S239510

IN THE SUPREME COURT OF CALIFORNIA

EN BANC

PITZER COLLEGE,
Petitioner,

vs.

INDIAN HARBOR INSURANCE COMPANY,
Respondent.

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

PETITIONER'S SUPPLEMENTAL BRIEF

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This supplemental brief is intended to address certain new authority that was not available in time for Petitioner Pitzer College's brief on the merits, specifically this Court's decision in *Shepard, Mullin, Richter & Hampton, LLP v. J-M Manufacturing Co., Inc.* (2018) 6 Cal.5th 59, as well as two cases decided by federal district courts: *Centurion Medical Liability Protective Risk Retention Group Inc. v. Gonzalez* (C.D.Cal. 2017) 296 F.Supp.3d 1212, and *Providence Health and Services v. Certain Underwriters at Lloyd's London* (W.D.Wash. 2019) 358 F.Supp.3d 1195.

I. The *Shepard Mullin* Case

In its briefing, Indian Harbor argued repeatedly that under *Nedlloyd Lines B.V. v. Superior Court* (1992) 3 Cal.4th 459, a "fundamental policy"

of the state of California sufficient to overcome a contrary choice-of-law provision in a contract must be based on a statute, constitution, or "principle of unconscionability.". (See Respondent's Answering Brief, p. 26; Respondent's Answer to Amicus Curiae Brief, pp. 8-9.) In service of this argument, Indian Harbor reasoned by analogy, citing cases from the employment context – in particular, *Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083. (Respondent's Answering Brief, p. 27; Respondent's Answer to Amicus Curiae Brief, pp. 8-9.) Indian Harbor argued that this Court restricted so-called *Tameny* claims for wrongful discharge in violation of public policy to public policies "delineated in constitutional or statutory provisions," and that therefore a similar test applied under *Nedlloyd* in the choice of law area, even if the *Nedlloyd* Court itself did not expressly say so. (*Gantt, supra* at 1095; Respondent's Answering Brief, p. 27; Respondent's Answer to Amicus Curiae Brief, p. 9.)

In *Shepard Mullin*, a law firm represented a defendant in a qui tam action filed on behalf of various public entities, including a public entity that the law firm had previously represented. (*Shepard Mullin, supra* at 68-69.) The law firm took the position that the public entity had previously executed an advance conflict waiver, and that it could therefore represent the defendant in the qui tam action without violating the Rules of Professional Conduct, and entered into this arrangement without disclosing the conflict. (*Id.* at 69.) In its engagement agreement, the law firm

included an arbitration provision. (*Id.* at 70.) Later, the law firm again began performing work for the public entity, but failed to disclose the conflict to either client. (*Id.*) The law firm was subsequently disqualified as a result of the conflict, but not before billing its client more than $3 million, of which over $1 million remained unpaid at the time of disqualification. (*Id.*) Litigation resulted between the law firm and its (now-former) client over the unpaid fees, and over disgorgement of the already-paid fees. (*Id.* at 70-71.)

The law firm sought to compel its client into arbitration under the engagement agreement, but the client opposed the law firm's motion, arguing that the conflict of interest rendered the entire agreement illegal and unenforceable. (*Id.* at 71.) The law firm prevailed on the arbitration petition, at arbitration, and again on the client's petition to vacate the arbitration award. (*Id.*) However, the Court of Appeal reversed, ruling that the law firm's violation of (now-former) rule 3-310(C)(3) of the Rules of Professional Conduct made the entire engagement agreement unenforceable. (*Id.* at 71-72.) This Court granted the law firm's petition for review, certifying, among other issues, the question "whether a court may invalidate an arbitration award on the ground that the agreement containing the arbitration agreement violates the public policy of the state as expressed in the Rules of Professional Conduct, as opposed to statutory law." (*Id.* at 72.)

The law firm argued to this Court that the "strong public policy" in favor of arbitration under the California Arbitration Act could only be overcome by a showing that the contract was "illegal and against the public policy of the state," *as declared by the Legislature* – mere judicial pronouncements would not do. (*Id.* at 73.) Therefore, the law firm argued, its arbitration award must be confirmed because the Rules of Professional Conduct are made by this Court, and not by the Legislature. (*Id.*)

This Court disagreed. While the Court recognized the primacy of the Legislature in determining California's public policy, it also noted "that a contract or transaction may be found contrary to public policy even if the Legislature has not yet spoken to the issue." (*Id.*) The Court quoted with approval *Safeway Stores v. Retail Clerks International Ass'n* (1953) 41 Cal.2d 567, 574: "In cases without number the state courts have declared contracts, transactions and activities . . . to be contrary to public policy where their legislative departments have not spoken on the subject." (*Shepard Mullin, supra* at 73.) The Court wrote "California law holds that a contract may be held invalid and unenforceable on public policy grounds even though the public policy is not enshrined in a legislative enactment." (*Id.* at 79.)

II. The Federal District Court Cases

Two federal district court cases on the question of the application of the notice-prejudice rule to notice provisions in claims-made-and-reported

policies were decided between the conclusion of Pitzer's briefing in the present case and the present: *Centurion Medical Liability Protective Risk Retention Group Inc. v. Gonzalez* (C.D.Cal. 2017) 296 F.Supp.3d 1212, and *Providence Health and Services v. Certain Underwriters at Lloyd's London* (W.D.Wash. 2019) 358 F.Supp.3d 1195.

The relevant facts of the two cases are quite similar. In each case, the insured under a claims-made-and-reported policy reported a claim to the insurer after the expiration of a specified notice period (20 days in *Centurion* and 60 days in *Providence*), but within the policy period. (*Centurion*, *supra* at 1214-1215; *Providence*, *supra* at 1196-1198.) In *Centurion*, the court refused to apply the notice-prejudice rule, stating that the notice-prejudice rule did not apply to claims-made-and-reported policies. (*Centurion*, *supra* at 1218.) The *Centurion* court noted that "Case law has yet to make a distinction between a claim reported within the policy period but outside of an additionally imposed time limit, and a claim reported outside of the policy period." (*Id.*)

By contrast, in *Providence*, the court came to the opposite conclusion on substantively identical facts. As the *Centurion* court did, the *Providence* court noted that there was no authority on point. (*Providence*, *supra* at 1200.) However, unlike the *Centurion* court, the *Providence* court did not prematurely stop its analysis at this point. Instead, the *Providence* court looked to Washington authority on the difference between

occurrence-based and claims-made policies, and on the reasons for Washington's refusal to apply the notice-prejudice rule to claims asserted after the policy period of a claims-made-and-reported policy. (*Id.* at 1200-1201.) Washington, like California[1] (and like essentially every other state that has weighed in on this issue, see Reply Brief, p. 16) distinguishes between, on the one hand, the policy period in a claims-made-and-reported policy, which defines the scope of coverage itself, and to which the notice-prejudice rule does *not* apply, and on the other, an ordinary notice provision, which serves only to defeat otherwise-covered claims, and to which the notice-prejudice rule *does* apply. (*Id.*) As such, the *Providence* court concluded that the notice-prejudice rule applied to a time limit operating within the policy period of a claims-made-and-reported policy. (*Id.* at 1201.)

The *Providence* court reached the correct conclusion, and the *Centurion* court erred. The *Centurion* court should have looked to *Pension Trust Fund for Operating Engineers v. Federal Ins. Co.* (9th Cir. 2002) 307 F.3d 944, and to the underlying rationale for non-application of the notice-prejudice rule to the policy period in claims-made-and-reported policies as

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[1] California and Washington law are identical on this point. The seminal case on point in Washington, *Safeco Title Ins. Co. v. Gannon* (Wash.Ct.App. 1989) 774 P.2d 30, which is quoted extensively in *Providence*, was also cited in California's seminal case on this point, *Pacific Employers Ins. Co. v. Superior Court* (1990) 221 Cal.App.3d 1348, 1359, and both cite the same Florida case as the basis for their ruling: *Gulf Ins. Co. v. Dolan, Fertig And Curtis* (Fla. 1983) 433 S.2d 512.

set forth in *Pacific Employers Ins. Co. v. Superior Court* (1990) 221 Cal.App.3d 1348. Instead, the *Centurion* court prematurely terminated its analysis, concluding that the lack of authority on point meant that there was no distinction between the policy period and an ordinary notice provision in a claims-made-and-reported policy. The absence of direct authority on point should have caused the court to look at the underlying rationale for the rule, as the *Providence* court did, which would have compelled the *Centurion* court to reach the same conclusion as the *Providence* court.

Respectfully submitted,

MURTAUGH TREGLIA STERN & DEILY, LLP

Dated: May 22, 2019

By: /s/ *Thomas N. Fay*
MICHAEL J. MURTAUGH
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CERTIFICATE OF WORD COUNT

The text of this brief consists of 2,216 words as counted by the Microsoft Word version 2010 word processing program used to generate the brief.

Dated: May 22, 2019

By: /s/ *Thomas N. Fay*
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Attorneys for Petitioner PITZER COLLEGE

CERTIFICATE OF SERVICE
DECLARATION OF SERVICE BY MAIL

I, the undersigned, declare that I am and was at the time of service of the papers herein referred to over the age of 18 years and not a party to the action, and I am employed in the county of Orange, California, within which county the subject mailing occurred. My business address is 2603 Main Street, Penthouse, Irvine, CA 92614-6232. I am familiar with Murtaugh, Treglia, Stern & Deily LLP's practice for collection and processing correspondence for mailing with the United States Postal Service and that the correspondence shall be deposited with the United States Postal Service the same day in the ordinary course of business.

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CYNTHIA DUFFY

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Case No. S239510
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