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February 1, 2017

VIA FEDEX (OVERNIGHT)

SUPREME COURT
FILED

FEB 2 2017

Jorge Navarrete Clerk

Deputy

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

RE: Pitzer College v. Indian Harbor Insurance Company
Ninth Circuit Court of Appeals Case No. 14-56017

Justices of the California Supreme Court:

Pursuant to California Rule of Court 8.548(e)(1), I hereby write to the Court in support of the Request for Certification by the Ninth Circuit Court of Appeals in the above-referenced case on behalf of my client, Plaintiff/Appellant Pitzer College, and to clarify certain matters referenced in the order of the Court of Appeals.

Clarifications Relating to the Order of the Court of Appeals

The Notice Provision:

The Ninth Circuit's Order, at page 6, footnote 2, references the "policy period" provision. Unfortunately, the provision that is at issue in this case is the "notice" provision, not the "policy period" provision quoted by the Ninth Circuit. This appears to be a scrivener's error and does not impact the Ninth Circuit's substantive analysis.

The policy in question is a claims-made-and-reported policy, which only covers claims that are made and reported during the policy period. In addition to the time limit created by the "policy period" provision, the policy also requires notice of claims to be provided "as soon as practicable." This latter notice provision is the subject of the pending appeal.

Importantly, there is no dispute that the claim was tendered during the policy period. Instead, the dispute centers around whether a delay in tendering the claim within the policy period can cause a forfeiture of coverage absent a showing of prejudice.

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The "Emergency" Provision:

The Ninth Circuit certified two questions to this Court, one dealing with the notice provision and one dealing with the consent provision. Importantly, however, and as the Ninth Circuit's order notes, Pitzer has contended throughout this litigation that the factual circumstances surrounding the remediation in question triggered the "emergency" exception to the consent provision.

The Ninth Circuit, while requesting certification of the important legal issues, appears to have reserved this factual question for later determination.[1] For clarity, Pitzer has not abandoned or waived its contention that the emergency exception applies, and will continue to pursue that theory before the Ninth Circuit.

A California Supreme Court Decision is Necessary to Settle an Important Question of California Law

Indian Harbor Insurance Company contends that Pitzer College delayed in giving notice of its claim for insurance coverage arising from the discovery of lead-contaminated soil at a construction site on Pitzer's campus, and that this delay results in a forfeiture of coverage as a matter of law. Under well-established California law, an insurance carrier seeking to terminate or forfeit coverage on the basis of a failure of notice must show "prejudice" to prevail; this is known as the "notice-prejudice rule." (*Pacific Employers Ins. Co. v. Superior Court* (1990) 221 Cal.App.3d 1348, 1357.) However, rather than following California law, Indian Harbor seeks to impose New York law, as a result of a New York choice-of-law provision in the insurance policy.

By way of background, for decades New York persisted as one of the few jurisdictions strictly enforcing notice provisions in insurance policies without requiring a showing of prejudice. In 2008, to remedy this issue (which the bill sponsor's memorandum described as "an inequitable outcome with insurers collecting billions of dollars in premiums annually, and disclaiming coverage over an inconsequential technicality") the New York state legislature added the notice-prejudice rule to a statutory list of protections for insureds, thus joining the vast majority of American jurisdictions in granting insureds this protection.[2] However, under New York's statutory scheme, the notice-prejudice rule only applies to insurance policies "issued or delivered" within the state of New York. (New York Insurance Law § 3420.)

Perversely, as to those policies selecting New York law – but which are issued and delivered outside New York – the "strict notice" rule reaches from the grave to defeat

[1] The California Supreme Court's review of questions requested for certification by the Ninth Circuit is limited to "questions of California law," and the court typically "play[s] no role in assessing the merits of . . . factual assertions, which must be determined in the federal court." (*Pooshs v. Philip Morris USA, Inc.* (2011) 51 Cal.4th 788, 793.)

[2] In 2005, for example, the Maryland Court of Appeals (Maryland's highest state court) counted 40 jurisdictions that had adopted the notice-prejudice rule, and only seven that strictly applied notice provisions. (*Prince George's County v. Local Government Ins. Trust* (2005) 879 A.2d 81, 94 fn.9.)

coverage for out-of-state insureds. Indian Harbor aims to achieve this bizarre and inequitable result in this case.

The question squarely presented by this case is whether California and its courts will allow insurance companies to effect a forfeiture of the coverage of California insureds on the basis of a technical (*i.e.*, non-prejudicial) failure of notice.

Legally, this question arises from the application of California's choice of law rules, which will override a contractual choice of law provision when a fundamental policy of California is at stake. (*Nedlloyd Lines B.V. v. Sup. Ct.* (1992) 3 Cal.4th 459, 466.) Many courts, both in California and in other jurisdictions, including this court, have restated at many different times the firm and settled public policy underlying California's notice-prejudice rule.[3] By contrast, no party or court involved in this case has located or cited any previous authority diminishing the importance of California's notice-prejudice rule.

Indian Harbor's principal arguments against the application of the notice-prejudice rule as a fundamental policy of California are:

- That there is a difference between, on the one hand, the word "fundamental" (used to describe the necessary policy level to overcome a choice of another state's law), and, on the other hand, the words "strong," or "abiding," (used by courts to describe the notice-prejudice rule) or "important" (the word used as a concession by Indian Harbor's counsel at oral argument); and

- That "fundamental" policies can only arise from statutes or the constitution.

The first argument can be disposed of quickly. This Court, in rendering its decision in the *Nedlloyd* case, which standardized the "fundamental policy" test described above, cited with approval four pre-existing California Court of Appeal cases, all of which used alternative formulations, including "strong public policy," and "California policy." The concurring and dissenting opinion of Justice Kennard in the *Nedlloyd* case also used the "strong public policy" formulation, and no one, either at the time or since, has ever suggested that there was some distinction between those formulations of the test.

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[3] An illustrative but necessarily incomplete list follows: *Campbell v. Allstate Ins. Co.* (1963) 60 Cal.2d 303, 307; *UNUM Life Ins. Co. of America v. Ward* (1999) 526 U.S. 358, 372 (California's notice-prejudice rule "grounded in policy concerns specific to the insurance industry."); *Steadfast Ins. Co. v. Casden Properties, Inc.* (N.Y. App. Div. 2007) 837 N.Y.S.2d 116, 121 ("California law is imbued with a strong public policy against technical forfeitures in the insurance context"); *Service Management Systems, Inc. v. Steadfast Ins. Co.* (9th Cir. 2007) 216 Fed.Appx. 662, 664 (referencing "California's strong public policy behind the notice-prejudice rule"); *National Semiconductor Corp. v. Allendale Mut. Ins. Co.* (D.Conn. 1982) 549 F.Supp. 1195, 1200 (recognizing California's "strong and abiding policy [requiring] that insurers prove prejudice to escape liability under the notice provision of an insurance contract"); *National Union Fire Ins. Co. of Pittsburgh, PA v. General Star Indem. Co.* (3d Cir. 2007) 216 Fed.Appx. 273, 280 ("California law is imbued with a strong public policy against technical forfeitures in the insurance context") (emphasis added throughout).

Indian Harbor has not been able to articulate any substantive difference between the terms.

The second argument raises a broad and important question about the nature of "fundamental policies" for purposes of California's choice of law analysis, which the Ninth Circuit specifically included in its first question presented to this Court. Tellingly, Indian Harbor's contention on this point has shifted over time.

In its arguments to the trial court, Indian Harbor contended that a fundamental policy could only arise from two sources: statutes or the constitution. However, Pitzer's counsel countered this argument by reference to decisions in which California state and federal courts overrode out-of-state choice-of-law agreements to invalidate class action waivers under this Court's holding from *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148. Such decisions demonstrated clearly that judge-made rules could constitute fundamental policies under California's choice of law rules.

In response, Indian Harbor expanded its contention on appeal to the Ninth Circuit, arguing that fundamental policies could only arise from (now) three sources: statutes, the constitution, and unconscionability. The Ninth Circuit's formulation of the question to this Court goes one step further, expanding Indian Harbor's purported rule to include four sources: statutes, the constitution, unconscionability, and regulations. The ever-expanding nature of Indian Harbor's supposed bright-line rule demonstrates that there is no such limiting rule, and that courts must instead conduct a rule-by-rule analysis. In fact, as the California Court of Appeal wrote, there is no "bright-line rule[] for determining what is and what is not contrary to a fundamental policy of California," following the Restatement's similar statement that "[n]o detailed statement can be made of the situations where a 'fundamental' policy . . . will be found to exist." (*Discover Bank v. Sup. Ct.* (2005) 134 Cal.App.4th 886, 893-894.)

The second question requested by the Ninth Circuit also relates to the fundamental question of whether California will allow insurance companies to effect a forfeiture of the coverage of California insureds on the basis of a technical failure of notice. That question involves whether a consent provision in a first-party coverage situation will be treated as a notice provision for purposes of application of the notice-prejudice rule.

The larger question here is whether insurers will be able, through clever draftsmanship or choice of out-of-state law, to circumvent the notice-prejudice rule. In the first-party coverage context, and specifically in the pollution remediation insurance context, it is often true (as it is here) that the terms of the policy place ultimate control over the remediation into the hands of the insured, subject only to a very limited veto power of the insurer for unreasonable remediation plans.

In effect, when a consent provision is applied to a first-party coverage situation like the situation in this case, the consent provision acts only as a notice provision, since the policy requires the insurer to approve a reasonable remediation. This contrasts

sharply with the degree of control that an insurer is afforded over defense and settlement of the claim in a third-party coverage context.

This Court should take up this question now in order to clarify the state of the law, and should rule that California's notice-prejudice rule is a fundamental policy of the state. The Court should also rule that, in the first-party context, a consent clause is treated the same as a notice provision for purposes of the notice-prejudice rule. As the Ninth Circuit notes in its order, "[t]he answers to these questions are . . . important to protections for California insureds." (Order Certifying Questions to California Supreme Court, p. 3.) In sum, this Court should uphold and defend these protections.

This case provides an opportunity for the Court to send a simple reminder to insurance companies: California will not permit them to create technical forfeitures of insurance coverage for California insureds, whether through application of out-of-state law, or through clever draftsmanship.

Sincerely,

MURTAUGH MEYER NELSON & TREGLIA LLP

Thomas N. Fay

cc: Max Stern, Esq. *(via FedEx Overnight)*
Jessica E. La Londe, Esq. *(via FedEx Overnight)*
Katherine Nichols, Esq. *(via FedEx Overnight)*
Ninth Circuit Court of Appeals *(via First-Class Mail)*

CERTIFICATE OF SERVICE

I, the undersigned, declare as follows:

I am employed in the County of Orange, State of California. I am over the age of 18 years, and not a party to the within action. I am an employee of or agent for MURTAUGH MEYER NELSON & TREGLIA LLP, whose business address is 2603 Main Street, 9th Floor, Irvine, California 92614-6232.

On **February 1, 2017** I served the foregoing document(s):

CORRESPONDENCE DATED FEBRUARY 1, 2017 TO CALIFORNIA SUPREME COURT

on the following parties in this action addressed as follows:

***** SEE ATTACHED SERVICE LIST *****

☒ ***(BY MAIL)*** I served and placed a true copy of each document in a sealed envelope with postage fully paid in the United States mail at Irvine, California. I am "readily familiar" with this firm's business practice for collection and processing of mail, that in the ordinary course of business said document(s) would be deposited with the U.S. Postal Service on that same day. I understand that the service shall be presumed invalid if the postal cancellation date or postage meter date on the envelope is more than one day after the date of deposit for mailing contained on this affidavit.

☒ ***(BY OVERNIGHT DELIVERY)*** I served and placed a true copy of each document in a sealed envelope with delivery fees provided for and deposited in a box regularly maintained by Federal Express or Overnight Express. I am readily familiar with this firm's practice for collection and processing of documents for overnight delivery and know that in the ordinary course of Murtaugh Meyer Nelson & Treglia LLP's business practice the document(s) described above will be deposited in a box or other facility regularly maintained by Federal Express or Overnight Express or delivered to a courier or driver authorized by Federal Express or Overnight Express to receive documents on the same date it is placed at Murtaugh Meyer Nelson & Treglia LLP for collection.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

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

Executed on **February 1, 2017** at Irvine, California.

KARLA V. FONSECA

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Ninth Circuit Court of Appeals – Case No. 14-56017
Our File No.: 575-14369

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