpretation of the Statutes and therefore are not relevant here.

III.

FACTUAL BACKGROUND²

A. The Bentley Policy

Eric Bentley ("Eric") purchased a term life insurance policy from United, which issued February 28, 2001, with a \$1,000,000 face amount ("Bentley Policy"). Joint Stipulation of Facts and Evidence ¶ 7. ("Jt. Stip.") [Doc. # 149.] Eric was both the policyholder and the insured under the Bentley Policy. *Id.* ¶ 7.

Eric paid the Bentley Policy's premium annually for 13 years from 2001 through 2013. Eric made a premium payment of \$670.80 on or about May 1, 2014. *Id.* ¶ 8. On May 23, 2014, United emailed Eric confirming that United used his most recent payment "to advance your coverage to August 28, 2014." *Id.* ¶ 9. United sent Eric a premium notice, dated July 28, 2014, advising him that his next premium payment was due on August 28, 2014. *Id.* ¶ 10. No premium payment was made for the Bentley Policy by August 28, 2014. *Id.*

United sent Eric another premium notice, dated September 9, 2014. *Id.* ¶ 11. No premium payment was made for the Bentley Policy after the premium payment

² The Court sets forth the material undisputed facts and views all reasonable inferences to be drawn from them in the light most favorable to the non-moving party. Unless otherwise indicated, the facts are undisputed or were not controverted by admissible evidence. Although Bentley asserted evidentiary objections [Doc. ## 152 and 152-2], the Court declines to rule on them because they pertain to evidence that: (1) the Court need not consider to decide the MSJ, or (2) does not affect the outcome of the instant motion, regardless of whether it is admissible.

of \$670.80 made on or around May 1, 2014. *Id.* United then sent Eric a letter dated October 28, 2014 that stated: **[**9]** "We have not received your premium payment due August 28, 2014. **[¶]** Since your payment has not been received, your coverage has terminated . . ." *Id.* ¶ 12.

Eric died on November 7, 2014. *Id.* ¶ 13. As of the date of the October 28, 2014 letter discussed above, Jennifer Bentley, as Trustee of the 2001 Bentley Family Trust, was the beneficiary of the Bentley Policy. *Id.*

Jennifer Bentley made a claim to United for the death benefits under the Bentley Policy. *Id.* ¶ 14. United denied the claim for benefits because the Bentley Policy had, according to United, terminated before Eric's death. *Id.*

B. The Class

United issued each of the 32 policies ("Class Policies") within the Class Definition. *Jt. Stip.* ¶ 15. All but one of the life **[*729]** insurance policies listed on the May 2018 Policy and Beneficiary Chart³ ("Class List") was issued or delivered in California. *Id.* ¶ 16, Stipulated Ex. 1 [Doc. # 149-5]. The policy that was not issued or delivered in California, Policy No. UR2828580, was issued on July 8, **2013**, and lapsed according to United's records on November 5, **2013** (prior to reaching its anniversary date), when the policy owner had an address of record in California. *Id.* ¶ 17.

Each of **[**10]** the 31 insurance policies listed on the Class List that were issued or delivered in California were in force after the Statutes' Effective Date. *Id.* Of the 31 policies listed on the Class List that were issued or delivered in California, United's records show that ten policies⁴ Nos. UA7820542 (line 13), UR2663468 (line

14), UR2648669 (line 15), UR2627721 (line 16), UR2648784 (line 17), UR2674494 (line 18), UR2671752 (line 19), UR2584816 (line 23), UR2681720 (line 24), and UR2654966 (line 26), lapsed or terminated for non-payment of premium prior to reaching their anniversary date in **2013**. *Id.* ¶ 18. Besides these policies, all other policies that were issued or delivered in California and listed on the Class List reached an anniversary date in **2013** prior to their lapsing. *Id.* ¶ 20.

United stipulates that, aside from the seven policies in the Class List discussed below, all the other policies on the Class List lapsed for non-payment of premium. *Id.* ¶ 35. United contends that the following four policies on the Class List, Nos. 8448979 (line 2), 7997098 (line 3), 5554559 (line 8)⁵ and UA7820542 (line 13), lapsed due to inadequate cash value. *Id.* at 33. United also contends that the following three **[**11]** term policies on the Class List reached the end of their guaranteed level premium period prior to lapsing: BU1105227 (line 9), BU1133356 (line 10), and BU1152776 (line 31). *Id.* ¶ 34.

The listed beneficiaries on the Class List were the beneficiaries of each of the policies at the time the policies lapsed. *Id.* ¶ 21. United did not provide the policy owners of the life insurance policies listed on the Class List an opportunity to designate a person in addition to the policy owner (i.e., a "Designee") to receive notice of lapse or termination of a policy for nonpayment of premium ("Offer to Designate" Notice). *Id.* ¶ 22. United did not send any Designee any notice in connection with any of the policies listed on the Class List ("Designee Notice"). *Id.* ¶ 23. United has not paid death benefits on any of the policies on the Class List. *Id.* ¶ 32.

IV.

LEGAL STANDARD

Summary judgment should be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); accord **[*730]** Wash. Mut. Inc. v. United States, 636 F.3d 1207, 1216 (9th Cir. 2011). Material facts are those that may affect

³United compiled the May 2018 Class List according to the Class definition in the Court's Class Cert. Order. *Jt. Stip.* ¶ 4. Before the May 2018 Class List, United generated a November 2017 Class List. *Id.* ¶ 5; Stipulated Ex. 2. United created the November 2017 Policy and Beneficiary Chart in response to Bentley's discovery requests. *Id.* Regarding the two versions of the Policy and Beneficiary Chart, both sides dispute whether certain policies should or should not be on either list. See *Jt. Stip.* The Court will focus on the May 2018 Class List because it was compiled in accordance with the Class definition.

⁴The *Jt. Stip.* did not include policy no. UA7820542 (line 13). The Court assumes that there are ten policies because, with

the exception of the *Jt. Stip.*, the parties consistently refer to ten policies in this group.

⁵The Beneficiary for this policy has since opted out of the Class. *Jt. Suppl. Ex.* at 1

the outcome of the case. [Nat'l Ass'n of Optometrists & Opticians v. Harris](#), 682 F.3d 1144, 1147 (9th Cir. 2012) (citing [Anderson v. Liberty Lobby, Inc.](#), 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)). A dispute is genuine "if the evidence is such that a reasonable jury could [****12**] return a verdict for the nonmoving party." [Liberty Lobby](#), 477 U.S. at 248.

The moving party bears the initial burden of establishing the absence of a genuine dispute of material fact. [Celotex Corp. v. Catrett](#), 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Once the moving party has met its initial burden, [Rule 56\(c\)](#) requires the nonmoving party to "go beyond the pleadings and by [his or] her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Id.* at 324 (quoting [Fed. R. Civ. P. 56\(c\), \(e\)](#)); see also [Norse v. City of Santa Cruz](#), 629 F.3d 966, 973 (9th Cir. 2010) (*en banc*) ("[Rule 56](#) requires the parties to set out facts they will be able to prove at trial.").

"In judging evidence at the summary judgment stage, the court does not make credibility determinations or weigh conflicting evidence." [Soremekun v. Thrifty Payless, Inc.](#), 509 F.3d 978, 984 (9th Cir. 2007). "Rather, it draws all inferences in the light most favorable to the nonmoving party." *Id.*

When faced with cross-motions for summary judgment, the Court considers each motion on its own merits to determine whether the [Rule 56](#) summary judgment standard is satisfied. [Fair Housing Council of Riverside Cty., Inc. v. Riverside Two](#), 249 F.3d 1132, 1136 (9th Cir. 2001). Where the issues before the Court are questions of law, the case is particularly "well suited" for summary judgment. [Del Real, LLC v. Harris](#), 966 F. Supp. 2d 1047, 1051 (E.D. Cal. 2013); see also [Asuncion v. Dist. Dir. of U.S. Immigration & Naturalization Serv.](#), 427 F.2d 523, 524 (9th Cir. 1970) (district court properly resolved motion for summary judgment where issues presented were comprised solely [****13**] of questions of law).

V.

DISCUSSION

Bentley argues that, according to basic statutory interpretation, the renewal principle, and public policy,

the Statutes apply to the Class policies. Thus, Bentley maintains that United was required to give the notices provided in the Statutes because the policies lapsed after the Statutes' Effective Date. *Id.* at 2.

United asserts that, as a matter of law, the Statutes do not apply to the life insurance policies within the Class. United MSJ at 1. United contends that the Statutes apply only to those policies that were issued or delivered in California after the Statutes' Effective Date. *Id.* at 1.

A. The Statutes

The Statutes went into effect on January 1, 2013. [Section 10113.71\(b\)\(1\)](#) provides in relevant part:

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.

[Cal. Ins. Code § 10113.71\(b\)\(1\)](#).

[Section 10113.71\(b\)\(3\)](#), in pertinent part reads, "[n]otice shall be given to the policy [****731**] owner and to the designee [****14**] by first-class United States mail within 30 days after a premium is due and unpaid." *Id.* at [§ 10113.71\(b\)\(3\)](#).

[Section 10113.72](#) provides:

(a) An individual life insurance policy shall not be issued or delivered in this state 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. 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 [**15] 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.

[Cal. Ins. Code § 10113.72.](#)

The Court refers to [§ 10113.72\(a\)](#) as the "Offer to Designate" requirement, [§ 10113.72\(b\)](#) as the "Annual Notice" requirement, and [§ 10113.72\(c\)](#) as the "Designee/30-Day Notice" requirement. The Statutes require insurance providers to give policyholders and their designee(s) adequate notice prior to terminating their life insurance policy. May 1, 2018 Order at 3 [Doc. # 132].

1. The Plain Language of the Statutes

United argues that the Statutes apply only to policies issued or delivered on or after the Effective Date. According to United, the use of the word "shall" in the first sentence of both [§§ 10113.71](#) and [10113.72](#) indicate that the Legislature intended the Statutes to apply prospectively. United also contends that the use of "applicant" in [§ 10113.72\(a\)](#) and the reference to [subsection \(a\)](#) in [subsection \(c\)](#) read in light of [subsection \(b\)](#) indicate that the right to change designees would be unnecessary unless an applicant has already made a designation upon being issued a policy.

United asserts that "it would be impossible for an insurer to comply with a policy that it issued prior to [**16] the date of that statute's enactment" and application of the Statutes to pre-Effective Date policies is an unconstitutional impairment of contracts because the Statutes impose new obligations to which it did not consent. United MSJ at 10, n.7. United cites a litany of statutes within the California Insurance Code for the proposition that if the Legislature intended to include renewals, it would have included the term in the

Statutes.⁶

As Bentley points out, however, the Court did not rule that the Statutes apply [**732] retroactively. Instead, the Statutes apply prospectively to policies that continued in force after the Effective Date.

The Court has already addressed United's plain language argument several times and will not repeat its full analysis here.⁷ See June 22, 2016 Order at 6-7 [Doc. # 27], Sept. 14, 2016 at 4 [Doc. # 46], and Aug. 8, 2017 Order at 5-6 [Doc. # 107]. Suffice it to say that the Court stands by its prior ruling that the "Statutes [are] applicable to the Insured's Policy based on statutory construction principles." June 22, 2016 Order at 7.

First, "the Statutes do not apply retroactively to the Policy—rather, [Section 10113.72\(b\)](#) of the Insurance Code applies prospectively from the effective date of the Statutes [**17] and when a policy renews, it incorporates any changes in law that occurred prior to the renewal." Sept. 14 Order at 4 (citing June 22, 2016 Order at 8-9 (citing [Stephan v. Unum Life Ins. Co of Am.](#), 697 F. 3d 917, 927 (9th Cir. 2012))). [Doc. # 46.] United's reliance on [Interinsurance Exch. of Auto. Club v. Ohio Casualty Ins. Co.](#), 58 Cal. 2d 142, 23 Cal. Rptr. 592, 373 P.2d 640 (1962), to assert that the "black letter maxim" "that insurance policies are governed by the statutory and decisional law in force at the time the policy is issued" does not contravene the Court's interpretation of the Statutes. See United MSJ at 10-11. The ruling in *Interinsurance* was based on the premise that statutes should not have a retroactive effect on existing life insurance policies. [Interinsurance](#), 58 Cal.2d at 148-149. Furthermore, under binding Ninth Circuit

⁶ United cites [Cal. Ins. Code §§ 570, 4064, 10089.2, 10101, 10110.6, 10112.1, 10112.27, 10112.9, 10113.95, 10123.91, 10128.4, 10144.3, 10717](#), and [11588](#) as examples of statutes with express renewal language. App'x of Exs., Ex. 20 [Doc. # 148-7].

⁷ For example, in its Aug. 8, 2017 Order, the Court addressed United's attempt to utilize its briefing to rehash its statutory interpretation arguments instead of advancing new arguments relevant to its position. See Aug. 8, 2017 Order at 4-6. [Doc. # 107.] In the Aug. 8, 2017 Order, the Court construed United's Motion to Dismiss Bentley's Third Amended Complaint as a Motion for Reconsideration under [Fed. R. Civ. Proc. Rule 60\(b\)](#). *Id.* at 4. The Court noted "United's MTD focuses on this statutory-interpretation issue on which the Court already ruled. Indeed, United devotes roughly only three pages of its 25-page brief to the class-definition issue." *Id.* at 5 (internal citations omitted).

precedent, "[t]he law in effect at the time of a renewal of a policy governs the policy even if that law is subsequently changed or repealed." [Stephan, 697 F. 3d at 927](#) (citing [Interinsurance, 58 Cal. 2d at 148-149](#)). Here, the Court does not impose the Statutes' notification requirements on conduct that occurred prior to the Effective Date. The Court's application of the Statutes to the Class Policies is entirely prospective.

Second, the Court again rejects United's assertion that the Legislature intended to exclude renewed policies from the Statutes' coverage because it intentionally omitted the term "renewal" in the Statutes. Out of the 14 statutes **[**18]** United cites, eleven do not pertain to life insurance or apply to an insurer's notification requirements to the insured to prevent lapse or termination of coverage. The three statutes that do apply to life insurance do not relate to procedural notification requirements. Here, [§ 10113.71](#) imposes upon United the unambiguous mandate that a notice of pending lapse and termination of a life insurance policy "shall not be effective" unless it has been mailed by the insurer to the named policy owner and, as relevant here, a designee named pursuant to [Section 10113.72](#) at least 30 days prior to the effective date of termination. [Cal. Ins. Code § 10113.71\(b\)\(1\)](#). There is a concomitant requirement that the insurer notify a "policy owner" annually of his or her right to designate one or more persons to receive notice of lapse or termination of a policy for nonpayment of premium. [Id. at 10113.72\(b\)](#). **[*733]** Nothing in these cited provisions predicate the notice upon whether the "policy owner" is an existing, new, or renewing policy holder.

Third, United's reliance on *Briseno* to support its argument that the Statutes do not apply to renewed policies is of no avail. [Briseno v. ConAgra Foods, Inc., 844 F.3d 1121, 1125 \(9th Cir. 2017\)](#). *Briseno* merely recites a well-known canon of statutory construction—"expression unius est exclusion **[**19]** alterius" (i.e., the enumeration of certain criteria to the exclusion of others should be interpreted as an intentional omission). The Court stands by its Aug. 8, 2017 Order in which it determined that the traditional canons of construction the *Briseno* court applied do not undermine the statutory interpretation principles the Court used to construe the meaning of the Statutes. See Aug. 8, 2017 Order at 6. [Doc. # 107.]

Fourth, the Court has already ruled against United's argument that application of the Statutes to the Class Policies is an unconstitutional impairment of contract. See United Mot. for Cert. of Court's Order at 12. [Doc. #

30.] As previously stated, the Statutes only include a protective notification measure; so long as United provides the requisite notice, United can exit from the policy agreement. See Sept. 14, 2016 Order at 4. [Doc. # 46.]

United has not brought forth any arguments that persuade the Court to change course on its prior statutory interpretation and ruling that the Statutes apply prospectively from the Effective Date to the Class Policies. The Court already determined, "[t]o adopt United's interpretation would mean that the Statutes *never* apply to an existing **[**20]** policy issued before the effective date of the Statutes, no matter how far into the future that policy is extended. This leads to an absurd result, which the Legislature could not have intended." June 22, 2016 Order at 7 (emphasis original).⁸

a. Renewal Principle

United contends that there is no case law applying the "renewal principle" to a statute that does not include the word "renewal" therein. United MSJ at 16. Bentley counters that both *Stephan* and *Cerrone* establish a renewal principle in California. Bentley Opp'n at 18.

In California, an insurance policy incorporates all statutory and decisional law in force at the time of that policy's issuance—this law binds the parties to the policy. [Interinsurance, 58 Cal. 2d at 148-149](#). Likewise, when an insurance policy is renewed, any changes in the law that occurred prior to the renewal are incorporated into the policy. [Stephan, 697 F.3d at 927](#) (citing [Modglin v. State Farm Mut. Auto. Ins. Co., 273 Cal. App. 2d 693, 700, 78 Cal. Rptr. 355 \(1969\)](#)). Courts have applied this renewal principle to incorporate new California law into insurance policies that were in force prior to the effective date of the new law and renewed after the effective date. Cf. [Modglin, 273 Cal. App. 2d at 700](#) (observing that to create a rule that an uninsured motorist statute could only apply to new auto insurance

⁸ United also asserts "it is not the role of the judiciary to extrapolate a public policy from a statute that the plain meaning of its words simply does not support." United MSJ at 15-16. The Court did not rely on a public policy to interpret the Statutes. The Court merely observed that its "interpretation of the Statutes is *further* supported by the public policy underlying the Statutes to protect consumers from losing insurance coverage if the premium is accidentally missed." June 22, 2016 Order at 7 (emphasis added).

policies, but not renewals of existing policies, [**21] would allow insurers to circumvent the purpose of the uninsured motorist statute by only renewing policies instead of [*734] issuing new ones) and Cerrone v. Reliance Standard Life Ins. Co., 9 F. Supp. 3d 1145, 1151-1152 (S.D. Cal. 2014) (citing the renewal principle in *Stephan* to hold that Cal. Ins. Code § 10110.6, a statute that voids discretionary clauses in certain circumstances, applied to and voided the discretionary provision within a life insurance policy because the policy renewed and continued in force after the effective date of the statute). The Court incorporates its prior analysis applying the renewal principle to this case and will not repeat it here. See June 22, 2016 Order at 7-8 and May 1, 2018 Order at 6-7. The renewal principle applies to the Class Policies.

b. The California DOI and the Insurance Industry

United also argues that according to both the California DOI and the insurance industry, the Statutes apply only to policies issued or delivered on or after the Effective Date. See United MSJ at 3-6. United accompanies this argument with a request for judicial notice of numerous exhibits, which the Court has denied. See United App'x of Exs. and discussion at Part II, *supra*.

United offers the DOI's periodic market conduct examination of United that includes guidelines applying the Statutes' notice requirement only [**22] to policies issued after January 1, 2013 to further support its argument. *Id.* at 4; United App'x of Exs., Ex. 17.

United asserts another insurer, Transamerica Premier Life Insurance Company, also has construed the Statutes not to apply to policies issued or delivered prior to the Effective Date.⁹ United MSJ at 4-5.

The Court does not find United's arguments persuasive.

An agency interpretation of the meaning and legal effect of a statute is entitled to consideration and respect by the courts; however . . . the binding power of an agency's *interpretation* of a statute or regulation is contextual: Its power to persuade is

⁹United offers an email blast from the Association of California Life & Health Insurance Companies to entity representatives in the insurance industry that states the Statutes will be implemented prospectively and does not apply to policies issued or delivered prior to January 1, 2013. See United App'x of Exs., Ex. 21.

both circumstantial and dependent on the absence of factors that support the merit of the interpretation.

Yamaha Corp. of Am. v. State Bd. of Equalization, 19 Cal. 4th 1, 7, 78 Cal. Rptr. 2d 1, 960 P.2d 1031 (1998) (emphasis in original). Here, the documents United offers do not provide the reasoning behind their interpretation that the Statutes apply only to policies delivered or issued on or after the Effective Date. In the absence of any meaningful analysis, the Court rejects their interpretation of the Statutes.

2. Whether the Statutes Apply to Policies Issued or Delivered Outside of California

United contends that the Statutes do not apply to policies that were issued or delivered outside of California even if the [**23] renewal principle were applicable here. *Id.* United maintains that applying California law to out-of-state policies creates confusion because there could be a conflict between California and the other state's notice requirements. *Id.* at 21. Additionally, United argues if the Statutes were to apply to out-of-state issued policies because of the renewal principle, then those policies would have to renew after the Effective Date. *Id.*

Bentley counters that the renewal principle is applicable to policies first issued or delivered outside of California and later [*735] renewed in the state. Bentley Opp'n at 20-21. Further, Bentley argues that United could simply comply with both state laws, or the law of the state where the policyholder resides. *Id.* at 22, n. 9.

The parties' dispute regarding whether the Statutes can apply to out-of-state policies centers on the inclusion of one policy¹⁰ on the Class List. See Jt. Stip. ¶¶ 16-17 and Suppl. Memo Opp'n Bentley MSJ at 4. [Doc. # 170.] United issued this policy in Florida on July 8, 2013 and it lapsed on November 5, 2013 for nonpayment. Kallenbach Dec. ¶ 3 [Doc. # 170-1]. United sent a premium notice to the policyholder at his Florida address in July 2013 and United received payment [**24] on August 2, 2013. *Id.* ¶ 4. United later received a request for change of address, effective September 23, 2013, from the Florida address to an address in San Diego, California. *Id.* It follows that the policyholder likely paid the premium payment while still in Florida. *Id.* From the evidence, it appears that United

¹⁰UR2828580 (line 21).

was not aware of the policyholder's move from Florida to California until after the final premium payment was made. Even under Bentley's argument, the premium payment had to have been made in California for the policy to renew in California. Here, there is no indication that the premium renewal occurred in California. Therefore, the Court removes this policy from the Class List.

3. A Premium Payment Constitutes a "Renewal" and a Policy Must "Renew" After the Effective Date for the Statutes to Apply

United asserts that even if the renewal principle were to apply here, policies that lapsed in 2013 prior to their renewal (or annual anniversary date) cannot be subject to the Statutes. United MSJ at 22. More specifically, United argues a mere premium payment does not constitute renewal. Suppl. Memo Opp'n Bentley MSJ at 4. According to United, four of the policies on the Class List terminated in 2013 prior **[**25]** to reaching their anniversary date in 2013, and therefore, according to the renewal policy, should not be included in the Class.¹¹ *Id.* United maintains that it was required to send policyholders an annual Offer to Designate Notice at any specific time. *Id.* at 23. Therefore, United could have sent the Offer to Designate Notice to at any time between the Effective Date and December 31, 2013 and not violated the Statutes. *Id.*

Bentley responds that owners of policies in force after the Effective Date should have been given, at a minimum, the Annual Notice and Designee Notice prior to lapse. Bentley Opp'n at 22-23. Bentley also maintains that, even if a policy did not renew after the Effective Date, the Statutes apply because they authorize a private right of action. Suppl. Memo ISO Bentley MSJ at 5-7. [Doc. # 169.] Finally, Bentley asserts that policies that do not include "renewal" language still renew annually because [Cal. Ins. Code § 10110.6](#) provides that insurance policies automatically renew annually on their anniversary date. *Id.* at 24.

A Class Policy renewed when a premium payment was made after the Effective Date, regardless of whether the payment was an annual or a subannual premium payment. In *Argonaut*, the court held that a monthly premium payment **[**26]** of a transportation liability insurance policy, which was considered an annual term

policy, constituted a renewal. [Argonaut Ins., Co. v. Colonial Ins. Co., 70 Cal. App. 3d 608, 619-20, 138 Cal. Rptr. 855 \(1977\)](#). The **[*736]** court determined the statute in question was incorporated into the policy once the policy renewed through a monthly premium payment that occurred after the statute's effective date. [Id. at 620](#).

Here, the facts are similar to those in *Argonaut*. A Class Policy owner can pay for his or her annual life insurance policy in other intervals besides annually, such as in monthly payments. See e.g. *Jt. Stip., Ex. 3 at 22* ("Payment of Premiums"). [Doc. # 149-2.] By the terms of the Class Policies, if a policyholder fails to make a timely premium payment, the policy terminates. *Id.* at 23 ("Nonpayment of Premiums"). The policy can be reinstated if the policyholder fulfills certain conditions, including paying all past due premiums. *Id.* ("Reinstatement"). Additionally, all the policies on the Class List terminated after the Effective Date because of failure to make a required premium payment. *Jt. Suppl. Ex., Ex. A (Column E)*. [Doc. # 167-1.] Whereas neither the Class Policies nor the Statutes define renewal, Black's Law Dictionary defines "renewal" as "[t]he re-creation of a legal relationship or **[**27]** the replacement of an old contract with a new contract, as opposed to the mere extension of a previous relationship or contract." Black's Law Dictionary (10th Ed. 2014). This definition is consistent with the holding in *Argonaut* because the court did not consider the policy renewal a mere extension of the previous policy, but a new contract. See [Argonaut, 70 Cal. App. 3d at 620](#).

United's argument that the Court tacitly rejected the *Argonaut* renewal definition when it dismissed Bentley's individual breach of contract claim is incorrect. Bentley's individual breach of contract claim (the third cause of action) alleged United breached its policy with Eric because United did not provide coverage for the entire year even though Eric made one of two required semi-annual payments during that policy year. TAC ¶ 71. [Doc. # 87.] By contrast, that a "renewal" can mean a subannual policy payment that renews a policy for the period of time that the payment covers is entirely consistent with the Court's previous ruling that one semi-annual payment does not result in the policy renewing for the entire policy year.

Under the renewal principle, a renewal must occur subsequent to the Effective Date for the Statutes to be incorporated **[**28]** into the policies on the Class List. Bentley's reliance on [Cal. Ins. Code § 10110.6](#) for her assertion that a policy renews if it continues in force on

¹¹ See *infra* Part V.A.3, n. 14.

or after its anniversary date is misplaced. [Section 10110.6](#) provides that discretionary clauses in life and disability insurance policies are void. See [Cal. Ins. Code § 10110.6](#). [Subsection \(b\)](#) states, "for the purposes of this section, 'renewed' means continued in force on or after the policy's anniversary date." [§ 10110.6\(b\)](#) (emphasis added). Bentley does not cite to any legal authority that applies [§ 10110.6](#)'s renewal definition outside the context of discretionary clauses. Nor does [§ 10110.6](#) contain language indicating that its renewal definition was meant to be applied to other aspects of insurance policies besides the voidability of discretionary clauses. Indeed, the phrase "for the purposes of this section" in [§ 10110.6\(b\)](#) indicates otherwise. Furthermore, case law supports the application of the renewal principle to incorporate a new statute into different types of insurance policies that renew subsequent to the effective date of the new statute (e.g., auto insurance in *Modglin*, transportation liability insurance in *Argonaut*, disability insurance in *Stephan*, and life insurance in *Cerone*).

For the Statutes to apply to a Class Policy, it must renew **[**29]** after the Effective **[*737]** Date. Bentley's arguments that the Statutes apply to the Class Policies either because (1) those policies were in force subsequent to the Effective Date or (2) the Statutes apparently authorize a private cause of action are of no avail. See Bentley MSJ at 11 and Suppl. Memo ISO Bentley MSJ at 5. If either argument were valid, it would obviate the need for the renewal principle entirely.¹² Plaintiff cannot rely on the renewal principle when it suits her and then jettison it when it does not.

Finally, United's argument that it had until December 31, 2013 to send out an Offer to Designate Notice is

¹² The Court recognizes that, at the Class Certification stage, the Court ruled that United needed to comply with all laws in effect at the time, including the Statutes (See May 1, 2018 Order at 10). At the summary judgment stage, however, the Court must determine whether there was a breach of contract. See Bentley MSJ at 7. For there to be a breach in contract due to violation of the notice requirement pursuant to the Statutes, the Statutes must apply to the Class Policies. The parties' extensive briefing regarding the renewal policy makes it clear to the Court that a renewal must occur before the Statutes can apply to the Class Policies. The mere concurrence of Class Policies in force when the Statutes became effective is insufficient for the Statutes to apply to the Class Policies. The Statutes must be incorporated into any given policy prior to determining whether the Statutes afford a private cause of action.

unavailing. United was aware of the Statutes prior to the Effective Date and was expected to be in compliance by the time the Statutes became effective, especially given California's renewal principle and the fact that a premium payment constitutes a renewal. See United App'x, Ex. 19 at 51-52 (indicating the California insurance governmental agencies communicated to insurers that insurers needed to be compliant with the Statutes by their Effective Date).

In consideration of the requirement under the renewal principle that a policy must renew for the Statutes to apply and that renewal can be a premium payment, the Court **[**30]** revises the Class List. First, six policies¹³ United contends should be removed from the Class List because they did not reach their anniversary date in 2013 will remain because a premium payment was made in 2013 after the Effective Date. See Jt. Suppl. Ex., Ex. A (Column D). The Court removes four policies¹⁴ from the Class List because no premium payments were made in 2013 and therefore the Statutes were never incorporated into those policies through the renewal principle prior to lapsing. *Id.*

4. The Statutes Govern Policies that Terminated After Reaching the End of Their Guaranteed Level Premium Period

United contends the Statutes do not apply to policies that terminated after reaching the end of their guaranteed level premium. See United MSJ at 23; United App'x of Exs., Exs. 5-7; Jt. Stip. ¶ 34.

United argues that the "most reasonable inference" as to why those policies lapsed after reaching the end of the guaranteed level premium period is that those policyholders no longer wanted to pay a premium that was several times the amount they had been paying. United MSJ at 23-24. United maintains that based on this inference, those policies did not lapse for nonpayment of premium and therefore the Statutes should not apply to **[**31]** those policies. *Id.* at 24.

[*738] Bentley asserts that these policies should be in the Class because the reason for nonpayment of a premium is irrelevant—what matters is that there was a

¹³ UR2627721 (line 16), UR2674494 (line 18), UR2671752 (line 19), UR2584816 (line 23), UR2681720 (line 24), and UR2654966 (line 26).

¹⁴ UA7820542 (line 13), UR2663468 (line 14), UR 2648669 (line 15), and UR2648784 (line 17).

lapse due to nonpayment. Bentley Opp'n at 25.

The Court upholds its previous ruling that the Statutes apply to policies that lapsed after reaching the end of their guaranteed premium period. May 1, 2018 Order at 11-12. "The Statutes require insurers to provide policyholders notice whenever their premium is due and unpaid. It does not distinguish the circumstances in which the premium remains constant or increases." *Id.* (internal citation omitted).

5. The Statutes Govern Policies that Terminated for Inadequate Cash Value

United argues the Statutes do not apply to policies that terminated for inadequate cash value because there was no missed premium payment. See Bjork Decl., Ex. B [Doc. # 147-2]; United App'x of Exs., Exs 1-4; Jt. Stip. ¶ 33 United MSJ at 24. Some policyholders borrowed against their policy's cash value and were required to pay interest on that loan. *Id.* If the policy contained insufficient cash value and the policyholder failed to pay the interest charge, the policy lapsed. *Id.*

Bentley argues these policies [**32] should be included in the Class because there is no functional difference between policies that lapsed due to inadequate cash value and nonpayment of premium. Bentley Opp'n at 24.

The Court maintains its previous ruling that policies that lapsed due to inadequate cash value lapsed because the policyholder did not make a premium payment. May 1, 2018 Order at 11. Indeed, the letters sent to the policyholders whose policies were terminated because of inadequate cash value all include language stating that the policy would be terminated if premiums and/or interest were not paid by a particular date.

6. Other Disputed Policies

The Parties dispute whether policies that lapsed after receiving an Annual Notice in 2016, but did not receive Annual Notices in 2013, 2014, or 2015 should be in the Class.¹⁵ Bentley MSJ at 15 - 16; see also Jt. Stip.

¹⁵ Bentley originally asserted policies 7864066, 7759088, BU1067439, and BU1164839 were in the Class for this reason. Jt. Stip. Facts ¶¶ 20, 24. These policies were originally included in the November 2017 Class List, but were excluded from the May 2018 Class List because they fell out of the Class Definition per the Court's May 1, 2018 Order. United Mot. to Show Cause at 6. Since filing their summary judgment

Bentley Mot. to Show Cause at 1. [Doc. # 142.] Bentley contends policies that received an Annual Notice only in 2016 should be in the Class because failure to send the Annual Notice prior to 2016 constituted breach of the policy. *Id.* The Court ruled against Bentley and held that "a beneficiary [was] not a class member simply because his or her policyholder did not receive an Annual [**33] Notice in 2013, 2014, or 2015. Rather, Defendant's failure to provide one or more of the third-party notices . . . signifies that the beneficiaries on those policies fall within the class definition." July 13, 2018 Order at 4.

Notwithstanding that ruling, Bentley sent Class notices to the beneficiaries of [**739] three of these policies¹⁶ despite those policies not being on the Class List and in contravention of this Court's July 13 Order. See United Mot. to Show Cause at 5 [Doc. # 165]. Because United sent these policyholders the Annual Notice prior to the policies lapsing, they do not fall within the Class definition.¹⁷ See Jt. Stip. Facts, Exs. 9 and 11. The Court maintains its prior ruling that these policies do not belong in the Class.¹⁸ See July 13, 2018 Order at 4.

7. Revised Class List

Even with the revisions to the Class List noted above, there remain 26 Class Policies, which encompass 33 Class Members. This number is still sufficient to satisfy the [Fed. R. of Civ. P 23\(a\)\(1\)](#) numerosity requirement. See *Slaven v. BP Am., Inc.*, 190 F.R.D. 649, 654 (C.D. Cal. 2000) ("[t]he Ninth Circuit has not offered a precise numerical standard; other District courts have, however,

motions, the Parties have resolved their dispute regarding 7864066 and BU1067439 and agree these two policies are not in the Class. Resp. to United Opp'n at 1 [Doc. # 164]; Jt. Stip. Bentley Mot. to Show Cause at 1, n.1 [Doc. # 168]. Bentley still maintains 7759088 and BU1164839 are in the Class.

¹⁶ 7864066, 7759088, and BU1164839.

¹⁷ United requests Bentley send curative letters to the four beneficiaries (7864066, 7759088, and BU1164839) who improperly received the Class notice, advising those beneficiaries that the August 8, 2018 notice they received was in error and should be disregarded. United Mot. Show Cause at 8-9. United also requests it be permitted to review the notice prior to it being sent and that it be provided with a copy of each notice Bentley sends. *Id.* at 9.

¹⁸ The Parties stipulated that if the Court resolves their dispute regarding these policies in this Order, it would resolve United's Mot. to Show Cause. See Jt. Stip. re Mot. to Show Cause. [Doc. # 168.]

enacted presumptions that the numerosity requirement is satisfied by a showing of 25-30 members."). The Court's **[**34]** Class List revisions therefore do not jeopardize the class certification.

B. Breach of Contract

Based on the renewal policy discussed above, any changes in the law that occurred prior to the renewal are incorporated into the policy at the time of renewal. [Stephan, 697 F.3d at 927](#). Thus, the Statutes were incorporated into Eric's policy, which is a valid contract of insurance.

"[T]he elements of a cause of action for breach of contract are (1) the existence of the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to the plaintiff."¹⁹ [Oasis W. Realty, LLC v. Goldman, 51 Cal. 4th 811, 821, 124 Cal. Rptr. 3d 256, 250 P.3d 1115 \(2011\)](#) (citing [Reichert v. General Ins. Co., 68 Cal. 2d 822, 830, 69 Cal. Rptr. 321, 442 P.2d 377 \(1968\)](#)). Jennifer Bentley, as the class representative, has successfully demonstrated that United breached its contractual duty to pay life insurance benefits because²⁰: (1) United issued the life insurance policy to Eric Bentley, and Jennifer Bentley is that policy's beneficiary, Jt. Stip. ¶ 15; (2) the Bentley policy was issued, delivered, or renewed in California by United, *id.* ¶¶ 16-17; (3) the Bentley policy renewed after the Effective Date, *id.* ¶¶ 17, 20; (4) United did not provide Eric Bentley with the Offer to Designate or provide Jennifer Bentley with the Designee/30-Day Notice required by the Statutes, **[**35]** *id.* ¶¶ 22-24; (5) the Bentley policy **[*740]** lapsed for non-payment of premium after the Effective Date, *id.* ¶¶ 4-5, 35-36; and (6) to date, United has not paid death benefits on the Bentley policy. *id.* ¶ 32.

Thus, there is no dispute of material fact that United breached its contractual duty to pay Jennifer Bentley's life insurance claim.

¹⁹ The merits of the cross-motions for summary judgment pertain to Jennifer Bentley, the class representative. Whether any given policy qualifies to be on the Class List is a separate matter, which the Court has addressed above.

²⁰ Bentley also asserts United breached the Bentley Policy because it did not provide Bentley the proper 30-day notice provided in [§ 10113.72](#) in accordance with the 60-day grace period in [§ 10113.71](#). Bentley MSJ at 18-19.

1. Damages

The Parties disagree regarding damages calculations. Bentley asserts that according to [Cal. Ins. Code § 10111](#), she and Class Members are entitled to the face value of the policies, without any set-offs due to apparent loan balances and unpaid premiums. Bentley MSJ at 22 and Bentley Reply at 13. She also contends that she and Class Members are entitled to prejudgment interest. *Id.* Bentley asserts that [Cal. Ins. Code § 10172.5](#) sets an interest rate minimum, and [§ 10172.5](#) does not prevent applying the higher ten percent interest rate. Bentley Reply at 14. To that end, Bentley maintains that the prejudgment interest applied should be ten percent per annum after breach pursuant to [Cal. Civ. Code § 3289\(b\)](#), because the Class Policies do not specify a legal rate of interest. Bentley MSJ at 22.

United counters that Class Members are entitled to the death benefits calculated according to each policy's terms, which may be less than the face value of the policy. United **[**36]** Opp'n at 21. United maintains that for some of the Class Policies, the benefits will be less than the face value because some policyholders borrowed on the policy or had unpaid premiums at the time of lapse. *Id.* According to United, the net death benefit for a particular policy would be the face value minus any loans plus interest due and/or premiums due. *Id.* United also asserts that some policies lapsed within the first two years of issuance, which means the death benefit is 110% of the premiums paid unless the policyholder died due to an accident. *Id.* Finally, United argues that the policies do in fact state an interest rate (either one or three percent, depending on the policy) and, therefore, pursuant to [Cal. Ins. Code § 10172.5\(a\)](#), the prejudgment interest is either one or three percent, whichever is listed in the particular policy. *Id.* at 22.

The death benefits for each policy are as defined in each policy's terms. See Jt. Stip., Exs. 3 and 15. Damages for contractual breach, where the only obligation was to pay money, are limited to "the amount due by the terms of the obligation, with interest thereon." [Cal. Civ. Code § 3302](#). Further, [§ 10111](#) states that, "[i]n life or disability insurance, the only measure of liability and damage is the **[**37]** sum or sums payable in the manner and at the times as provided in the policy to the person entitled thereto." [Cal. Ins. Code § 10111](#). According to [§ 10111](#), the policy's value is the amount owed to the policyholder (or beneficiary) when an insurance policy is breached. Therefore, Bentley and Class Members are entitled to the death benefits, but for

the reasons United asserts, the death benefit for some policies will be less than face value.²¹ Any disputes as to the precise amount of the death benefits for each beneficiary will have to be the subject of a separate motion.

[*741] Bentley and Class Members are also entitled to prejudgment interest. [Section 3289\(a\)](#) provides that the legal rate of interest chargeable after a breach of contract is "any legal rate of interest stipulated by contract." [Cal. Civ. Code § 3289\(a\)](#). The interest rate is ten percent interest per annum only when the contract does not stipulate a legal interest. *Id.* at [§ 3289\(b\)](#). Further, [§ 10172.5\(a\)](#) provides in relevant part:

Notwithstanding any other provision of law, each insurer admitted to transact life insurance . . . in this state that fails or refuses to pay the proceeds of, or payments under, any policy of life insurance issued by it within 30 days after the date of death of the insured shall pay interest, **[**38]** at a rate not less than the then current rate of interest on death proceeds left on deposit with the insurer computed from the date of the insured's death, on any moneys payable and unpaid after the expiration of the 30-day period.

[Cal. Ins. Code § 10172.5\(a\)](#).

Contrary to Bentley's assertion, the Class Policies specify a legal rate of interest. Therefore, the ten percent interest rate does not apply here. See *e.g.* Jt. Stip., Ex. 3 at 25 ("General Conditions"). Specifically, depending on the type of policy, United pays the policyholder or beneficiary the policy proceeds at either a one or three percent interest rate.²² [Burton v.](#)

²¹ Bentley's argument that United waived its right to claim set-offs because United failed to assert set-offs as an affirmative defense is not persuasive. See Bentley Reply at 13. United's Answer asserts set-off as its Seventeenth Affirmative Defense. [Doc. # 108.] Bentley cites several cases to support her argument, but none of the cases cited relates to life insurance policy death benefits and the Court is not convinced the cited cases are analogous. *Id.* Furthermore, calculating the face value of each policy according to the computation set forth in the policy is consistent with [Cal. Ins. Code § 10111](#).

²² The Court assumes United's assertion that the policy interest rates are either one or three percent because it determined that none of the policyholders selected the Payout Option that has an interest rate based on a Single Premium Immediate Annuity policy, which may be different than one or three percent. See Jt. Stip., Ex. 3 at 9.

[Prudential Ins. Co. of Am., 669 Fed. App'x 829, 829 \(2016\)](#) (affirming the district court's interpretation that [§ 10172\(a\)](#) required "insurers to pay at least the same interest rate that they paid to their depositors during the period in which the life insurance benefits were benefits were past due."); see, *e.g.*, Jt. Stip., Ex. 15; see also Jt. Stip., Ex. 1 (Column X) and Jt. Suppl. Ex., Ex. A (Column Z).

The Court disagrees with Bentley that [§ 10172.5\(b\)](#) provides for application of a higher interest rate in the circumstance that payment is withheld beyond what is "reasonably necessary." See Bentley Reply at 14-15. [Section 10172.5](#) is not a tort-based statute and Bentley does not assert a tort **[**39]** claim. Furthermore, Bentley does not contest that the deposit interest rate is either one or three percent, depending on the policy. See Bentley Reply 14-15. Therefore, prejudgment interest shall be applied to the death benefits for each Class Policy, consistent with the guaranteed interest rate explicitly specified in each particular policy.²³

VI.

CONCLUSION

In light of the foregoing, the Court GRANTS summary judgment in favor of Plaintiff Jennifer Bentley on her breach of contract claim and DENIES United's cross-motion for summary judgment.

The Court also GRANTS United's Motion for Order to Show Cause to the extent that Bentley must send curative notices to the four beneficiaries²⁴ who inappropriately received a Class notice despite not being on the Class List. Bentley must allow **[*742]** United to review the notices in advance of mailing and shall provide United with a copy of the notices sent. The parties shall file a joint status report **within ten days** indicating how they wish to proceed.

IT IS SO ORDERED.

²³ United requests that it proceed through its normal claims process to confirm the policyholder has died and from what cause. United Opp'n at 22, n.19. Determining cause of death is relevant to the death benefits calculations for the graded benefit whole life policies. *Id.*

²⁴ See *supra* Part V.A.6, n. 16.

DATED: February 21, 2019

/s/ Dolly M. Gee

DOLLY M. GEE

UNITED STATES DISTRICT JUDGE

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2019 SESSION

19-0014
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HOUSE BILL **696-FN**

AN ACT establishing a protective order for vulnerable adults.

SPONSORS: Rep. Cushing, Rock. 21; Rep. McMahon, Rock. 7; Rep. Campion, Graf. 12; Rep. Long, Hills. 10; Rep. Gordon, Graf. 9; Rep. Marsh, Carr. 8; Sen. Chandley, Dist 11; Sen. Carson, Dist 14; Sen. Hennessey, Dist 5

COMMITTEE: Health, Human Services and Elderly Affairs

ANALYSIS

This bill establishes a procedure for protective orders for vulnerable adults.

Explanation: Matter added to current law appears in **bold italics**.
Matter removed from current law appears in ~~(in brackets and struck through)~~
Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.
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STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Nineteen

AN ACT establishing a protective order for vulnerable adults.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 New Chapter: Protective Orders for Vulnerable Adults. Amend RSA by inserting after chapter 173-C the following new chapter:

CHAPTER 173-D

PROTECTIVE ORDERS FOR VULNERABLE ADULTS

173-D:1 Purpose. The purpose of this chapter is to enable vulnerable adults, to seek permanent and temporary relief from abuse, exploitation, and neglect.

173-D:2 Definitions. In this chapter:

I. "Abuse" means any one of the following:

- (a) "Emotional abuse" means the misuse of power, authority, or both, verbal harassment, or unreasonable confinement which results or could result in the mental anguish or emotional distress of a vulnerable adult.
- (b) "Physical abuse" means the use of physical force which results or could result in physical injury to a vulnerable adult.
- (c) "Sexual abuse" means contact or interaction of a sexual nature involving a vulnerable adult without his or her informed consent.

(d) "Other abuse" means any of the following:

- (1) Assault or reckless conduct as defined in RSA 631:1 through RSA 631:3.
- (2) Criminal threatening as defined in RSA 631:4.
- (3) Sexual assault as defined in RSA 632-A:2 through RSA 632-A:5.
- (4) Interference with freedom as defined in RSA 633:1 through RSA 633:3-a.
- (5) Destruction of property as defined in RSA 634:1 and RSA 634:2.
- (6) Unauthorized entry as defined in RSA 635:1 and RSA 635:2.
- (7) Harassment as defined in RSA 644:4.
- (8) Cruelty to animals as defined in RSA 644:8.

II. "Authorized" means written consent provided by the vulnerable adult.

III. "Contact" means any action to communicate with another either directly or indirectly, including, but not limited to, using any form of electronic communication, leaving items, or causing another to communicate in such fashion.

IV. "Defendant" means the person against whom the protective orders are sought and, if the petition is granted, the restrained person.

V. "Department" means the department of health and human services.

VI. "Exploitation" means the improper use of a vulnerable adult's person or property for another person's profit or advantage, or the breach of a fiduciary relationship through the use of a person or a person's property for any purpose not in the proper and lawful execution of a trust, including, but not limited to, situations where a person obtains money, property, or services from a vulnerable adult through the use of undue influence, harassment, duress, deception, fraud or under any circumstances where the person knew or had reason to know that the vulnerable adult lacked capacity to consent.

VII. "Foreign protective order" means an order enforceable under RSA 173-D:14.

VIII. "Neglect" means an act or omission which results or could result in the deprivation of essential services or supports necessary to maintain the minimum mental, emotional, or physical health and safety of a vulnerable adult.

IX. "Plaintiff" means the vulnerable adult to be protected by the protective orders and, if the court grants the petition, the protected person.

X. "Vulnerable" means that the physical, mental, or emotional ability of a person is such that he or she is unable to manage personal, home, or financial affairs in his or her own best interest, or he or she is unable to act or unable to delegate responsibility to a responsible caretaker or caregiver.

173-D:3 Jurisdiction and Venue.

I. The district division and the judicial branch families division of the circuit courts shall have concurrent jurisdiction over all proceedings under this chapter.

II. If the plaintiff has left the household or premises to avoid further abuse, the plaintiff shall have the option to commence proceedings pursuant to RSA 173-D:4 in the county or district where the plaintiff temporarily resides.

III. Proceedings under this chapter may be transferred to another court upon the motion of any party or of the court as the interests of justice or the convenience of the parties may require.

173-D:4 Commencement of Proceedings; Hearing.

I. A vulnerable adult, guardian, or attorney-in-fact of a vulnerable adult, or if authorized by the vulnerable adult, the department, may seek relief pursuant to RSA 173-D:6 by filing a petition, in the county or district where the plaintiff or defendant resides, alleging abuse, exploitation or neglect by the defendant. Any person filing a petition containing false allegations of abuse shall be subject to criminal penalties. Notice of the pendency of the action and of the facts alleged against the defendant shall be given to the defendant, either personally or as provided in paragraph II. The plaintiff shall be permitted to supplement or amend the petition only if the defendant is provided an opportunity prior to the hearing to respond to the supplemental or amended petition. All petitions filed under this section shall include the home and work telephone numbers of the defendant, if known. Notice of the whereabouts of the plaintiff shall not be revealed except by order of the court for good cause shown. Any answer by the defendant shall be filed with the court and a copy shall be provided to the plaintiff by the court.

II. No filing fee or fee for service of process shall be charged for a petition or response under this section, and the plaintiff or defendant may proceed without legal counsel. Either a peace officer or the sheriff's department shall serve process under this section. Any proceeding under this chapter shall not preclude any other available civil or criminal remedy.

III. The clerks of the circuit courts shall supply forms for petitions and for relief under this chapter designed to facilitate pro se proceedings. All such petitions shall contain the following words: I swear that the foregoing information is true and correct to the best of my knowledge. I understand that making a false statement on this petition will subject me to criminal penalties.

IV.(a) The court shall hold a hearing within 30 days of the filing of a petition under this section or within 10 days of service of process upon the defendant, whichever occurs later.

(b) The time frame established in this paragraph may be extended for an additional 10 days upon motion by either party for good cause shown. A recusal by the judge or any act of God or closing of the court that interferes with the originally scheduled hearing shall not be cause for the dismissal of the petition. The court shall reschedule any hearing under this section in an expeditious manner.

V. In any proceeding under this chapter, the court shall not be bound by the technical rules of evidence and may admit evidence which it considers relevant and material.

VI. In a proceeding under this chapter, a support person may accompany a party in court and, if the party is not represented by an attorney, may sit with the party at the table that is generally reserved for the party and the party's attorney. The support person is present to provide moral and emotional support for a person who alleges he or she is a victim of abuse. The support person is not present as a legal adviser and may not provide legal advice. The support person may assist the person who alleges he or she is a victim of abuse in feeling more confident that he or she will not be injured or threatened by the other party during the proceedings if the person who alleges he or she is a victim of abuse and the other party are required to be present in close proximity. This section does not preclude the court from exercising its discretion to remove the support person from the courtroom if the court believes the support person is prompting, swaying, or influencing the party assisted by the support person.

173-D:5 Temporary Relief.

I. Upon a showing of an immediate and present danger of abuse, exploitation, or neglect, the court may enter temporary orders to protect the plaintiff with or without actual notice to defendant. The court may issue such temporary orders by telephone, facsimile or any other methods approved by court rules. Such telephonically issued orders shall be made by a circuit court judge to a law enforcement officer, shall be valid in any jurisdiction in the state, and shall be effective until the close of the next regular court business day. Such orders shall be returnable to the circuit court where the plaintiff resides or to which the plaintiff has fled, unless otherwise ordered by the issuing judge. If non-telephonic temporary orders are made ex parte, the party against whom such relief is issued may file a written request with the clerk of the court and request a hearing on such orders. Such hearing shall be held no less than 2 business days and no more than 3 business days after the request is received by the clerk. Such hearings may constitute the final hearing described in RSA 173-D:4, V. Such temporary relief may include:

(a) Protective orders:

- (1) Restraining the defendant from abusing, exploiting, or neglecting the plaintiff.
- (2) Restraining the defendant from entering the premises and curtilage where the plaintiff resides, except when the defendant is accompanied by a peace officer and, upon reasonable notice to the plaintiff, is allowed entry by the plaintiff for the sole purpose of retrieving toiletries, medication, clothing, business equipment, and any other items as determined by the court.
- (3) Restraining the defendant from withholding items of the plaintiff's personal property which are specified in the order. A peace officer shall accompany the plaintiff or his/her representative in retrieving such property to protect the plaintiff.
- (4) Restraining the defendant from contacting the plaintiff or entering a specified place frequented regularly by the plaintiff.
- (5) Restraining the defendant from abusing the plaintiff, plaintiff's relatives, regardless of their place of residence, or plaintiff's household members in any way.
- (6) Restraining the defendant from taking, converting, or damaging property in which the plaintiff has a legal or equitable interest.
- (7) Granting the plaintiff exclusive care, custody, or control of any animal owned, possessed, leased, kept, or held by the plaintiff or by the plaintiff jointly with the defendant in either household, and ordering the defendant to stay away from the animal and forbidding the defendant from taking, transferring, encumbering, concealing, committing an act of cruelty or neglect, or disposing of the animal.
- (b) Other relief, including but not limited to:
 - (1) In the case of financial exploitation, prohibiting the defendant from transferring or otherwise encumbering any of his or her assets which equal or exceed the amount of assets claimed to be exploited, provided, however, that such prohibition shall not extend to, encumber, or otherwise limit the rights of creditors, mortgages, or secured parties in such property.
 - (2) Restraining the defendant from taking any action which would lead to the disconnection of any and all utilities and services to the parties' household, or the discontinuance of existing business or service contracts, including, but not limited to, mortgage or rental agreements.
 - (3) An order enjoining a party from specified behavior that the court determines is necessary to protect the vulnerable adult.
 - (4) If the court makes a specific finding that it is necessary for the protection of the plaintiff, the court may issue an order directing the defendant to relinquish to a police officer any and all firearms and ammunition in the control, ownership, or possession of the defendant, or any other person on behalf of the defendant for the duration of the protective order.

173-D:6 Relief.

I. A finding of abuse, exploitation, or neglect shall mean the defendant represents a credible threat to the safety of the plaintiff or physical, mental, or financial well-being. Upon a showing of abuse, exploitation, or neglect of the plaintiff by a preponderance of the evidence, the court shall grant such relief as is necessary to bring about a cessation of abuse, exploitation, or neglect. Such relief may include:

(a) Protective orders:

- (1) Restraining the defendant from abusing, exploiting or neglecting the plaintiff.
- (2) Restraining the defendant from entering the premises and curtilage where the plaintiff resides, except when the defendant is accompanied by a peace officer and is allowed entry by the plaintiff for the sole purpose of retrieving personal property specified by the court.
- (3) Restraining the defendant from contacting the plaintiff or entering the plaintiff's place of employment, school, or any specified place frequented regularly by the plaintiff or by any family or household member.
- (4) Restraining the defendant from abusing the plaintiff, plaintiff's relatives, regardless of their place of residence, or plaintiff's household members in any way.
- (5) Restraining the defendant from taking, converting, or damaging property in which the plaintiff has a legal or equitable interest.
- (6) Granting the plaintiff exclusive care, custody, or control of any animal owned, possessed, leased, kept, or held by the plaintiff or by the plaintiff jointly with the defendant in either household, and ordering the defendant to stay away from the animal and forbidding the defendant from taking, transferring, encumbering, concealing, committing an act of cruelty or neglect, or disposing of the animal.

(b) Other relief including, but not limited to:

- (1) Granting the plaintiff the exclusive use and possession of the premises and curtilage of the plaintiff's place of residence, unless the defendant exclusively owns or leases and pays for the premises and the defendant has no legal duty to support the plaintiff and provided, however, that such relief shall not extend to, extinguish, encumber, or otherwise limit the rights of creditors, mortgagees, or secured parties in such property.
- (2) Restraining the defendant from withholding items of the plaintiff's personal property specified by the court. A peace officer shall accompany the plaintiff in retrieving such property to protect the plaintiff.
- (3) Granting to the plaintiff the exclusive right of use and possession of the household furniture, furnishings, or a specific automobile, unless the defendant exclusively owns such personal property and the defendant has no legal duty to support the plaintiff.
- (4) Ordering the defendant to make automobile, insurance, health care, utilities, rent, or mortgage payments if the defendant has a legal or fiduciary duty to do so.
- (5) Ordering the defendant to pay the plaintiff monetary compensation for losses suffered as a direct result of the abuse, exploitation, or neglect which may include, but not be limited to, misappropriated funds, loss of earnings or support, medical and dental expenses, damage to property, out-of-pocket losses for injuries sustained, and moving and shelter expenses.
- (6) If the court makes a specific finding that it is necessary for the protection of the plaintiff, issuing an order directing the defendant to relinquish to a police officer any and all firearms and ammunition in the control, ownership, or possession of the defendant, or any other person on behalf of the defendant for the duration of the protective order.
- (7) Ordering the defendant to pay reasonable attorney's fees.

II. If the court makes a specific finding that it is necessary for the protection of the plaintiff, the court may prohibit the defendant from purchasing, receiving, or possessing any deadly weapons and any and all firearms and ammunition for the duration of the order. The court may subsequently issue a search warrant authorizing a peace officer to seize any deadly weapons specified in the protective order and any and all firearms and ammunition, if there is probable cause to believe such firearms and ammunition and specified deadly weapons are kept on the premises or curtilage of the defendant.

III. The court shall not deny the plaintiff protective orders based solely on a lapse of time between an act of abuse, exploitation, or neglect and the filing of a petition, provided that the underlying act presents a credible threat to the plaintiff's current safety or physical, mental, or financial well-being.

IV. No order made under this section shall supersede or affect any court order pertaining to the possession of a residence or household furniture as determined by a circuit court, or title to real or personal property.

V. The findings of fact with respect to the protective order shall be final, but questions of law may be transferred from the circuit court to the supreme court.

VI. Any order under this section shall be for a fixed period of time not to exceed one year, but may be extended by order of the court upon a motion by the plaintiff, showing good cause, with notice to the defendant, for one year after the expiration of the first order and thereafter each extension may be for up to 5 years, upon the request of the plaintiff and at the discretion of the court. The court shall review the order and each renewal thereof and shall grant such relief as may be necessary to provide for the safety and well-being of the plaintiff. A defendant shall have the right to a hearing on the extension of any order under this paragraph to be held within 30 days of the extension. The court shall state in writing, at the respondent's request, its reason or reasons for granting the extension. The court shall retain jurisdiction to enforce and collect any financial compensation due to the plaintiff which accrued prior to the expiration of the protective order.

VII. Both parties shall be issued written copies of any orders issued by the court, and all orders shall bear the following language: "A willful violation of this order is a crime, as well as contempt of court. Violations of the protective provisions shall result in arrest and may result in imprisonment." Orders shall clearly state how any party can request a further hearing and how the plaintiff may bring a criminal complaint or a petition for contempt if there is a violation of any court order.

VIII.(a) No order issued under this chapter shall be modified other than by the court.

(b) If either party wishes the defendant to be excused from any provisions of an order of protection, the remedy is to petition the court for modification of such order.

(c) A defendant who is restrained from contacting the plaintiff or entering the premises of the plaintiff is prohibited from doing so even if invited by the plaintiff unless the restraining order has been modified by the court.

(d) This paragraph shall give unequivocal direction to peace officers that orders for protection are to be enforced as written and that no action by a party relieves them of the duty to enforce the order.

IX. Upon issuing an order against a defendant, in which a defendant is restrained from having any contact with the plaintiff, the court shall advise the plaintiff that it would be unwise and possibly unsafe for the plaintiff to contact the defendant. If the plaintiff wishes to contact the defendant for any reason, the court shall advise the plaintiff that such contact be made only after petitioning the court for a modification of the order. In an emergency situation, the plaintiff or plaintiff's family may request that the local police department notify the defendant and the local police may accompany the defendant to a designated location, such as a hospital, if appropriate.

X.(a) A copy of each protective order issued under this chapter shall be transmitted to the administrative office of the courts by facsimile or computer. An emergency protective order issued telephonically shall be transmitted by telephone or facsimile to the department of safety.

(b) The administrative office of the courts shall enter information regarding the protective orders into the state database which shall be made available to police and sheriff departments statewide. The department of safety shall make available information regarding emergency protective orders issued telephonically to police and sheriff departments statewide.

(c) The administrative office of the courts shall update the database upon expiration or termination of a protective order.

(d) Notwithstanding any other provision of law, the administrative office of the courts, the department of health and human services, or the department of safety, their employees and agents, and law enforcement officials shall not be held criminally or civilly liable for action taken under this chapter or RSA 458:16, provided they are acting in good faith and without gross negligence, and within the scope of their duties and authority.

XI. If a criminal records check conducted by the department of safety indicates that a potential buyer or transferee is prohibited from receipt or possession of a firearm pursuant to a protective order issued under this chapter, the department of safety shall notify the administrative office of the courts of the denial. The administrative office of the courts shall immediately notify the plaintiff that the defendant has attempted to purchase or obtain a firearm in violation of the protective order.

XII.(a) Within 15 days prior to the expiration of the protective orders, the defendant may request, by motion to the court, the return of any and all firearms and ammunition and specified deadly weapons held by the law enforcement agency while the protective order was in effect. Upon receipt of such a motion, the court shall schedule a hearing no later than 15 days after the expiration of the order. The court shall provide written notice to the plaintiff who shall have the right to appear and be heard, and to the law enforcement agency which has control of the firearms, ammunition, and specified deadly weapons. The scope of the hearing shall be limited to:

(1) Establishing whether the defendant is subject to any state or federal law or court order that precludes the defendant from owning or possessing a firearm; and

(2) Under circumstances where the plaintiff has requested an extension of the protective order, whether the plaintiff has established by a preponderance of the evidence that the defendant continues to represent a credible threat to the safety of the plaintiff.

(b) If the court finds that the defendant is not subject to any state or federal law or court order precluding the ownership or possession of firearms, or if the court denies the plaintiff's request to extend the protective order, the court shall issue a written order directing the law enforcement agency to return the requested firearms, ammunition, or deadly weapon to the defendant.

(c) Law enforcement agencies shall not release firearms and ammunition and specified deadly weapons without a court order granting such release. The law enforcement agency may charge the defendant a reasonable fee for the storage of any firearms and ammunition and specified deadly weapons taken pursuant to a protective order. The fee shall not exceed the actual cost incurred by the law enforcement agency for the storage of the firearms and ammunition and specified deadly weapons. The defendant may make alternative arrangements with a federally licensed firearms dealer for the storage of firearms, at the defendant's own expense, upon approval of the court. Such firearms shall be turned over to the appropriate law enforcement agency for transfer to the storage facility. Retrieval of such firearms shall be through the law enforcement agency responsible for their transfer to the storage facility pursuant to a court order as prescribed in this paragraph.

(d) No law enforcement agency shall be held liable for alleged damage or deterioration due to storage or transportation to any firearms and ammunition and specified deadly weapons held by a law enforcement agency, provided that due care is used.

173-D:7 Permissible Contact.

I. A protective order issued pursuant to RSA 173-D:5 or RSA 173-D:6 shall not be construed to prohibit an attorney, or any person acting on the attorney's behalf, who is representing the defendant in an action brought under this chapter, or in any criminal proceeding concerning the abuse alleged under this chapter, from contacting the plaintiff for a legitimate purpose within the scope of the civil or criminal proceeding; provided, that the attorney or person acting on behalf of the attorney: identifies himself or herself as a representative of the defendant; acknowledges the existence of the protective order and informs the plaintiff that he or she has no obligation to speak; terminates contact with the plaintiff if the plaintiff expresses an unwillingness to talk; and ensures that any personal contact with the plaintiff occurs outside of the defendant's presence, unless the court has modified the protective order to permit such contact.

II. A no-contact provision in a protective order issued pursuant to RSA 173-D:5 or RSA 173-D:6 shall not be construed to:

(a) Prevent contact between counsel for represented parties; or

(b) Prevent a party from appearing at a scheduled court or administrative hearing; or

(c) Prevent a defendant or defendant's counsel from sending the plaintiff copies of any legal pleadings filed in court relating to the petition or related civil or criminal matters.

III. A violation of this section may result in a finding of contempt of court.

173-D:8 Guardian Ad Litem. In all proceedings under this chapter, the court may appoint a guardian ad litem to represent the interests of the vulnerable adult. The guardian ad litem may continue to serve after the final disposition of the case.

173-D:9 Notification.

I. A copy of any order made under this chapter which prohibits any person from abusing another shall be promptly transmitted to the local law enforcement agency having jurisdiction to enforce such order.

II. Temporary orders shall be promptly served on the defendant by a peace officer. Subsequent orders shall be sent to the defendant's last address of record. The defendant shall be responsible for informing the court of any changes of address. Law enforcement agencies shall establish procedures whereby a peace officer at the scene of an alleged violation of such an order may be informed of the existence and terms of such order.

III. Any court-ordered changes or modifications of the order shall be effective upon issuance of such changes or modifications, and shall be mailed or otherwise provided to the appropriate local law enforcement agency and transmitted to the department of safety within 24 hours of the entry of such changes or modification.

173-D:10 Violation of Protective Order: Penalty.

I.(a) When the defendant violates either a temporary or permanent protective order issued or enforced under this chapter, peace officers shall arrest the defendant and ensure that the defendant is detained until arraignment, provided that in extreme circumstances, such as when the health of the defendant would be jeopardized by the temporary detention, a judge in response to a request by the arresting law enforcement officer or agency, may order an alternative to detention pending arraignment. Such arrests may be made within 12 hours without a warrant upon probable cause, whether or not the violation is committed in the presence of a peace officer.

(b) Subsequent to an arrest, the peace officer may seize any firearms and ammunition in the control, ownership, or possession of the defendant and any deadly weapons which may have been used, or were threatened to be used, during the violation of the protective order. If seized, the law enforcement agency shall maintain possession of the firearms, ammunition, or deadly weapons until the court issues an order directing that the firearms, ammunition, or deadly weapons be relinquished and specifying the person to whom the firearms and ammunition or deadly weapons will be relinquished.

II. The prosecution and sentencing for criminal contempt for a violation of a protective order shall not preclude the prosecution of or sentencing for other criminal charges underlying the contempt.

III. A person shall be guilty of a class A misdemeanor if such person knowingly violates a protective order issued under this chapter or any foreign protective order enforceable under the laws of this state. Charges made under this chapter shall not be reduced to a lesser charge, as permitted in other instances under RSA 625:9.

IV. Any person convicted under paragraph III, or who has been convicted in another jurisdiction of violating a protective order enforceable under the laws of this state, who, within 6 years of such conviction or the completion of the sentence imposed for such conviction, whichever is later, subsequently commits and is convicted of one or more offenses involving abuse may be charged with an enhanced penalty for each subsequent offense as follows:

(a) There shall be no enhanced charge under this section if the subsequent offense is a class A felony or an unclassified felony;

(b) If the subsequent offense would otherwise constitute a class B felony, it may be charged as a class A felony;

(c) If the subsequent offense would otherwise constitute a class A misdemeanor, it may be charged as a class B felony;

(d) If the subsequent offense would otherwise constitute a class B misdemeanor, it may be charged as a class A misdemeanor;

(e) If the subsequent offense would otherwise constitute a violation, it may be charged as a class B misdemeanor.

V. A victim of abuse, exploitation, or neglect shall be entitled to all rights granted to victims of crime under RSA 21-M:8-k.

173-D:11 Protection by Peace Officers.

I. Whenever any peace officer has probable cause to believe that a person has been abused, exploited, or neglected, as defined in RSA 161-F:43 and RSA 173-D:2, that officer shall use all means within reason to prevent further abuse, exploitation, or neglect including, but not limited to:

(a) Confiscating any deadly weapons involved in the alleged abuse, exploitation or neglect.

(b) Transporting or obtaining transportation for the victim to a place of safety, local family member, or friend.

(c) Assisting the victim in removing toiletries, medication, clothing, and any other items determined by the court.

(d) Giving the victim immediate and written notice of the rights of victims and of the remedies and services available to victims of abuse, exploitation and neglect. The written notice shall include a statement substantially as follows:
 "If you are the victim of abuse, exploitation and neglect and you believe that law enforcement protection is needed for your physical safety, you have the right to request that the officer assist in providing for your safety, including asking for an emergency telephonic order for protection. You may also request that the officer assist you in obtaining from your premises and curtilage, toiletries, medication, clothing, business equipment, and any other items as determined by the court, and in locating and taking you to a local safe place including, but not limited to, a place of safety a family member's or friend's residence, or a similar place of safety. If you are in need of medical treatment, you have the right to request that the officer assist you in obtaining an ambulance. You may request a copy of the report filed by the peace officer, at no cost, from the law enforcement department."
 173-D:12 Notice to the Victim.
 I. Notwithstanding the peace officer's obligations in RSA 173-D:11, all peace officers shall give victims of abuse, exploitation, and neglect immediate and adequate notice of their right to go to the circuit court of their county to file a petition asking for protective orders against the abusive person and to seek a private criminal complaint.
 II. The clerk of the court shall be responsible for advising victims of their right to request that the judge issue an order which may include:
 (a) Restraining the defendant from abusing, exploiting, and/or neglecting the victim.
 (b) Directing the defendant to leave and stay away from the victim's premises and curtilage.
 (c) Restraining the defendant from contacting the victim, or entering any specified place frequented regularly by the victim.
 (d) Restraining the defendant from abusing, in any way, the victim, household members, or victim's relatives, regardless of their place of residence.
 (e) Restraining the defendant from taking, converting, or damaging personal or real property in which the victim may have a legal or equitable interest.
 (f) Ordering the defendant to pay the victim monetary compensation for losses suffered as a direct result of the abuse, exploitation, or neglect which may include, but not be limited to, misappropriated funds, loss of earnings or support, medical and dental expenses, damage to property, out-of-pocket losses for injuries sustained, and moving and shelter expenses.
 (g) Ordering the removal of any and all firearms and ammunition in the control, ownership, or possession of the defendant.
 (h) Ordering the defendant to pay reasonable attorney's fees.
 173-D:13 Emergency Care; Limitation and Liability. Any act or omission of any peace officer rendering emergency care or assistance to a victim under this chapter including, but not limited to transportation, shall not impose civil liability upon the peace officer or the peace officer's supervisors or employer if the care or assistance is rendered in good faith, unless the act or omission is a result of gross negligence or willful misconduct.
 173-D:14 Orders Enforceable.
 I. Any protective order issued under this chapter shall be effective throughout the state.
 II. Any protective order issued by any other state, tribal, or territorial court related to abuse, exploitation or neglect of a vulnerable adult, including an ex parte order, shall be deemed valid if the issuing court had jurisdiction over the parties and matter under the law of the state, tribe, or territory, and the person against whom the order was made was given reasonable notice and opportunity to be heard. There shall be a presumption of validity where an order appears facially valid.
 III. Any valid protective order, as defined in paragraph II, shall be accorded full faith and credit throughout the state.
 IV. A person entitled to protection under a foreign protective order, as defined in paragraph II, may file such order in any circuit court by filing with the court a certified copy of the order. Such person shall swear under oath in an affidavit to the best of such person's knowledge that the order is presently in effect as written. Such filing shall be without fee or cost. The clerk of the circuit court shall forward such order to the administrative office of the courts which shall enter such order in the state database. Such filing shall not be a precondition to arrest or enforcement of a foreign order.
 V. A peace officer may rely upon a copy of any protective order issued under this chapter or upon a copy of a foreign protective order, as defined in this section, which has been provided to the peace officer by any source.
 VI. Law enforcement personnel may rely on the statement of the person protected by the order that the order remains in effect as written, provided such person reasonably appears to be of sound mind when making such statement.
 173-D:15 Reporting and Referrals. Any law enforcement officer who investigates an alleged incident of abuse, exploitation, or neglect of a vulnerable adult shall report the matter to the department pursuant to RSA 161-F:46 and advise the person subject to such violence of the availability of programs from which that person may receive services.
 173-D:16 Severability. If any provision of this chapter or the application of such provision to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the chapter which can be given effect without the invalid provisions or applications, and to this end the provisions of this chapter are severable.
 2 Effective Date. This act shall take effect January 1, 2020.

LBAO
 19-0014
 Amended 6/7/19

HB 696-FN- FISCAL NOTE
 AS AMENDED BY THE SENATE (AMENDMENT #2019-1968s)

AN ACT establishing a protective order for vulnerable adults.

FISCAL IMPACT: [X] State [X] County [] Local [] None

STATE:	Estimated Increase / (Decrease)			
	FY 2020	FY 2021	FY 2022	FY 2023
Appropriation	\$0	\$0	\$0	\$0
Revenue	\$0	\$0	\$0	\$0
Expenditures	Indeterminable Increase	Indeterminable Increase	Indeterminable Increase	Indeterminable Increase
Funding Source:	[X] General	[] Education	[] Highway	[] Other

COUNTY:	\$0	\$0	\$0	\$0
Revenue	\$0	\$0	\$0	\$0
Expenditures	Indeterminable Increase	Indeterminable Increase	Indeterminable Increase	Indeterminable Increase

METHODOLOGY:

This bill enacts a new chapter that provides a process enabling vulnerable adults to seek permanent and temporary relief from abuse, exploitation, and neglect. As part of this process, the Department of Health and Human Services is authorized, but not mandated, to file a petition in a county or district where the plaintiff or other defendant resides alleging abuse, exploitation, or neglect by the defendant. The Department states that, were it to directly file the petitions, there would likely be additional personnel costs as well as mileage expenses for Department lawyers, adult protective service workers, and any other witnesses necessary to properly prosecute the petition. In addition, the Department assumes that even in cases in which it is not the moving party filing the petition, its personnel would still be utilized as witnesses. The Department is unable to estimate the extent of any additional costs.

This bill contains penalties that may have an impact on the New Hampshire judicial and correctional systems. There is no method to determine how many charges would be brought as a result of the changes contained in this bill to determine the fiscal impact on expenditures. However, the entities impacted have provided the potential costs associated with these penalties below.

Judicial Branch	FY 2020	FY 2021
Class B Misdemeanor	\$53	\$54
Class A Misdemeanor	\$76	\$77
Routine Criminal Felony Case	\$481	\$486
Protective Order	\$166	\$167
Warrant Request	\$76	\$77
Appeals	Varies	Varies
It should be noted that average case cost estimates for FY 2020 and FY 2021 are based on data that is more than ten years old and does not reflect changes to the courts over that same period of time or the impact these changes may have on processing the various case types. An unspecified misdemeanor can be either class A or class B, with the presumption being a class B misdemeanor.		
Judicial Council		
Public Defender Program	Has contract with State to provide services.	Has contract with State to provide services.
Contract Attorney – Felony	\$825/Case	\$825/Case
Contract Attorney – Misdemeanor	\$300/Case	\$300/Case
Assigned Counsel – Felony	\$60/Hour up to \$4,100	\$60/Hour up to \$4,100
Assigned Counsel – Misdemeanor	\$60/Hour up to \$1,400	\$60/Hour up to \$1,400
It should be noted that a person needs to be found indigent and have the potential of being incarcerated to be eligible for indigent defense services. The majority of indigent cases (approximately 85%) are handled by the public defender program, with the remaining cases going to contract attorneys (14%) or assigned counsel (1%).		
Department of Corrections		
FY 2018 Average Cost of Incarcerating an Individual	\$40,615	\$40,615
FY 2018 Annual Marginal Cost of a General Population Inmate	\$4,620	\$4,620
FY 2018 Average Cost of Supervising an Individual on Parole/Probation	\$571	\$571
NH Association of Counties		
County Prosecution Costs	Indeterminable	Indeterminable
Estimated Average Daily Cost of Incarcerating an Individual	\$105 to \$120	\$105 to \$120

The Department of Safety states the bill's fiscal impact will be under \$10,000. Any impact would be related to the expanded scope of current protective order procedures already in place for domestic violence protective orders.

The Department of Justice states the bill will have no fiscal impact as the offenses contemplated by the bill would typically be prosecuted by county prosecutors. Any appeals from convictions would be handled by the Department, but could be done within its existing budget.

AGENCIES CONTACTED:

Departments of Corrections, Justice, Safety, and Health & Human Services, Judicial Branch, Judicial Council, and New Hampshire Association of Counties

Regulation Best Interest

SEC Adopts Best Interest Standard of Conduct

Summary

This *Notice* reminds members of the Securities and Exchange Commission's (SEC's) adoption of a best interest standard of conduct for broker-dealers and a relationship summary (Form CRS) delivery obligation, and provides an SEC email address where members may submit questions about the new requirements. As more fully described below, the SEC encourages firms to actively engage with SEC staff as early as possible as questions arise when planning for implementation. Firms may send their questions by email to IABDQuestions@sec.gov. FINRA also will assist members in their implementation of the best interest standard in various ways.

Questions concerning this *Notice* may be directed to:

- ▶ James S. Wrona, Vice President and Associate General Counsel, Office of General Counsel (OGC), at (202) 728-8270 or jim.wrona@finra.org;
- ▶ Meredith Cordisco, Associate General Counsel, OGC, at (202) 728-8018 or meredith.cordisco@finra.org;
- ▶ Joseph P. Savage, Vice President and Counsel, Office of Regulatory Analysis, at (240) 386-4534 or joe.savage@finra.org; or
- ▶ Angela C. Goelzer, Vice President and Counsel, Office of Regulatory Analysis, at (202) 728-8120 or angela.goelzer@finra.org.

Discussion

On June 5, 2019, the SEC adopted Regulation Best Interest (Reg BI) under the Securities Exchange Act of 1934.¹ Reg BI establishes a “best interest” standard of conduct for broker-dealers and associated persons when they make a recommendation to a retail customer of any securities transaction or investment strategy involving securities, including recommendations of types of accounts.

August 7, 2019

Notice Type

- ▶ Guidance

Suggested Routing

- ▶ Compliance
- ▶ Legal
- ▶ Operations
- ▶ Senior Management

Key Topics

- ▶ Best Interest Standard of Conduct

Referenced Rules

- ▶ Form CRS
- ▶ Investment Advisers Act of 1940
- ▶ Regulation Best Interest
- ▶ Securities Exchange Act of 1934

The SEC also adopted new rules and forms to require broker-dealers and investment advisers to provide a brief relationship summary (Form CRS) to retail investors.² In addition, the SEC published interpretations concerning investment advisers' standard of conduct under the Investment Advisers Act of 1940 (Advisers Act),³ and the "solely incidental" prong of the broker-dealer exclusion from the Advisers Act.⁴

The Advisers Act releases were effective on July 12, 2019. Firms must comply with Reg BI and Form CRS by **June 30, 2020**. See the following SEC resources for details:

- ▶ [SEC Release for Regulation Best Interest: The Broker-Dealer Standard of Conduct](#)
- ▶ [SEC Release for Form CRS Relationship Summary; Amendments to Form ADV](#)
- ▶ [Form CRS Instructions](#)
- ▶ [Commission Interpretation Regarding Standard of Conduct for Investment Advisers](#)
- ▶ [Commission Interpretation Regarding the Solely Incidental Prong of the Broker-Dealer Exclusion from the Definition of Investment Adviser](#)

Questions Concerning Reg BI, Form CRS and the Advisers Act Releases

A staff committee with representatives from the SEC's Division of Investment Management, Division of Trading and Markets, Division of Economic and Risk Analysis, Office of Compliance Inspections and Examinations and Office of the General Counsel was established to assist firms with planning for implementation of the new rules. Firms were encouraged to actively engage with this committee as questions arise in planning for implementation. As noted above, firms may send their questions by email to IABDQuestions@sec.gov.

FINRA Assistance to Firms

FINRA has created a [webpage](#) for Reg BI where members can obtain information about the new rules. FINRA will produce written and online content to assist firms, as appropriate. Moreover, FINRA plans to hold in-person meetings and workshops to assist firms with their implementation efforts. FINRA will announce these initiatives through various communication channels, including website announcements and emails to firms.

Endnotes

1. See Exchange Act Release No. 86031 (June 5, 2019), 84 FR 33318 (July 12, 2019).
2. See Exchange Act Release No. 86032 (June 5, 2019), 84 FR 33492 (July 12, 2019).
3. See Investment Advisers Act Release No. 5248 (June 5, 2019), 84 FR 33669 (July 12, 2019).
4. See Investment Advisers Act Release No. 5249 (June 5, 2019), 84 FR 33681 (July 12, 2019).