

SUPREME COURT
FILED

NOV 01 2017

Jorge Navarrete Clerk

Deputy

S239510

**IN THE SUPREME COURT OF
CALIFORNIA**

PITZER COLLEGE,
Petitioner,

vs.

INDIAN HARBOR INSURANCE COMPANY,
Respondent

QUESTIONS CERTIFIED BY THE NINTH CIRCUIT COURT OF APPEALS
CASE No. 14-56017

**RESPONDENT INDIAN HARBOR INSURANCE COMPANY'S
ANSWER TO AMICUS CURIAE BRIEF OF UNITED
POLICYHOLDERS**

DUANE MORRIS LLP
Max H. Stern (SBN 154424)
E-mail: mhstern@duanemorris.com
Jessica E. La Londe (SBN 235744)
E-mail: jelalonde@duanemorris.com
Spear Tower
One Market Plaza, Suite 2200
San Francisco, CA 94105-1127
Telephone: +1 415-957-3000
Fax: +1 415 957 3001

DUANE MORRIS LLP
Katherine Nichols (SBN 228893)
E-mail: knichols@duanemorris.com
865 South Figueroa Street, Suite 3100
Los Angeles, CA 90017-5460
Telephone: +1 213 689 7400
Fax: +1 213 689 7401

Attorneys for INDIAN HARBOR INSURANCE COMPANY

S239510

**IN THE SUPREME COURT OF
CALIFORNIA**

PITZER COLLEGE,
Petitioner,

vs.

INDIAN HARBOR INSURANCE COMPANY,
Respondent

QUESTIONS CERTIFIED BY THE NINTH CIRCUIT COURT OF APPEALS
CASE NO. 14-56017

**RESPONDENT INDIAN HARBOR INSURANCE COMPANY'S
ANSWER TO AMICUS CURIAE BRIEF OF UNITED
POLICYHOLDERS**

DUANE MORRIS LLP
Max H. Stern (SBN 154424)
E-mail: mhstern@duanemorris.com
Jessica E. La Londe (SBN 235744)
E-mail: jelalonde@duanemorris.com
Spear Tower
One Market Plaza, Suite 2200
San Francisco, CA 94105-1127
Telephone: +1 415-957-3000
Fax: +1 415 957 3001

DUANE MORRIS LLP
Katherine Nichols (SBN 228893)
E-mail: knichols@duanemorris.com
865 South Figueroa Street, Suite 3100
Los Angeles, CA 90017-5460
Telephone: +1 213 689 7400
Fax: +1 213 689 7401

Attorneys for INDIAN HARBOR INSURANCE COMPANY

TABLE OF CONTENTS

	Page
INTRODUCTION.....	6
ARGUMENT	8
I. THE NOTICE PREJUDICE RULE IS NOT A FUNDAMENTAL POLICY OF CALIFORNIA FOR CHOICE OF LAW PURPOSES	8
A. UP Incorrectly Describes the Standard for What Qualifies as a “Fundamental” Policy	8
B. The Notice Prejudice Rule is Not a “Fundamental” Policy of California.....	13
1. California’s Purported Interest in Protecting Policyholders Does Not Make the Notice-Prejudice Rule a “Fundamental” Policy	13
2. The Notice-Prejudice Rule is Not a “Fundamental” Policy and Should Not Apply Here in Any Event.....	15
II. THE NOTICE-PREJUDICE RULE CANNOT AND SHOULD NOT BE APPLIED TO THE CONSENT PROVISION HERE	16
A. The Indian Harbor Policy is Not a First-Party Policy.....	17
B. Regardless, a Prejudice Requirement Should Not Be Read Into the Consent Provision.....	19
C. The Policy Requires Indian Harbor’s Prior Consent	22
III. UP’S AMBIGUITY ARGUMENT SHOULD BE REJECTED	23
A. UP’s Ambiguity Argument Should Be Rejected Because It is Not Before This Court, Was Not Raised by Pitzer, and Was Effectively Conceded by Pitzer	23
B. UP’s Ambiguity Argument Should Be Rejected Because There is No Ambiguity in the Policy	25
CONCLUSION	28

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>20th Century Ins. Co. v. Superior Court</i> (2001) 90 Cal.App.4th 1247	14-15
<i>AIU Ins. Co. v. Superior Court</i> (1990) 51 Cal.3d 807	18
<i>American Home Assur. Co. v. Republic Ins. Co.</i> (2d Cir. 1993) 984 F.2d 76	27
<i>Bank of the West v. Superior Court</i> (1992) 2 Cal.4th 1254	13
<i>City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.</i> (1998) 68 Cal.App.4th 445	22
<i>Discover Bank v. Superior Court</i> (2005) 36 Cal.4th 148	9, 11
<i>Egan v. Mut. of Omaha Ins. Co.</i> (1979) 24 Cal.3d 809	14
<i>Fibreboard Corp. v. Hartford Accident & Indemnity Co.</i> (1993) 16 Cal.App.4th 492	18
<i>Fisher v. City of Berkeley</i> (1984) 37 Cal.3d 644, <i>aff'd sub nom. Fisher v. City of Berkeley, Cal.</i> (1986) 475 U.S. 260	24-25
<i>Fundingsland v. Omh Healthedge Holdings, Inc.</i> (S.D. Cal. May 26, 2016) No. 15-CV-01053-BAS(WVG), 2016 WL 3022053	11
<i>Gantt v. Sentry Insurance</i> (1992) 1 Cal.4th 1083	6, 8-9
<i>Garvey v. State Farm Fire & Casualty Co.</i> (1989) 48 Cal.3d 395	17-18, 20
<i>Grafton Partners L.P. v. Superior Court</i> (2005) 36 Cal.4th 944	11

<i>Gribaldo, Jacobs, Jones & Associates v. Agrippina Versicherungen A.</i> (1970) 3 Cal.3d 434.....	14, 20, 22, 26
<i>Haycock v. Hughes Aircraft Co.</i> (1994) 22 Cal.App.4th 1473, as modified on denial of reh'g (Feb. 28, 1994).....	8
<i>Howard v. American Nat. Fire Ins. Co.</i> (2010) 187 Cal.App.4th 498, as modified on denial of reh'g (Sept. 9, 2010)	20
<i>Insua v. Scottsdale Ins. Co.</i> (2002) 104 Cal.App.4th 737	13, 21
<i>Jamestown Builders, Inc. v. General Star Indemnity Co.</i> (1999) 77 Cal.App.4th 341	21-22
<i>Klussman v. Cross Country Bank</i> (2005) 134 Cal.App.4th 1283	11
<i>Lavie v. Procter & Gamble Co.</i> (2003) 105 Cal.App.4th 496	25
<i>McKee v. AT & T Corp.</i> (2008) 164 Wash.2d 372	11-12
<i>Mercury Casualty Co. v. Hertz Corp.</i> (1997) 59 Cal.App.4th 414	24
<i>Montrose Chemical Corp. v. Admiral Ins. Co.</i> (1995) 10 Cal.4th 645	17
<i>Nedlloyd Lines B.V. v. Superior Court</i> (1992) 3 Cal.4th 459	<i>Passim</i>
<i>Pacific Employers Ins. Co. v. Superior Court</i> (1990) 221 Cal.App.3d 1348	13
<i>People v. Doolin</i> (2009) 45 Cal.4th 390	22
<i>Scott v. Cingular Wireless</i> (2007) 160 Wash.2d 843	11

<i>Shell Oil Co. v. Winterthur Swiss Ins. Co.</i> (1993) 12 Cal.App.4th 715, reh'g denied and opinion modified (Feb. 22, 1993)	20
<i>Sonic-Calabasas A, Inc. v. Moreno</i> (2013) 57 Cal.4th 1109	9
<i>State Farm Fire & Cas. Co. v. Sup. Ct.</i> (1989) 210 Cal.App.3d 604	13
<i>Templo Fuente De Vida Corp. v. National Union Fire Ins. Co. of Pittsburgh</i> (2016) 224 N.J. 189	16
<i>Tri-Union Seafoods, LLC v. Starr Surplus Lines Ins. Co.</i> (S.D. Cal. 2015) 88 F.Supp.3d 1156	10
<i>Venoco, Inc. v. Gulf Underwriters Ins. Co.</i> (2009) 175 Cal.App.4th 750	13
<i>Vu v. Prudential Prop. & Cas. Ins. Co.</i> (2001) 26 Cal.4th 1142	10
<i>Washington Mutual Bank, FA v. Superior Court</i> (2001) 24 Cal.4th 906	10, 14
<i>Younger v. State of California</i> (1982) 137 Cal.App.3d 806	24
Statutes	
California Civil Code § 1641	22
California Civil Code § 1670.5(a).....	9
California Code of Civil Procedure § 1858	22
Other Authorities	
Restatement (Second) of Conflict of Laws § 187(2)(b).....	8

INTRODUCTION

The submission by United Policyholders (“UP”) offers no new or persuasive basis to change long-standing California law in a way that would allow Pitzer to avoid its contractual obligations and recover almost \$2 million in remediation costs it spent on its own, months before notifying Indian Harbor of its discovery of soil contamination. UP’s arguments fail for the same reasons that Pitzer’s do.

To override this State’s strong public policy in favor of choice of law provisions, a competing public policy must be “fundamental.” UP ignores that this Court in the *Gantt* case held that “fundamental” policies are “delineated in constitutional or statutory provisions.” UP also disregards the fact that *Nedlloyd* carried this standard forward in the context of analyzing choice-of-law provisions, and this Court later broadened the standard to include unconscionable contractual provisions. With only one exception (a federal trial court case that is irreconcilable with *Nedlloyd*), this standard has been uniformly applied by California courts, and the cases cited by UP all demonstrate this. Because it is undisputed that the notice-prejudice rule does not fall into these categories, the public policy basis for the rule is not “fundamental.”

While UP addresses what it believes the standard for “fundamental” is not, UP has not articulated what it believes the standard is. UP jumps to the conclusion that the notice-prejudice rule is a “fundamental” policy because California courts have expressed an interest in protecting policyholders. But one does not flow from the other. California’s interest in adding an element to the proof required for the late notice coverage defense does not compel the conclusion that a policy’s choice of law clause should not be enforced. California’s public policy in favor of enforcing such clauses is at least as strong a policy as the notice-prejudice rule. UP’s position also ignores that the dispute here is not one that should require

such protection: the contract here was entered into by two sophisticated parties that both had insurance experts representing their interests.

UP also has not come forward with any compelling reason the consent provision should not apply on its face, as it has been by numerous California courts (including this one) for decades. UP's argument that the Indian Harbor policy is a first-party policy is both untrue and irrelevant. UP's contention is based on its description of the Indian Harbor policy as providing "indemnification for direct losses," but the Indian Harbor policy provides coverage for Pitzer's *liability*, not losses, a key distinction between third-party and first-party policies. Regardless of the classification of Indian Harbor's policy, there is no basis to ignore the consent provision. Indian Harbor had the right to be involved with the remediation in order to ensure the efficient and effective resolution of Pitzer's liability for pollution, and it was deprived that right. The well-established policy justifications for enforcing the consent provision without a showing of prejudice therefore apply here.

UP's ambiguity argument is inappropriate and incorrect, and it should be rejected by this Court. Specifically, the issue of any alleged ambiguity in the policy is not before this Court, and Pitzer has conceded the point by admitting that, if New York law applies, it loses. If that were not the case, review of the questions certified to this Court would not be necessary. This Court should not consider an argument not before it and raised for the first time in the more than four years of this litigation by an amicus curiae. Further, the argument has no merit. The policy is not ambiguous and requires both prompt notice and Indian Harbor's prior consent before commencing remediation and incurring costs. Pitzer, a party to the contract, has never contended that it did not understand what these provisions meant, and the record establishes that it and its broker understood the provisions in the exact same way as Indian Harbor did. Any

argument for a new interpretation raised by a non-party to the contract is without merit and should not be entertained at this point in the litigation.

For these reasons and those set forth in Indian Harbor's Answering Brief, Indian Harbor respectfully requests that the Court answer both certified questions in the negative.

ARGUMENT

I. THE NOTICE PREJUDICE RULE IS NOT A FUNDAMENTAL POLICY OF CALIFORNIA FOR CHOICE OF LAW PURPOSES

A. UP Incorrectly Describes the Standard for What Qualifies as a "Fundamental" Policy

UP does not dispute that, to negate the parties' choice of law in a contract, the California policy must be "fundamental." (*Nedlloyd Lines B.V. v. Superior Court* (1992) 3 Cal.4th 459, 466 (the last step of the analysis is "whether the chosen state's law is contrary to a *fundamental* policy of California"); Restatement (Second) of Conflict of Laws § 187(2)(b) ("... application of the law of the chosen state would be contrary to a fundamental policy of a state . . .").) This "fundamental" standard has significance and means that the policy must be more than merely "strong," as discussed in Indian Harbor's answering brief (pp. 22-25).

UP (and Pitzer in its reply brief) ignores this Court's prior pronouncement of what makes a policy "fundamental" such that it can override another, competing, policy. In *Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083 (decided six months before *Nedlloyd*), this Court held that an employee, to override the public policy behind the at-will employment rule,¹ must show that the interests they seek to protect are "carefully

¹ "The California Supreme Court has held that the presumption of at-will employment exists because of public policy considerations." (*Haycock v.*

tethered to fundamental policies *that are delineated in constitutional or statutory provisions.*” (*Id.* at 1095 (emphasis added).)

Nedlloyd reiterated this test by describing the required showing to avoid a choice of law clause as follows: a “government regulatory policy designed to restrict freedom of contract” and a “California statute or constitutional provision designed to preclude freedom of contract.” (*Nedlloyd*, 3 Cal.4th at 468, 471 (emphasis added).) UP offers no explanation of what this Court meant in these statements if not that the requisite policy must arise from statute or a constitution, just as held in *Gantt*. In the choice of law context, the requisite test has been expanded to include situations where a contractual clause is so unfair as to be unconscionable. (*Discover Bank v. Superior Court* (2005) 36 Cal.4th 148.) This makes sense, because by statute an unconscionable provision may be unenforceable. (*See, e.g.*, Cal. Civ. Code, § 1670.5(a) (“If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.”).) And the standard for unconscionability is so high (e.g., a provision “shock[s] the conscience” (*Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1145)) that this additional exception does not swallow the rule in favor of enforcing choice of law clauses.

Nedlloyd made no mention of a “fundamental” policy arising from ordinary common law. And, as set forth in *Indian Harbor’s* answering

Hughes Aircraft Co. (1994) 22 Cal.App.4th 1473, 1488, *as modified on denial of reh’g* (Feb. 28, 1994).)

brief, California courts have, for decades (and with only one exception), applied the “fundamental” policy in the way described by Indian Harbor: limited to what has been expressed in a statute, constitution, or rule of unconscionability. (See Answering Brief, pp. 29-31.) Indian Harbor continues to assert that the outlier case of *Tri-Union Seafoods, LLC v. Starr Surplus Lines Ins. Co.* (S.D. Cal. 2015) 88 F.Supp.3d 1156 is contrary to *Nedlloyd*, was incorrectly decided, and should not be relied on to change California law. (See Answering Brief discussion at pp. 31-32.)

UP’s sole argument with respect to *Tri-Union* is that it is not contrary to *Nedlloyd* because: “The elements of adhesion and public interest – which are implicated in insurance policies – were not at issue with the contract analyzed in *Nedlloyd*.” (UP Brief, at p. 19.) However, the relationship in *Nedlloyd* was a *more* protected one than the insurer-insured relationship – a fiduciary’s duty to its principal. (See, e.g., *Vu v. Prudential Prop. & Cas. Ins. Co.* (2001) 26 Cal.4th 1142, 1150-1151 (holding that the insured-insurer relationship does not rise to the level of a fiduciary relationship).) Moreover, this Court has made clear that the *Nedlloyd* rule and test applies just as strongly to contracts of adhesion as any other contract. (See, e.g., *Washington Mutual Bank, FA v. Superior Court* (2001) 24 Cal.4th 906, 917-918 (holding that the *Nedlloyd* analysis applies “in the context of consumer adhesion contracts”).) The type of reasoning employed by *Tri-Union* does not comport with precedent and would undermine parties’ ability to accurately predict the enforceability of their choice of law clauses. The better answer is that *Tri-Union* cannot be reconciled with *Nedlloyd* and thus should be disregarded.

The cases discussed by UP do not provide support for its argument, because all are consistent with Indian Harbor’s position. UP first sets up the strawman argument that Indian Harbor has argued that a fundamental policy can only be found in a statute and then UP provides contrary

examples. However, Indian Harbor's position, set forth extensively in its answering brief, is that a fundamental policy can be found in a statute, constitution, or rule of unconscionability. Thus, UP's citation to *Klussman* does not contradict Indian Harbor's argument, but rather supports it. (*Klussman v. Cross Country Bank* (2005) 134 Cal.App.4th 1283 (class action waiver unconscionable under California law so choice of law provision not enforced).)

UP's citation to an unpublished federal trial court case (*Fundingsland v. Omh Healthedge Holdings, Inc.* (S.D. Cal. May 26, 2016) No. 15-CV-01053-BAS(WVG), 2016 WL 3022053) is unpersuasive. The court's choice-of-law discussion cited by UP was dicta: "the Court does not need to determine whether California law ultimately applies." (*Id.* at *9.) In that discussion, the court stated only that there was a "possibility" that California law applied. (*Id.*) Moreover, it appears that the issue the *Fundingsland* court was addressing – whether a litigant can waive its right to a jury trial through a pre-dispute contract – has been resolved by California courts by reference to the California Constitution and Code of Civil Procedure, and thus falls within the test for "fundamental" created by *Nedlloyd*. (See, e.g., *Grafton Partners L.P. v. Superior Court* (2005) 36 Cal.4th 944.)

With a citation to a Washington case, UP argues that "protecting parties in a weaker bargaining power (like Pitzer here) is a fundamental public policy of California." (UP Brief, p. 18.) First, *McKee v. AT & T Corp.* (2008) 164 Wash.2d 372 is entirely in keeping with Indian Harbor's position: that case finds that New York law conflicts with Washington's fundamental public policy of allowing class actions, a waiver of which has been found unconscionable. (*Id.*, citing *Scott v. Cingular Wireless* (2007) 160 Wash.2d 843, 854.) Thus, *McKee* is consistent with cases relied on by Indian Harbor, such as *Discover Bank v. Superior Court* (2005) 36 Cal.4th

148, which declined to enforce a choice of law provision because a class action waiver was unconscionable under California law.

In addition, as discussed below, Pitzer did not have “weaker bargaining power” than Indian Harbor. It is a sophisticated entity with insurance experts representing it during the negotiation and underwriting of the policy. Further, the *McKee* decision does not stand for the proposition that anytime there is a party with superior bargaining power, all issues arising under the contract will be deemed “fundamental.” Such a rule would not give effect to this Court’s rule that enforcing choice of law clauses is a strong California public policy. (See, e.g., *Nedlloyd, supra*, 3 Cal.4th at 464-465 (California has a “strong policy favoring enforcement” of choice of law provisions).)

UP argues that “[d]ecisional authority impacting the insurer/policyholder relationship, including the notice-prejudice rule, are a matter of substantial public interest and should be considered in a choice-of-law analysis.” (UP Brief, p. 20.) UP cites no authority for this proposition. In addition, there is no “substantial public interest” here: two private entities contracted for New York law, but one seeks to avoid that law it agreed to in order to obtain reimbursement for almost \$2 million it unilaterally spent several months before it bothered to notify its insurance carrier of its discovery of pollution or the work it wanted to perform. If any public interest exists here, it is that of the public’s interest to rely on contractually agreed choice of law provisions.

B. The Notice Prejudice Rule is Not a “Fundamental” Policy of California

1. California’s Purported Interest in Protecting Policyholders Does Not Make the Notice-Prejudice Rule a “Fundamental” Policy

UP devotes much of its brief to discussing California’s purported interest in protecting policyholders. This is a red herring.

California’s interest in protecting policyholders does not mean that all insurance-related issues are “fundamental” policies. This would negate choice of law provisions in all insurance policy disputes where California law favored the policyholder, which is not the law in California. After all, insurance contracts are interpreted according to typical contract rules. (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264 (“While insurance contracts have special features, they are still contracts to which the ordinary rules of contractual interpretation apply.”).)

In addition, UP’s argument ignores that, despite any interest in protecting policyholders, California regularly upholds insurance provisions that limit or preclude coverage to policyholders, including other types of timed notice requirements and other conditions of the policy, without a requirement of prejudice. (*See, e.g., Venoco, Inc. v. Gulf Underwriters Ins. Co.* (2009) 175 Cal.App.4th 750, 760 (requirement of notice within 60 days of an accident upheld in pollution buy-back clause); *Pacific Employers Ins. Co. v. Superior Court* (1990) 221 Cal.App.3d 1348, 1357 (holding that the notice-prejudice rule does not apply to claims-made policies); *Insua v. Scottsdale Ins. Co.* (2002) 104 Cal.App.4th 737, 746 (consent provision enforced); *State Farm Fire & Cas. Co. v. Sup. Ct.* (1989) 210 Cal.App.3d 604, 612 (upholding failure to comply with first-party policy’s contractual time limitation to bring a lawsuit against an insured).) California’s interest in protecting policyholders does not mean that coverage will always be

found or that no time limits or conditions will be enforced without a showing of prejudice.

The cases cited by UP – *Egan v. Mut. of Omaha Ins. Co.* (1979) 24 Cal.3d 809 and *20th Century Ins. Co. v. Superior Court* (2001) 90 Cal.App.4th 1247 – address different issues than those under consideration here. In both *Egan* and *20th Century*, the courts were pointing to the “quasi-public” nature of the insured-insurer relationship as a reason for the existence of a tort remedy (e.g., bad faith) against an insurer – there is no tort remedy sought or bad faith alleged here.² In addition, *Egan* involved the payment of disability benefits to an individual and *20th Century* involved a homeowners’ insurance policy, where the alleged “quasi-public” nature of an insurer’s obligations and alleged unequal bargaining power may be more of a concern. Here, there is no proof that there was unequal bargaining power or that Pitzer was the type of policyholder that required protection “against the oppressive use of superior bargaining power”: the policy is a contract entered into by two sophisticated parties, and Pitzer had others (including insurance professionals) negotiating and buying specialized insurance on its behalf.

Similarly, whether this is a contract of adhesion does not bear on the question of the enforceability of either the notice requirement or the choice of law clause in the policy. (See, e.g., *Gribaldo, Jacobs, Jones & Associates v. Agrippina Versicherungen A.* (1970) 3 Cal.3d 434 (enforcing consent requirement regardless of prejudice); *Washington Mutual Bank, FA, supra*, 24 Cal.4th at 917-918 (“California . . . has no public policy against the enforcement of choice-of-law provisions contained in contracts of adhesion where they are otherwise appropriate.”).)

² UP has misattributed its leading quotation to *Egan*, when it actually appeared in *20th Century*.

As part of its “quasi-public” discussion, *20th Century* pointed to the fact that the insurance industry is highly regulated. This is true. And to the extent California public policies are set forth in statute or regulations, they may qualify as a “fundamental” policy sufficient to overcome the parties’ choice of law. However, when the legislature has not spoken – and California is not a state in which there is statutory adoption of the notice-prejudice rule generally or a statutory bar against choice of law clauses in insurance policies – then it has not deemed the policy sufficiently important to be treated as a fundamental policy. Therefore, Indian Harbor’s position on what policies rise to the level of abrogating choice of law provisions is consistent with the scope of insurance regulations.

In addition, California courts have never applied the notice-prejudice rule in the context of a claims-made-and-reported policy between two sophisticated parties, and this Court should find that the rule does not apply in this context.

2. The Notice-Prejudice Rule is Not a “Fundamental” Policy and Should Not Apply Here in Any Event

Because the notice-prejudice rule is not found in a statute, constitution, or rule of unconscionability, it is not a fundamental policy that overrides the parties’ agreement that New York law applies. In keeping with this standard, the notice-prejudice rule has never been held to be a “fundamental” policy of California.

As set forth in Indian Harbor’s answering brief, the notice-prejudice rule – which does no more than add an element to an affirmative defense of breach – is not the type of public policy that has been held to overcome parties’ contractual choice of law. In addition, the limited scope of the notice-prejudice rule – it has only been held to apply to certain policies in certain situations (i.e., a prompt notice provision in an occurrence-based third-party liability insurance policy) – means that it cannot be

“fundamental” under an ordinary understanding of that term. UP repeatedly asserts that the notice-prejudice rule is a “mandatory” one. This is patently untrue. While the notice-prejudice rule is a policy in California in certain circumstances, there are many situations where the notice prejudice rule does not apply. (See discussion above and Answering Brief, pp. 36-37.) A common law rule that does no more than add an element to an affirmative defense, with such limited scope of application, cannot be deemed “fundamental.”

Also as set forth in Indian Harbor’s answering brief, no California court has addressed whether the notice-prejudice rule applies to the separate prompt notice requirement in the conditions of a claims-made policy with a reporting requirement. Indian Harbor respectfully urges this Court to expressly hold that the notice-prejudice rule does not apply at all in the context of this type of policy, where such contract is between sophisticated parties, in keeping with the New Jersey Supreme Court decision in *Templo Fuente De Vida Corp. v. National Union Fire Ins. Co. of Pittsburgh* (2016) 224 N.J. 189. UP did not address these arguments.

* * *

For the above reasons and those set forth in Indian Harbor’s answering brief, Indian Harbor respectfully requests that this Court answer the first certified question in the negative.

II. THE NOTICE-PREJUDICE RULE CANNOT AND SHOULD NOT BE APPLIED TO THE CONSENT PROVISION HERE

UP has cited no compelling reason to ignore this Court’s long-standing rule that no prejudice need be shown to enforce the consent provision of an insurance policy. This policy is not a first-party policy and, even if it were, the consent provision should be enforced, consistent with well-established precedent.

A. The Indian Harbor Policy is Not a First-Party Policy

UP argues that “this case involves a first-party claim because Pitzer seeks indemnification for direct losses and there is no injured third-party.” (UP Brief at p. 23-24.) It is not true that the policy indemnifies “direct losses.” In fact, the policy does not cover losses at all, but rather it covers liability for remediation: Indian Harbor does not reimburse Pitzer for the value of its land but rather for the cost of cleaning it up when Pitzer is legally obligated to do so. Therefore, the distinction UP attempts to draw is based on a false premise.

UP’s description also overly simplifies the difference between first-party and third-party policies. As Indian Harbor discussed extensively in its answering brief, the true distinction between these types of policies is not the technicality of who receives money under the policy; rather, the key is what the money is for: loss or liability. (*See, e.g., Montrose Chemical Corp. v. Admiral Ins. Co.* (1995) 10 Cal.4th 645.) Here, Indian Harbor did not agree to reimburse Pitzer for any “loss”; instead, it agreed to pay for legally required remediation. Moreover, the existence or non-existence of a claimant is irrelevant. That is not what distinguishes first-party and third-party policies. In any case, there is a claimant in environmental liability: the enforcement entity that can enforce the law if an adequate remediation is not performed.

This Court in *Garvey v. State Farm Fire & Casualty Co.* (1989) 48 Cal.3d 395 also discussed the difference between first- and third-party liability:

Liability and corresponding coverage under a third-party insurance policy must be carefully distinguished from the coverage analysis applied in a first-party property contract. Property insurance, unlike liability insurance, is unconcerned with establishing negligence or otherwise assessing tort liability. . . . Property insurance . . . is an agreement, a contract,

in which the insurer agrees to indemnify the insured in the event that the insured property suffers a covered loss

(*Id.* at 406 (quoting Bragg, *Concurrent Causation and the Art of Policy Drafting: New Perils for Property Insurers* (1985) 20 Forum 385, 386-387).) Although Pitzer's negligence may have been irrelevant (as it sometimes is under various environmental laws),³ its liability for the pollution condition was required for there to be coverage. Thus, it is liability and not loss that gives rise to the relevant coverage under the Indian Harbor policy.

In support of its argument that this is a first-party policy, UP cites to the definition of "RESTORATION COSTS," which provides coverage for certain "costs incurred by the INSURED."⁴ (ER 224.) However, no "RESTORATION COSTS" are at issue here. In addition, "RESTORATION COSTS" are simply one type of cost under "REMEDIATION EXPENSE," which itself must be "required by" law or a "legally executed state voluntary program." (*Id.*) Moreover, the fact that the policy arguably has some element of first-party coverage does not change the overall force and effect of the policy. For example, a traditional third-party commercial general liability policy provides coverage for

³ Notably, there are many situations where negligence is not necessary for liability to exist, as in any strict liability imposed by law, and yet these liabilities are insured by third-party liability policies. (*See, e.g., Fibreboard Corp. v. Hartford Accident & Indemnity Co.* (1993) 16 Cal.App.4th 492, 502 (finding coverage under third-party policy for strict product liability); *AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807, 836 (finding coverage for CERCLA claims under third-party policy and noting: "CERCLA, for example, is a strict liability statute that serves essentially remedial goals, irrespective of fault.").)

⁴ UP actually calls it "REMEDIATION COSTS" but there is no such term in the policy. In addition, UP incorrectly quotes the definition of "RESTORATION COSTS." (ER 224.)

“Supplementary Payments,” which includes coverage for “All reasonable expenses *incurred by the insured* at our request to assist us in the investigation or defense of the claim or ‘suit’” (Emphasis added.)

The difference between the definition of “RESTORATION COSTS,” on the one hand (which provides some coverage for real or personal property damaged in the course of remediation required because of legal liability), and the rest of the policy, on the other hand, which provides coverage to Pitzer for its liability for certain pollution conditions, demonstrates that the policy is not a first-party policy. In addition, Pitzer incurred defense costs relating to its pollution liability and the remediation, which costs it has sought from Indian Harbor. Coverage for defense costs is one of the hallmarks of a third-party liability policy.

UP seems to suggest that because Pitzer would be the recipient of money paid under the policy, that means this is a first-party policy. However, the only reason that is the case is because Pitzer proceeded to incur the almost \$2 million in remediation costs prior to notifying Indian Harbor. If Indian Harbor had been properly notified and given consent for remediation, Indian Harbor would have paid those costs itself (after Pitzer’s satisfaction of the self-insured retention), directly to the companies undertaking the remediation: Indian Harbor’s obligations are to “pay on behalf of” the insured for covered costs (ER 221). This is distinguishable from a first-party situation (e.g., in the property or disability context), where benefits are owed directly to the insured.

The coverage provided under the Indian Harbor policy is not for “direct losses” but for liability, so the policy is a third-party policy.

B. Regardless, a Prejudice Requirement Should Not Be Read Into the Consent Provision

UP suggests that because some courts have identified some differences between first-party and third-party insurance in certain

circumstances, that means the consent provision should not apply here. However, just because California courts have found differences in how types of policies are treated in certain other respects not implicated in this case, does not mean that a consent provision cannot and should not be enforced in both types of policies. While first- and third-party insurance is different in some respects, it is not different in all respects. The cases cited by UP for its proposition address entirely different circumstances. (*See Garvey, supra*, 48 Cal.3d at 399, 405 (holding that the determination of cause is different in first-party and third-party policies); *Howard v. American Nat. Fire Ins. Co.* (2010) 187 Cal.App.4th 498, 530, *as modified on denial of reh'g* (Sept. 9, 2010) (“differences in determining the scope of the implied covenant of good faith and fair dealing and the obligations the covenant imposes on an insurer”); *Shell Oil Co. v. Winterthur Swiss Ins. Co.* (1993) 12 Cal.App.4th 715, 764, *reh'g denied and opinion modified* (Feb. 22, 1993) (differences in defense obligation).)

In addition, the justifications advanced by California courts for applying the consent provision without a prejudice requirement demonstrate that the consent provision here should be enforced. For example, *Gribaldo* explained one reason behind not requiring a showing of prejudice in the consent context: because the purpose is “to prevent collusion as well as to invest the insurer with the complete control and direction of the defense or compromise of suits or claims.” (*Gribaldo, supra*, 3 Cal.3d at 449.) Similar reasoning applies here. The insurer has a right to “complete control and direction” over the way that remediation it will pay for is conducted and to determine what form of remediation will resolve the insured’s liability, prevent future liability, be most cost-effective and efficient, and will preserve rights of subrogation, among other objectives. After all, the insurance company of pollution liability is in the best position to effectuate these goals, as it has overseen remediation

repeatedly and has the necessary contacts and experience. This case provides a good example of why the insurance company should be involved from the outset. Here, Pitzer undertook a level and scope of remediation that was not necessary, at a considerably greater cost to Pitzer, and undertook remediation in a way that did not preserve its subrogation rights. (ER 257-261 at ¶¶ 1-22.) This is precisely the reason that an insurance company should be and has the right to be involved with remediation from the outset of discovery of a pollution condition and to consent to the costs of remediation.

UP argues that “[t]he policy justifications for strict enforcement of a consent provision in a third-party policy simply do not exist in the context of a first-party claim.” (UP Brief, p. 23.) This line of argument provides further support for a finding that the Indian Harbor policy is not a first-party policy. In a first-party situation, because a loss typically occurs at one point in time (e.g., loss of a house, car, life), there is nothing for an insurer to consent to and no opportunities for the insurer to be involved. Here, however, there were many opportunities for Indian Harbor to be involved had its consent been sought.

UP’s argument also ignores the key distinction between notice and consent breaches that has been drawn by California courts: enforcement of the notice provision vitiates coverage, whereas enforcement of the consent provision simply denies reimbursement for those specific costs incurred without consent. (See, e.g., *Jamestown Builders, Inc. v. General Star Indemnity Co.* (1999) 77 Cal.App.4th 341, 351; *Insua, supra*, 104 Cal.App.4th at 746; Answering Brief, pp. 52-54.) The first requires a showing of prejudice because of the prospective forfeiture in coverage it creates; the second does not require a showing of prejudice because it does

not forfeit future coverage – there simply is no coverage for costs previously incurred without consent.⁵ (*Id.*)

A prejudice requirement therefore should not be read into the consent provision.

C. The Policy Requires Indian Harbor’s Prior Consent

The consent provision requires Indian Harbor’s “written consent” before “remediation [is] commenced” and costs are incurred. This is clear language, and Pitzer has never stated that it did not understand what it means. This type of language has been repeatedly upheld by California courts. (*See, e.g., Gribaldo, supra*, 3 Cal.3d at 441; *Jamestown Builders, supra*, 77 Cal.App.4th at 345-346.) UP has not identified any compelling reason this plain language should not apply here.

UP argues that the consent provision is nothing more than a notice provision. This ignores the clear language of the consent provision and the way California courts have applied similar language for decades. In addition, it violates well-established rules of contract construction. (*People v. Doolin* (2009) 45 Cal.4th 390, 413 n.17 (quoting *City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 473) (“Any contract must be construed as a whole, with the various individual provisions interpreted together so as to give effect to all, if reasonably possible or practicable.”)); *see also* Cal. Civ. Code § 1641; Cal. Code Civ. Pro. § 1858.)

The policy required Indian Harbor’s prior consent before remediation began and costs were incurred, and UP has not seriously disputed otherwise.

⁵ The cooperation provision requires a showing of prejudice because enforcement works in a similar way to the notice provision: violation of the cooperation provision forfeits future coverage entirely.

* * *

For the above reasons and those set forth in Indian Harbor's answering brief, Indian Harbor respectfully requests that this Court answer the second certified question in the negative.

III. UP'S AMBIGUITY ARGUMENT SHOULD BE REJECTED⁶

A. UP's Ambiguity Argument Should Be Rejected Because It is Not Before This Court, Was Not Raised by Pitzer, and Was Effectively Conceded by Pitzer

This Court certified the following questions:

1. Is California's common law notice-prejudice rule a fundamental public policy for the purpose of choice-of-law analysis?
2. If the notice-prejudice rule is a fundamental public policy for the purpose of choice-of-law analysis, can the notice-prejudice rule apply to the consent provision in this case?

(See Court's March 22, 2017 Order Granting Review.) Neither of these questions is whether the language of the Indian Harbor policy is ambiguous. UP's new assertion of ambiguity is entirely outside the scope of what this Court is considering.

Moreover, Pitzer has conceded that, if New York law applies, the notice provision applies and it loses; in its opening brief in the Ninth Circuit Court of Appeals, Pitzer stated: "California law would require Indian Harbor to show prejudice to obtain summary judgment, while New York law would not. The determination of which state's law to apply to the notice provision is *dispositive*." (Ninth Circuit Opening Brief, p. 11 (emphasis added); see also Pitzer's 2/1/17 letter to this Court in Support of

⁶ UP made the ambiguity argument in its section discussing the consent provision, but also has included arguments pertaining to the notice provision. For this reason, Indian Harbor addresses it in a separate section.

Ninth Circuit's Request for Certification.) Therefore, Pitzer contends that it is whether the prejudice rule applies – and not any alleged ambiguity in the policy – that dictates the outcome of this case.⁷ Pitzer has never made the argument that the policy is ambiguous as to its notice obligations.

Because Pitzer abandoned or did not raise this argument, it cannot be raised by UP as an amicus. (*Younger v. State of California* (1982) 137 Cal.App.3d 806, 813-814 (“Amicus curiae must accept the issues made and propositions urged by the appealing parties, and any additional questions presented in a brief filed by an amicus curiae will not be considered.”); see also *Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 713, *aff'd sub nom. Fisher v. City of Berkeley, Cal.* (1986) 475 U.S. 260 (“[B]oth parties and amici should bear a heavy burden in this court when they attempt, after a hearing has been granted, to raise an issue which they could have raised earlier. The burden should be especially great where the issue could have been raised before the decision of the Court of Appeal became final as to that court. In all but the rarest cases, this court should refuse to consider a new issue that has been raised in such a belated manner. Otherwise, amici control the issues this court considers and decides - a most curious method of appellate review.”); *Mercury Casualty Co. v. Hertz Corp.* (1997) 59 Cal.App.4th 414, 425 (“As a general rule, issues not raised by the appealing parties may not be considered if raised for the first time by amici curiae.”).)

⁷ In Indian Harbor's answering brief in the Ninth Circuit, Indian Harbor twice confirmed that Pitzer conceded New York law would preclude coverage: “Pitzer does not dispute that its notice to Indian Harbor was late or that New York law would preclude coverage here, but it contends that California's notice-prejudice rule should apply.” (Ninth Circuit Answering Brief, p. 9) and “Because Pitzer does not dispute that New York law precludes coverage here based on Pitzer's late notice, judgment in Indian Harbor's favor should be affirmed.” (Ninth Circuit Answering Brief, p. 25). Pitzer never contested these statements.

While courts have occasionally departed from this general rule, they usually do so only “when the issue posed is purely a question of law based on undisputed facts, and involves important questions of public policy.” (*Lavie v. Procter & Gamble Co.* (2003) 105 Cal.App.4th 496, 503 (quoting *Fisher, supra*, 37 Cal.3d at 654-655).) This issue does not involve an “important question[] of public policy.” This is a private contract between two private companies, and any alleged ambiguity in the policy has no effect on the public at large.

For these reasons, UP’s ambiguity argument should not be addressed by the Court.

B. UP’s Ambiguity Argument Should Be Rejected Because There is No Ambiguity in the Policy

The Indian Harbor policy is not ambiguous, and UP’s arguments to the contrary do not hold up on a close look at the Indian Harbor policy as a whole and in light of Pitzer’s (and its representatives’) positions during the claim submission and in this litigation.

UP first argues that the policy is ambiguous because the prefatory language does not mention the notice “as soon as practicable” requirement. However, that prefatory language says: “THIS POLICY MAY HAVE PROVISIONS OR REQUIREMENTS DIFFERENT FROM OTHER POLICIES YOU MAY HAVE PURCHASED. PLEASE READ CAREFULLY.” (ER 221.) In addition, the introductory paragraph of the policy states that the policy is “subject to all the terms and conditions of this Policy” (*Id.*)

Needless to say, not all policy terms can appear in the preamble of the policy, and a policyholder must read the entire policy for a list of all exclusions and conditions that might apply. UP suggests that, because the reporting requirement is mentioned early in the policy, that is the only policy term that must be met for coverage to apply. Of course, that is

incorrect, as there are a number of other terms, exclusions, and conditions that can limit coverage under the policy, despite an insured's compliance with the reporting requirement. UP's argument also ignores that conditions of the policy not listed in any prefatory section are regularly enforced, such as the consent condition. (*See, e.g., Gribaldo, supra*, 3 Cal.3d 434.)

UP also contends that the policy did not require prompt notice in the situation Pitzer faced. That is incorrect. The notice provision states that it applies when "any POLLUTION CONDITION is first discovered by the INSURED that results in a LOSS or REMEDIATION EXPENSE" and that the insured must provide to Indian Harbor "notice of the particulars" as specified in that paragraph. (ER 230.) The policy further provides: "In the event of oral notice, the INSURED agrees to furnish to the Company a written report as soon as practicable." (*Id.*) If a written report must occur "as soon as practicable," then the oral notice that preceded it logically must be "as soon as practicable" as well. In the context of the notice provision as a whole, this language is clear.

Moreover, Pitzer has never argued that the notice language was not clear or that it had a different understanding about how the policy worked. And Pitzer's representatives (CUC and its broker) both understood the policy requirements: CUC stated that "[t]he policy is very clear on the reporting requirements" and the broker stated that he could not "disagree with XL's position." (SER 240; SER 237; *see also* SER 220 ("Based on this [voluntary payment] exclusion, this claim will likely be denied . . .") and SER 240 ("[I]t's doubtful that Pitzer will receive any recovery for this loss.")) Pitzer also has conceded repeatedly that, if New York law applies, the notice provision applies and it is not entitled to relief.

UP also contends that, under the Indian Harbor policy, Pitzer was not required to provide notice until it had "actually incurred a remediation expense." (UP Brief at p. 31; *see also* UP Brief at p. 32 ("Pitzer is not

obligated to provide notice of a remediation expense until it has actually commenced remediation and has incurred costs to investigate or abate a pollution condition.”.) This is not a reasonable interpretation of the policy’s notice requirement, as discussed above.

Moreover, even if UP were correct that the notice obligation is not triggered until amounts were incurred or remediation commenced, that means the notice requirement was triggered as of January 11, 2011, when Pitzer incurred remediation costs by undertaking testing. (ER 61.) Therefore, even under UP’s interpretation of the policy’s notice requirements, Pitzer’s obligation to provide notice began at that time. Under the New York law agreed by the parties, the sixth-month delay in notice would bar coverage as a matter of law. (*See American Home Assur. Co. v. Republic Ins. Co.* (2d Cir. 1993) 984 F.2d 76, 78.) Thus UP’s argument for the existence of an ambiguity in the notice provision is both incorrect (as described above) and immaterial (as the notice was still late enough to void coverage).

Contrary to UP’s assertion, there is nothing inherently inconsistent (and, therefore, no ambiguity) with the notice and consent provisions. As set forth above, the policy requires notice as soon as practicable when “any POLLUTION CONDITION is first discovered by the INSURED.” The consent provision requires the insured to obtain Indian Harbor’s written consent before commencing remediation or incurring costs. Even under UP’s interpretation of the policy (where the notice requirement is triggered only *after* commencing remediation or incurring costs), the two provisions can be adequately reconciled: if the insured promptly provides notice, there will be coverage even for past costs, but if the insured does not do so, there is no coverage under these provisions. There is no basis for finding that these provisions should be completely ignored.

While not relevant to the ambiguity issue, UP argues during this discussion that it is “disingenuous for Indian Harbor to complain[] about a purported two week delay by Pitzer in providing notice of the remediation efforts undertaken when the carrier itself waited twice that long to even acknowledge that Pitzer had submitted a claim in writing on July 11, 2011.” (UP Brief, p. 30 n.5.) Of course, Pitzer’s delay was not only two weeks, but rather it was 6 months after discovery of the lead contamination and 3 months after completion of the remediation. (SER 162-164, 231.) A further two week delay occurred between Pitzer’s risk manager advising that notice should be provided to Indian Harbor and Pitzer’s broker providing notice. (SER 220, 231.) Under these circumstances – where the remediation was entirely completed and no defense, remediation, or other activity was occurring at the time of notice to Indian Harbor – a month to respond to the insured’s notice was not unreasonable. Moreover, Pitzer never responded to that acknowledgment letter and the requests for information therein, so Indian Harbor eventually denied coverage. (SER 244-246.) Regardless, the timing of Indian Harbor’s response has no bearing on this case or the issues before this Court.

* * *

For the above reasons, Indian Harbor respectfully requests that this Court reject UP’s ambiguity argument.

CONCLUSION

For the foregoing reasons and those set forth in its answering brief, Indian Harbor respectfully urges this Court to answer both certified questions in the negative.

Dated: October 20, 2017

DUANE MORRIS LLP

By: /s/ Max H. Stern
Max H. Stern
Jessica E. La Londe

Attorneys for INDIAN HARBOR
INSURANCE COMPANY

DM1/8133803

CERTIFICATE OF COMPLIANCE

This certifies that this brief complies with the type-volume limitation set forth in California Rules of Court Rule 8.204. Specifically, this brief uses a proportional typeface and 13-point font and contains 8,411 words.

Dated: October 20, 2017

DUANE MORRIS LLP

By: /s/ Max H. Stern

Max H. Stern

Jessica E. La Londe

Attorneys for INDIAN HARBOR
INSURANCE COMPANY

CERTIFICATE OF SERVICE

Pitzer College v. Indian Harbor Insurance Company
California Supreme Court, Case No. S239510

I am a resident of the state of California, I am over the age of 18 years, and I am not a party to this lawsuit. I am an employee of Duane Morris LLP and my business address is Spear Tower, One Market Plaza, Suite 2200, San Francisco, California 94105. I am readily familiar with this firm's practices for collecting and processing correspondence for mailing with the United States Postal Service and for transmitting documents by FedEx, fax, email, messenger and other modes. On the date stated below, I served the following documents:

**RESPONDENT INDIAN HARBOR INSURANCE COMPANY'S
ANSWER TO AMICUS CURIAE BRIEF OF UNITED
POLICYHOLDERS**

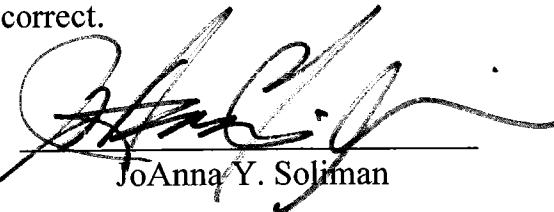
<u>X</u>	BY U.S. MAIL: <input checked="" type="checkbox"/> I enclosed the documents in a sealed envelope or package addressed to the person(s) set forth below, and placed the envelope for collection and mailing following our ordinary business practices, which are that on the same day correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in San Francisco, California, in a sealed envelope with postage fully prepaid.
<u>X</u>	BY ELECTRONIC SERVICE: I hereby certify that based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the documents to be sent to the person(s) at the e-mail addresses listed below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.
<u>X</u>	BY OVERNIGHT DELIVERY: I enclosed the documents in a sealed envelope or package provided by FedEx and addressed to the person(s) listed below by placing the envelope or package(s) for collection and transmittal by FedEx pursuant to my firm's ordinary business practices, which are that on the same day a FedEx envelope or package is placed for collection, it is deposited in the ordinary course of business with FedEx for overnight delivery, with all charges fully prepaid.

<p><u>Via U.S. Mail and Email Only</u> Michael J. Murtaugh Lawrence J. DiPinto Thomas N. Fay Murtaugh Meyer Nelson & Treglia LLP 2603 Main Street, 9th Floor Irvine, CA 92614-6232 Tel: (949) 794-4000 Fax: (949) 794-4099 Email: mmurtaugh@mmnt.com ldipinto@mmnt.com tfay@mmnt.com</p>	<p>Attorneys for Petitioner-Plaintiff PITZER COLLEGE</p>
<p><u>Via U.S. Mail and Email Only</u> Richard C. Giller Polsinelli LLP 2049 Century Park East, Ste. 2900 Los Angeles, CA 90067 Tel: (310) 556-1801 Fax: (310) 556-1802 Email: rgiller@polsinelli.com</p>	<p>Attorneys for <i>Amicus Curiae</i> UNITED POLICYHOLDERS</p>
<p><u>Via U.S. Mail and Email Only</u> Michelle Buckley Polsinelli PC One E. Washington St., Ste. 1200 Phoenix, AZ 85004 Tel: (602) 650-2000 Fax: (602) 264-7033 Email: mmbuckley@polsinelli.com</p>	<p>Attorneys for <i>Amicus Curiae</i> UNITED POLICYHOLDERS</p>
<p><u>Via U.S. Mail and Email Only</u> Michael Lee Huggins Crowell & Moring LLP 3 Embarcadero Center, 26th Floor San Francisco, CA 94111 Tel: (415) 986-2800 Fax: (415) 986-2827 Email: mhuggins@crowell.com</p>	<p>Attorneys for <i>Amici Curiae</i> COMPLEX INSURANCE CLAIMS LITIGATION ASSOCIATION and AMERICAN INSURANCE ASSOCIATION</p>

<p><u>Via U.S. Mail and Email Only</u> Laura A. Foggan Crowell & Moring LLP 1001 Pennsylvania Avenue, N.W. Washington, D.C. 20004 Tel: (202) 624-2500 Fax: (202) 628-5116 Email: lfoggan@crowell.com</p>	<p>Attorneys for <i>Amici Curiae</i> COMPLEX INSURANCE CLAIMS LITIGATION ASSOCIATION and AMERICAN INSURANCE ASSOCIATION</p>
<p><u>Electronically Submitted and 9 Copies Via Overnight Delivery Only</u> Office of the Clerk Supreme Court of California 350 McAllister Sreet San Francisco, CA 94102-4797</p>	

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

Dated: October 20, 2017


JoAnna Y. Soliman