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February 14, 2017

SUPREME COURT
FILED

FEB 15 2017

Jorge Navarrete Clerk

Deputy

VIA FEDEX (OVERNIGHT)

California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4797

Re: ***Pitzer College v. Indian Harbor Insurance Company***
U.S. Court of Appeals for the Ninth Circuit Case No. 14-56017
California Supreme Court Case No. S239510

Justices of the California Supreme Court:

Pursuant to California Rule of Court 8.548(e)(2) and on behalf of Appellee Indian Harbor Insurance Company ("Indian Harbor"), we write the Court to reply to the February 1, 2017 letter submitted on behalf of Appellant Pitzer College ("Pitzer"). Indian Harbor does not disagree that the California Supreme Court should grant certification, as the comments of the Ninth Circuit's Order Certifying Questions suggest that the Ninth Circuit is considering departing from settled California law. Indian Harbor below replies to several of the points raised in Pitzer's letter that mischaracterize California law and applicable precedent from this Court.

The Choice of Law and Notice Provision[1]

This Court should accept the first certified question and confirm that this Court meant what it said in *Nedlloyd Lines B.V. v. Superior Court*, 3 Cal.4th 459, 466 (1992): only a "*fundamental*" (italics in original) California public policy will overcome this state's "strong" policy of enforcing the parties' contractual choice of governing law. There is nothing "fundamental" about the notice-prejudice rule, which is a common law rule that has been applied, usually to occurrence-based insurance, to require an insurer asserting the policy defense of failure to comply with the condition requiring notice to the insurer "as soon as practicable" to bear the additional burden of proving actual prejudice caused by the late notice.

In its letter, Pitzer contends that no court has drawn a distinction between a "fundamental" and a "strong" public policy, but that is exactly what this Court did in *Nedlloyd*, when it required that a policy be "fundamental" to overcome the "strong" policy of enforcing a contractual choice of law. In that case, this Court enforced the parties' choice of Hong Kong law that allowed a fiduciary to avoid entire causes of action for breach of the covenant of good faith and fair dealing and breach of fiduciary duty, for the reason that those causes of action were only common law bases for liability, not established in any California statute or constitutional provision. In the past, the Ninth Circuit has only relied on *Nedlloyd* to decline to enforce a contractual choice of law when the competing policy arose from statutes or the constitution, or the very limited situations when the contractual provision itself rose to the level of unconscionability under California law (as described by this Court in *Discover Bank v. Superior Court*, 36 Cal.4th 148 (2005)).

California's notice-prejudice rule is a common law creation that imposes an additional burden to enforce the usual liability insurance notice condition and thus is not a fundamental policy of California. It does not declare that a notice condition is unconscionable, and the burden it adds is no more important than the rights to the very important common law causes of action that *Nedlloyd* found could be avoided by the parties' contractual choice of law. To date, the courts have rejected attempts to use *Nedlloyd* to avoid burden-shifting or changes in burdens of proof for a common law cause of action or defense that result from the parties' contractual choice of law. Moreover, the notice-prejudice rule is one that was developed in the context of occurrence-based third-party liability insurance policies (as opposed to the claims-made-and-reported policy issued by Indian Harbor) and has rarely, if ever, been applied elsewhere. Indian Harbor does not dispute that the notice-prejudice rule is a "strong" public policy for the general notice condition in occurrence-based policies. But, as the Ninth Circuit's Order notes, there are

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[1] Indian Harbor agrees with Pitzer that the Ninth Circuit's Order mistakenly refers to the "policy period" provision in the insuring agreement instead of the general notice condition. It is undisputed that notice was provided by Pitzer during the policy period, as is required by the policy, but it also is undisputed that a second and separate requirement – that notice be provided "as soon as practicable" – was not satisfied by Pitzer.

many situations where California courts have found the rule does not apply at all, such as to the insuring agreement of claims-made policies, a notice requirement in an exception to a pollution exclusion, a first-party policy suit timing requirement, and insurance conditions requiring consent before costs are incurred.

Because the notice-prejudice rule is not a fundamental California policy, the New York choice of law clause agreed to by the parties should be applied. Pitzer has conceded that under the applicable New York law its delay in providing notice until months after it completed its remediation of soil contamination bars its claim for coverage as a matter of law, as found by the District Court. The New York common law no-prejudice rule is not considered inequitable by New York courts, and it is not, as Pitzer suggests, dead. The New York Court of Appeals and the Second Circuit still enforce the common law no-prejudice rule whenever the 2009 statute does not apply. *See, e.g., Indian Harbor Ins. Co. v. City of San Diego*, 586 Fed.Appx. 726, 729 fn.3 (2d Cir. 2014); *Briggs Ave LLC v. Ins. Co. of Hannover*, 11 N.Y.3d 377, 381-82 (2008). There is nothing "perverse" about applying a statute according to its plain terms and as dictated by the decisions of New York's highest state and federal courts. Here, two sophisticated parties mutually agreed that New York law would govern their contract, and there is no fundamental policy barring enforcement of that agreement.

The Ninth Circuit's first certified question asking whether common law public policies beyond unconscionability can overcome the choice of law in an arms-length business transaction threatens to upset established California law enforcing choice of law clauses. Every common law rule can be characterized by the side that now wants to avoid the contractual choice of law as reflecting some public policy. This Court should accept review of the Ninth Circuit's first certified question, answer the question in the negative, and confirm the narrow scope of what constitutes a fundamental policy under *Nedlloyd* that can overcome a contractual choice of law.

Consent Provision

There is absolutely no support in California precedent for Pitzer's novel argument that a consent provision should be treated like a notice provision, requiring prejudice to enforce, whether in the first-party context or third-party context. For more than 45 years, California has consistently followed the rule this Court established in *Gribaldo, Jacobs, Jones & Assocs. v. Agrippina Versicherunges A. G.*, 3 Cal.3d 434, 449 (1970), that a first-party claim for reimbursement of payments (for defense counsel) is not covered under a third-party liability policy if the payments were made in violation of a policy condition requiring prior consent, without any showing of prejudice.[2] In fact, in *Faust v. The Travelers*, 55 F.3d 471, 472-73 (9th

[2] Indian Harbor disputes the contention by Pitzer and apparent conclusion by the Ninth Circuit that the subject policy is a first-party policy; among other things, it is titled as a "Legal Liability" policy and the relevant coverage is only for remediation the insured is "required" to perform. (See Section V.C.3.a. of Indian Harbor's Answering Brief in the Ninth Circuit). As in *Gribaldo*,

Cir. 1995), which also involved a first-party claim for reimbursement of payments, the Ninth Circuit itself recognized that the notice-prejudice rule does not apply to consent provisions.

The Ninth Circuit's second certified question asking whether the notice-prejudice rule can be applied to a consent provision with respect to a first-party claim suggests it is considering departing from decades of established California law since *Gribaldo*, including its own decision in *Faust*. This Court should accept review of the second certified question, answer the question in the negative, and confirm that this unbroken line of cases – enforcing the consent provision without requiring additional proof of prejudice – should not be disturbed.

Very truly yours,

Max H. Stern

Max H. Stern

MHS:js

cc: Michael J. Murtaugh, Esq. *(via FedEx Overnight)*
Lawrence J. DiPinto, Esq. *(via FedEx Overnight)*
Thomas N. Fay, Esq. *(via FedEx Overnight)*
Ninth Circuit Court of Appeals *(via CM/ECF)*

Pitzer is making a first-party claim (for reimbursement of amounts it paid) under a third-party liability policy.

CERTIFICATE OF SERVICE

Pitzer College v. Indian Harbor Insurance Company
U.S. Court of Appeals for the 9th Circuit, Case No. 14-56017
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:

INDIAN HARBOR INSURANCE COMPANY'S CORRESPONDENCE DATED FEBRUARY 14, 2017 TO CALIFORNIA SUPREME COURT

X	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.
X	BY ELECTRONIC SERVICE: I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. 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.

Via FedEx Overnight 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	Attorneys for Plaintiff-Appellant PITZER COLLEGE

Via Electronic Service Office of the Clerk U.S. Court of Appeals for the Ninth Circuit The James R. Browning Courthouse 95 7th Street San Francisco, CA 94103	

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

Dated: February 14, 2017

Trina C. Morgan