S239510

IN THE SUPREME COURT OF CALIFORNIA

EN BANC

SUPREME COURT
FILED

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Deputy

PITZER COLLEGE,
Petitioner,

vs.

INDIAN HARBOR INSURANCE COMPANY,
Respondent.

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

PETITIONER'S OPENING BRIEF

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PETITIONER'S OPENING BRIEF

CERTIFIED QUESTIONS

Pursuant to its order dated March 22, 2017, this Court certified two questions for review in connection with this case:

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?

INTRODUCTION

Though this Court certified two questions for review, this case presents only one basic question, which this Court has answered before: does California law permit insurance companies to achieve a technical forfeiture of coverage as a result of a non-prejudicial breach of an immaterial term of the insurance contract? This Court's answer to that question has always been a resounding no, regardless of the artifice employed by insurers attempting to engineer a contrary result. The Court should honor its well-established jurisprudence on this theme and should reject Indian Harbor's effort to sidestep this basic principle of California's insurance law.

Indian Harbor's first tactic is to employ a New York choice of law provision to achieve a strict application of its notice provision. Such a strict application would be contrary to more than fifty years of California's "settled law," which instead would apply the "notice-prejudice rule" and require a showing of prejudice by Indian Harbor to enforce the notice provision. Indian Harbor's tactic has a particularly ironic and inequitable twist: New York's state legislature enacted the notice-prejudice rule, but limited it to insurance policies "issued or delivered" within the state of New York (thus protecting only New York insureds), and New York's high court recognized the notice-prejudice rule by judicial decision, but only for reinsurance contracts (thus protecting insurers). As a result, under New

York law, Pitzer's status as a disfavored California insured deprives Pitzer of the protection of the notice-prejudice rule, creating a technical forfeiture of coverage.

California's choice of law rules should prevent this inequitable result. When a "fundamental public policy" of the state of California would be violated by application of another state's law, California courts will refuse to enforce a choice of law provision as to that issue. This Court should hold that California's well-established notice-prejudice rule is a fundamental public policy of the state of California.

Indian Harbor's second tactic is to employ third-party coverage case law regarding consent provisions to a first-party coverage situation, i.e., outside of the appropriate context. In third-party policies, consent provisions secure a crucial right for insurers: the right to control defense and settlement of the third party's claim. In deference to this right, California courts have treated consent provisions in third-party policies differently from notice and cooperation provisions, applying consent provisions strictly, without requiring a showing of prejudice.

But under this policy, in the absence of the insurer's right to control defense and settlement of a third-party claim, a consent provision secures no crucial rights for the insurer, and should be treated the same way as similar conditions precedent, namely the notice and cooperation provisions.

As such, this Court should apply the notice-prejudice rule to the consent provision at issue in this case.

STATEMENT OF JURISDICTION

The California Supreme Court has jurisdiction over the present case as a result of its March 22, 2017 order granting a request for certification of questions by the United States Court of Appeals for the Ninth Circuit pursuant to California Rule of Court 8.548.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

Pitzer College ("Pitzer") sued Indian Harbor Insurance Company ("Indian Harbor") in California state court in 2013, alleging that Indian Harbor had breached its insurance contract with Pitzer. Indian Harbor removed the case to federal court on the basis of diversity, then, in 2014, brought a motion for summary judgment based upon Pitzer's delay in notifying Indian Harbor of Pitzer's claim under the policy, and upon the resulting failure to secure Indian Harbor's consent before incurring costs. The District Court granted the motion on May 22, 2014, and judgment was entered on June 3, 2014. Pitzer timely appealed from that judgment to the Ninth Circuit Court of Appeals. Pitzer's appeal was argued before a three-judge panel of the Ninth Circuit on October 5, 2016 (Judges Harry Pregerson, Richard A. Paez, and John T. Noonan Jr.). After oral argument,

on December 12, 2016, Judge Noonan was replaced on the panel by Judge Andrew D. Hurwitz.

On January 13, 2017, the Ninth Circuit requested that this Court certify two questions of California law for decision pursuant to California Rule of Court 8.548. On March 22, 2017, this Court granted the Ninth Circuit's request, restating the certified questions as reproduced above.

II. FACTS

Pitzer is one of the Claremont Colleges, a collection of private colleges in southern California. The Claremont University Consortium, a separate entity, bargains and contracts on behalf of the Claremont Colleges with outside entities for certain services commonly needed by all the member colleges (including insurance). (E.R. 68.)[1] The Claremont University Consortium entered an agreement with Indian Harbor on behalf of its members, including Pitzer, whereby Indian Harbor would provide insurance coverage for payment of remediation expenses resulting from pollution on property belonging to the colleges (the "Policy"). (E.R. 61, 67-68.) The Policy was issued in Pennsylvania and delivered to the Claremont Colleges' broker in Arizona. (E.R. 211.) It contains a choice-of-law provision, selecting New York law. (E.R. 65.) Indian Harbor is a

[1] All record citations herein are to the Excerpts of Record prepared pursuant to the Ninth Circuit's procedure.

Delaware corporation, with its principal place of business in Connecticut. (E.R. 78.)

In January 2011, Pitzer was beginning construction of a new dormitory on its campus when, during excavation, construction workers discovered discolored soils present on the site, halting all activity on the project. (E.R. 61.) Pitzer quickly determined that the discolored soil was contaminated with lead. (E.R. 61, 72, 200.) With the costs of construction delays mounting (thousands of dollars per day), Pitzer's employees retained environmental consultants and an attorney specializing in environmental law to determine, as quickly as possible, the best way forward. (E.R. 79-81.) Pitzer feared that any further delay would jeopardize the completion of the dormitory in time for the 2012-2013 academic year, which would have forced Pitzer to incur the enormous cost of securing off-campus housing for its students. (E.R. 81.)

Pitzer's environmental consultants presented Pitzer with a range of alternatives. (E.R. 79, 96.) The least expensive and fastest option, which also carried the lowest risk of future liability, was the use of a transportable treatment unit ("TTU") to treat the lead-contaminated soil onsite. (E.R. 79.) By a fortunate coincidence, one of only two TTUs licensed for this purpose in southern California happened to be immediately available. (E.R. 80.) These TTUs are normally reserved for use far in advance. (E.R. 80.) Pitzer immediately retained the available unit and commenced

remediation. (E.R. 80-81.) Believing it was solely responsible for the cost of the remediation, Pitzer spent approximately $2 million and completed the cleanup on April 12, 2011, just over three months after the first discovery of discolored soil on the project. (E.R. 65, 70, 79, 81) The construction of the dormitory was ultimately completed with only a few days to spare before students were to move into the new dormitory. (E.R. 81.) Had Pitzer delayed, or been prevented from immediately retaining the TTU, Pitzer would have incurred not only further construction delay costs, but also the off-campus housing costs for its displaced students. (E.R. 81, 83.)

After the discovery of the discolored soil and during the remediation, Pitzer's employees were focused on the immediate resolution of the problem, and on getting the project back on course. (E.R. 79-82.) During the period in which the remediation took place, Pitzer's Vice President and Treasurer, Yuet Lee, was unaware that the Indian Harbor Policy covered the remediation. (E.R. 81.) Approximately two months after completion of the remediation, during an insurance renewal meeting with the Claremont University Consortium, Mr. Lee mentioned the remediation to an employee of the Claremont University Consortium, and asked whether insurance coverage might be available. (E.R. 82, 161-162.) After confirming that the Policy covered the remediation, Pitzer tendered its claim to Indian Harbor on July 11, 2011. (E.R. 82.) Indian Harbor acknowledged the claim on

August 10, 2011, and denied the claim on March 16, 2012, citing the notice and consent provisions of the Policy. (E.R. 75-76.)

The notice[2] and consent provisions of the Policy, upon which Indian Harbor relied to deny Pitzer's claim, are reproduced below:

The notice provision:

> 1. The INSURED shall forward to the Company or to any of its authorized agents every demand, notice, summons, order or other process received by the INSURED or the INSURED's representative as soon as practicable; and
>
> 2. The INSURED shall provide to the Company, whether orally or in writing, notice of the particulars with respect to the time, place and circumstances thereof, along with the names and addresses of the injured and of available witnesses. In the event of oral notice, the INSURED agrees to furnish to the Company a written report as soon as practicable. (E.R. 63-64.)

The consent provision:

> No costs, charges or expenses shall be incurred, nor payments made, obligations assumed or remediation commenced without the Company's written consent which shall not be unreasonably withheld. This provision does not apply to costs incurred by the INSURED on an emergency basis, where any delay on the part of the INSURED would cause injury to persons or damage to property, or increase significantly the cost of responding to any POLLUTION CONDITION. If such emergency occurs, the INSURED shall notify the Company immediately thereafter. (E.R. 64-65.)

[2] In the Ninth Circuit's Order requesting certification of questions to this Court, the Ninth Circuit inadvertently referred to the "policy period" provision, rather than the separate "notice" provision, which is reproduced herein, and upon which Indian Harbor relies. The parties do not dispute that the claim was tendered within the applicable policy period.

The Policy contains the following choice-of-law provision, designating New York law:

> Choice of Law – All matters arising hereunder including questions related to the validity, interpretation, performance and enforcement of this Policy shall be determined in accordance with the law and practice of the State of New York (notwithstanding New York's conflicts of law rules). (E.R. 65.)

ARGUMENT

I. THE NOTICE-PREJUDICE RULE IS A FUNDAMENTAL PUBLIC POLICY OF THE STATE OF CALIFORNIA

A. Origins of the Conflict of Law at Issue

As this Court held more than fifty years ago in *Campbell v. Allstate Ins. Co.* (1963) 60 Cal.2d 303, in order to validly deny coverage based upon an insured's delay in providing notice, an insurer must prove that it suffered substantial prejudice from the delay. (*Shell Oil Co. v. Winterthur Swiss Ins. Co.* (1993) 12 Cal.App.4th 715, 760-761.) This principle has been recognized as "settled law" in California, and other jurisdictions have recognized that the rule is a "strong public policy" and a "strong and abiding policy" of the state of California. (See *Shell Oil Co.*, *supra* at 760 ("settled law"); *National Union Fire Ins. Co. of Pittsburg, PA v. General Star Indem. Co.* (3d Cir. 2007) 216 Fed.Appx. 273, 280 ("strong public policy"); *National Semiconductor Corp. v. Allendale Mut. Ins. Co.* (D.Conn. 1982) 549 F.Supp. 1195, 1200 ("strong and abiding policy").) Indian Harbor seeks to overcome this bedrock California insurance law

principle by application of New York law through the choice-of-law provision in its policy.

New York's law on the notice-prejudice rule is tortured and Kafkaesque. The baseline, common law rule in New York is the strict notice rule, which applies a blanket bar to coverage for even short delays in providing notice, regardless of prejudice. (*Indian Harbor Ins. Co. v. City of San Diego* (S.D.N.Y. 2013) 972 F.Supp.2d 634, 643, *aff'd* 2014 WL 4922143 (2d Cir.).)[3] However, this rule has two notable exceptions: a statutory exception applying the notice prejudice rule to policies "issued or delivered" within the state of New York (see New York Insurance Law § 3420(a)), and an exception for reinsurance contracts (where the insured is itself an insurance company). (See *Unigard Sec. Ins. Co. v. North River Ins. Co.* (N.Y. 1992) 594 N.E.2d 571.) The former exception is relatively new and, according to the bill sponsor's memorandum, was driven by the fact that "[c]urrent law . . . leads to an inequitable outcome with insurers collecting billions of dollars in premiums annually, and disclaiming coverage over an inconsequential technicality." (Bill Sponsor's Memorandum, 2008 New York Session Law 388.) In practical effect, New York law requires an insurer to show prejudice to deny coverage only when

[3] The courts in *Indian Harbor* and in other cases have sometimes used the term "no-prejudice rule" to describe this rule. Because of the possible confusion between the "no-prejudice rule" and the "notice-prejudice rule," this brief uses the term "strict notice rule."

the insured is either (1) an insurance company, or (2) located in New York.[4] All other insureds who delay in providing notice face an automatic forfeiture of coverage.

Since neither exception would apply here, there is a conflict between California and New York law. 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, as the trial court noted: "If prejudice is required, Defendant would not be able to prevail at summary judgment by relying on the Notice Provision." (E.R. 11.)

California courts will ordinarily enforce a contractual choice of law provision, but will impose California law where a "strong" or "fundamental" public policy of the state of California would be violated by application of the contractually chosen law, and where California has a materially greater interest than the chosen state in the determination of the particular issue. (*Nedlloyd Lines B.V. v. Sup. Ct.* (1992) 3 Cal.4th 459, 466 ("fundamental policy"); *Frame v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1971) 20 Cal.App.3d 668, 673 ("strong public policy").) In *Nedlloyd*, this Court articulated the standard for the determination of whether or not a

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[4] A cynical observer might conclude that New York's insurance law intentionally provides a favorable rule (the notice-prejudice rule) for favored classes of persons (New York residents and insurance companies), while derogating out-of-state insureds.

particular rule is a "fundamental policy," to be enforced despite a contractual choice of law provision specifying the law of another jurisdiction: namely, whether the rule in question is "designed to restrict freedom of contract," or "designed to preclude freedom of contract in this context." (*Nedlloyd, supra*, 3 Cal.4th at 468, 471.) A rule is designed to restrict freedom of contract when private parties to a contract cannot contract around the rule. (See *Brack v. Omni Loan Co., Ltd.* (2008) 164 Cal.App.4th 1312, 1323.)

B. A Wealth of Authority Supports the Proposition that the Notice-Prejudice Rule is a Fundamental Public Policy of the State of California

California has a strong public policy in favor of the notice-prejudice rule. The United States Supreme Court, describing this Court's seminal *Campbell* decision on this point, wrote, "Announcing the notice-prejudice rule in [*Campbell*], the California Supreme Court emphasized the 'public policy of this state' in favor of compensating insureds." (*UNUM Life Ins. Co. of America v. Ward* (1999) 526 U.S. 358, 372.) In the *Ward* case, the Council of State Governments filed an *amicus* brief in which it wrote "California's notice-prejudice rule . . . is grounded in public policy concerns for the protection of policyholders against forfeiture of their insurance benefits." (Brief for Council of State Governments, et al. as *Amici Curiae* at 12, *Ward*, 526 U.S. 358.) The Supreme Court cited this portion of the *amicus* brief, stating that California's grounding of the

notice-prejudice rule in policy concerns specific to the insurance industry was "key to [their] decision." (*Ward*, *supra* at 372.)

The Ninth Circuit Court of Appeals, in rejecting an express contractual waiver of the notice-prejudice rule, has also described the notice-prejudice rule as "California's strong public policy." (*Service Management Systems, Inc. v. Steadfast Ins. Co.* (9th Cir. 2007) 216 Fed.Appx. 662, 664.)[5] The *Shell Oil* case, the leading modern case on the subject, described the notice-prejudice rule as "settled law" in California. (*Shell Oil Co.*, *supra*, 12 Cal.App.4th at 760.) The Third Circuit Court of Appeals, discussing the notice-prejudice rule, wrote, "California law is imbued with a strong public policy against technical forfeitures in the insurance context." (*National Union Fire Ins. Co. of Pittsburg, PA v. General Star Indem. Co.*, *supra*, 216 Fed.Appx. at 280.) The United States District Court for the District of Connecticut also recognized California's "strong and abiding policy [requiring] that insurers prove prejudice to escape liability under the notice provision of an insurance contract." (*National Semiconductor Corp. v. Allendale Mut. Ins. Co.*, *supra*, 549 F.Supp. at 1200.)

Even New York itself recognizes California's strong public policy in favor of the notice-prejudice rule. In *Steadfast Insurance Co. v. Casden*

[5] Though this decision was initially issued as unpublished, the case can still be cited for its persuasive value pursuant to Ninth Circuit Rule 36-3(b) and Federal Rule of Appellate Procedure 32.1.

Properties, Inc. (N.Y. App. Div. 2007) 41 A.D.3d 120, 837 N.Y.S.2d 116, 121, the New York Supreme Court's Appellate Division[6] held that "California law is imbued with a strong public policy against technical forfeitures in the insurance context." In *Steadfast*, as in the *Service Management Systems* case before the Ninth Circuit, discussed above, the insurance policy in question contained an explicit waiver of the notice-prejudice rule. Citing the Ninth Circuit Court of Appeals' opinion in *Service Management Systems*, the New York court held that this explicit waiver was "void as against public policy" under California law. (*Steadfast, supra* at 121.)

The *Steadfast* and *Service Management Systems* cases were followed by a recent case before the Wyoming Supreme Court, *Century Surety Company v. Jim Hipner, LLC* (2016) 377 P.3d 784, in which the Wyoming Supreme Court, citing *Steadfast* and *Service Management Systems*, and answering questions certified by the Eighth Circuit Court of Appeals, held that an express waiver of the notice-prejudice rule was void as against Wyoming's public policy. The Wyoming court conducted a nationwide survey of court decisions and secondary authority considering the notice-prejudice rule, and concluded (as this Court did in 1963) that "the notice-

[6] An intermediate appellate court - the New York equivalent of California's Courts of Appeal.

prejudice rule is supported by sound public policy." (*Century Surety Company*, *supra* at 792.)

The *Steadfast*, *Service Management Systems*, and *Century Surety Company* decisions and the nature of the notice-prejudice rule itself both demonstrate that the notice-prejudice rule is "designed to restrict freedom of contract" under *Nedlloyd*, and is therefore a fundamental public policy of the state of California. As occasionally formulated, the notice-prejudice rule "creates a mandatory contract term." (*Cisneros v. UNUM Life Ins. Co. of America* (9th Cir. 1998) 134 F.3d 939, 946.) Thus, while a strict reading of the contract would void coverage when the insured fails to provide notice "as soon as practicable," the overriding public policy against technical forfeitures of insurance coverage causes a deviation from the contract's literal terms. Similarly, as the Ninth Circuit, the New York Superior Court's Appellate Division, and the Supreme Court of Wyoming have all held, an attempt by the insurer to contract around the notice-prejudice rule is void as against public policy.

Further, the *Nedlloyd* "fundamental public policy" rule itself is derived from Section 187 of the Restatement Second of Conflict of Laws. Comment (g) to that section of the Restatement includes the following highly suggestive language:

> [A] fundamental policy may be embodied in a statute which makes one or more kinds of contracts illegal or which is designed to protect a person against the oppressive use of

superior bargaining power. **Statutes involving the rights of an individual insured as against an insurance company are an example of this sort.** (emphasis added)

C. The Widely-Recognized Policy Reasons for the Notice-Prejudice Rule Also Support the Conclusion that the Rule Should Override a Choice of Contrary Law

Since the notice-prejudice rule was first recognized by this Court in 1963, many other jurisdictions have adopted the rule, typically by judicial decision. As a result, a great deal of detailed policy analysis on the question has been conducted by the highest courts of many different states. Similarly, the issue has been thoroughly examined in insurance treatises and other secondary sources of authority. The recent *Century Surety Company* decision, discussed above, surveys much of this scholarship and organizes the basic policy rationales for the notice-prejudice rule into three categories:

- "the adhesive nature of insurance contracts,"
- "the public policy objective of compensating tort victims," and
- "the inequity of the insurer receiving a windfall due to a technicality." (*Century Surety Company*, *supra*, 377 P.3d at 789.)

Each of these three rationales finds strong support in California law, and in the decisions of other courts applying the notice-prejudice rule.

1. The adhesive nature of insurance contracts supports the conclusion that the notice-prejudice rule should override a choice of contrary law.

The Pennsylvania Supreme Court, in *Brakeman v. Potomac Ins. Co.* (1977) 371 A.2d 193, 196, set forth in clear terms the rationale for treating contracts of adhesion differently from typical private contracts:

> We are of the opinion, however, that this argument, based on the view that insurance policies are private contracts in the traditional sense, is no longer persuasive. Such a position fails to recognize the true nature of the relationship between insurance companies and their insureds. An insurance contract is not a negotiated agreement; rather its conditions are by and large dictated by the insurance company to the insured.

This line of thinking, along with other policy rationales, has caused insurance contracts to be treated significantly differently from most other contracts in several respects (*Gray v. Zurich Ins. Co.* (1966) 65 Cal.2d 263, 269), including: the imposition of tort liability for bad faith (*Cates Construction Inc. v. Talbot Partners* (1999) 21 Cal.4th 28, 44), the principle that exclusions to coverage must be "conspicuous, plain and clear" (*Gray, supra* at 271), and the doctrine that courts have a "heightened responsibility to prevent marketing of policies that provide unrealistic and inadequate coverage." (*Carson v. Mercury Ins. Co.* (2012) 210 Cal.App.4th 409, 426.) One of these legal consequences, California's doctrine of tort liability for insurer bad faith, has already been held to be a "fundamental public policy" of the state of California in a recent, well-

reasoned decision of the United States District Court for the Southern District of California. (*Tri-Union Seafoods, LLC v. Starr Surplus Lines Ins. Co.* (S.D. Cal. 2015) 88 F.Supp.3d 1156, 1170.)

Another rule driven by similar concerns regarding contracts of adhesion has also been deemed a "fundamental public policy" under California law. In *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148, this Court held that adhesive consumer arbitration agreements with class action waivers were unconscionable under California law.[7] Subsequently, both the state California Court of Appeal and the federal Ninth Circuit Court of Appeals concluded that this rule was a fundamental public policy for choice-of-law purposes. (*Klussman v. Cross Country Bank* (2005) 134 Cal.App.4th 1283; *Omstead v. Dell, Inc.* (9th Cir. 2010) 594 F.3d 1081.)

California law contains a strong theme of skepticism of contracts of adhesion, particularly where bargaining power is unequal, and even more particularly in the insurance context. As discussed above, these concerns have, on at least two different occasions, manifested themselves in judicially-created rules which were deemed "fundamental public policies" of the state of California. This is a sensible approach; if the policy concern is that insurance companies will use their superior bargaining power to

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[7] The United States Supreme Court later held that California law was pre-empted by the Federal Arbitration Act on this point (See *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333), but this Court's underlying statement of California law remains sound.

force inequitable terms into contracts with their insureds, it makes little sense to allow the same companies to accomplish the same thing by reference to the law of another state. This Court should continue this approach and deem the notice-prejudice rule a fundamental public policy of the state of California for the same reasons.

2. The effects of the notice-prejudice rule beyond its impact on the contracting parties support the conclusion that the rule should override a choice of contrary law.

The *Century Surety Company* case identifies "the public policy objective of compensating tort victims" as a second policy rationale underlying the notice-prejudice rule. (*Century Surety Company, supra*, 377 P.3d at 789.) That case also describes this same policy rationale in slightly different terms, including "the public interest in enforcing insurance contracts to further compensate accident victims, including innocent third parties," (*Id.* at 790) and "the social function of insurance coverage: providing compensation for injuries sustained by innocent members of the public." (*Id.* (quoting *Great American Ins. Co. v. C.G. Tate Constr. Co.* (N.C. 1981) 279 S.E.2d 769, 774).)

These descriptions reflect the origins of the notice-prejudice rule in cases involving third-party liability claims, but also reflect a broader principle. Insurance contracts are different from ordinary contracts in part because of the impact of insurance contracts beyond the contracting parties.

In the third-party liability context, insurance policies are often the chief source of recovery for third-party tort claimants, and as such, a denial of coverage harms not only the policyholder, but also the injured third party, who may now be denied effective recovery for his or her injuries. In the first-party context, a denial of coverage can have a similar, if subtler, effect.

The environmental remediation insurance policy at issue in the present case provides an excellent example. First-party coverage is indisputably at issue here, since claims for remediation of the insured's property are based upon "damages claimed by the insured itself." (See *Howard v. American Nat. Fire Ins. Co.* (2010) 187 Cal.App.4th 498, 530.) If an insured under such a policy were unable to pay out of its own pocket for the remediation, and if the insurer were to deny coverage for a delay in providing notice, the pollution condition might end up left in place, untreated. As a result, either the environment is harmed or the taxpayers are forced to absorb the cost of the cleanup.

This concept is applicable not just to environmental remediation policies, but to first-party insurance policies in general:

> Another positive externality of a properly functioning insurance market is that private insurance provides fast compensation to victims of disasters, accidents, and torts, easing the burden on tax-funded social insurance programs like Social Security disability benefits or FEMA's Disaster Aid Programs. For example, as of August 2006, only a year after the disaster, insurers had already paid $17.6 billion for wind damage from Hurricane Katrina. Without these payments, many more homeowners would likely have been

forced to turn to the government for assistance. (Avraham, *The Economics of Insurance Law – A Primer* (2012) 19 Conn. Ins. L.J. 29, 41.)

These broad, society-wide consequences are a significant part of the policy justification for the notice-prejudice rule. Allowing insurers to apply New York law and deny coverage to California insureds over technical defects on the part of the insured would, in many cases, shift the burden of the insured risks onto California's people, environment, and state and local governments. Allowing insurers to achieve that effect would violate basic public policy principles.

3. California's widely-recognized strong public policy against technical forfeitures in the insurance context supports application of the notice-prejudice rule despite a choice of contrary law.

Over many decades, this Court has repeatedly expressed California's strong public policy disfavoring "technical forfeitures" in the insurance context. (*Bollinger v. National Fire Ins. Co.* (1944) 25 Cal.2d 399, 405; *California Comp. & Fire Co. v. Industrial Acc. Com'n* (1965) 62 Cal.2d 532, 535; *Prudential-LMI Com. Ins. v. Sup. Ct.* (1990) 51 Cal.3d 674, 691.) This strong public policy has been recognized not only in California, but by courts of other states applying California law. (See, e.g., *National Union Fire Ins. Co. of Pittsburg, PA v. General Star Indem. Co., supra*, 216 Fed.Appx. 273.) California courts have not hesitated to employ this rationale alongside equitable doctrines such as estoppel to relieve insureds

of potential forfeitures of coverage. (See, e.g., *O'Morrow v. Borad* (1946) 27 Cal.2d 794, 800; *Root v. American Equity Specialty Ins. Co.* (2005) 130 Cal.App.4th 926.)

This rule against technical forfeitures is also recognized as a core part of the underpinning of the notice-prejudice rule. (*Root*, *supra*, 130 Cal.App.4th 926, 941; *Century Surety Company*, *supra*, 377 P.3d at 789.) Even New York's state legislature recognizes the inequity of the common law strict notice rule and its resulting technical forfeitures of coverage. (Bill Sponsor's Memorandum, 2008 New York Session Law 388 ("[c]urrent law . . . leads to an inequitable outcome with insurers collecting billions of dollars in premiums annually, and disclaiming coverage over an inconsequential technicality").)

The application of New York's out-of-state strict notice rule in the present case would be the axiomatic technical forfeiture of insurance coverage. Pitzer's coverage determination would turn on an obscure feature of New York law, which New York's own state legislature recognizes as grossly inequitable, along with the factual irrelevancy of the physical location from which Pitzer's insurance policy was "issued." The resounding message of this Court's insurance law jurisprudence over a period of more than seventy years is that it is the policy of this state to avoid such technical forfeitures. This Court should extend this

jurisprudence to its logical conclusion: the notice-prejudice rule is a fundamental public policy of the state of California.

D. Respondent's Arguments to the Contrary Before the Ninth Circuit are Specious

In support of its contention that the notice-prejudice rule is not a fundamental public policy of the state of California, Indian Harbor raised three principal arguments: (1) that the notice-prejudice rule is "strong" or "important," but not "fundamental," and that there is some deliberate, meaningful distinction between those words; (2) that "fundamental public policies" under *Nedlloyd* can only arise from statutes, constitutions, or the principal of unconscionability; and (3) that California state and federal courts had, in previous cases, applied New York law and strictly enforced a notice provision in a situation comparable to this one. None of Indian Harbor's arguments have any merit.

1. There is no meaningful distinction between a "strong" public policy and a "fundamental" public policy for choice-of-law purposes.

As it must, Indian Harbor acknowledged before the Ninth Circuit that the notice-prejudice rule is a "strong" public policy of the state of California. However, Indian Harbor contends that a "strong" public policy is less strong than a "fundamental" public policy, and that therefore the vast wealth of authority discussed above supporting the proposition that the notice-prejudice rule is a "strong" public policy of the state of California is

meaningless and should be ignored. This analysis is unsupported by California law.

This Court announced the "fundamental public policy" test in *Nedlloyd Lines B.V. v. Superior Court* (1992) 3 Cal.4th 459. However, as noted above, this Court did not invent the test anew, but instead adopted an existing test set forth in the Restatement (Second) of Conflict of Laws. The Restatement approach had previously been applied by the California Courts of Appeal on four occasions that this Court cited with approval: *Mencor Enterprises, Inc. v. Hets Equities Corp.* (1987) 190 Cal.App.3d 432, 435-436, *Hall v. Superior Court* (1983) 150 Cal.App.3d 411, 417, *Ashland Chemical Co. v. Provence* (1982) 129 Cal.App.3d 790, 794-795, and *Gamer v. DuPont Glore Forgan, Inc.* (1976) 65 Cal.App.3d 280, 287.

Of those four cases cited by this Court in *Nedlloyd*, three (*Mencor*, *Hall*, and *Gamer*) used the "strong public policy" formulation of the rule, while *Ashland* simply used the term "California policy." The *Mencor* and *Gamer* courts used the terms "strong" and "fundamental" interchangeably, making no reference to any distinction between the two. (*Mencor*, *supra*, 190 Cal.App.3d at 440; *Gamer*, *supra*, 65 Cal.App.3d at 287-288.) The Ninth Circuit Court of Appeals has also used the "strong public policy" formulation of the rule on multiple occasions. (See *Haisten v. Grass Valley Medical Reimbursement Fund, Ltd.* (9th Cir. 1986) 784 F.2d 1392, 1402-

1403; *Hollingsworth Solderless Terminal Co. v. Turley* (9th Cir. 1980) 622 F.2d 1324, 1338.)

Even a concurrence to the *Nedlloyd* decision itself used the "strong public policy" formulation of the rule, with nothing either in the majority opinion or the concurrence itself suggesting that there was any difference. (*Nedlloyd, supra*, 3 Cal.4th at 479 (Kennard, J., concurring and dissenting).) California courts applying the *Nedlloyd* decision have also used the "strong public policy" formulation. (*Application Group, Inc. v. Hunter Group, Inc.* (1998) 61 Cal.App.4th 881, 900; *America Online, Inc. v. Sup. Ct.* (2001) 90 Cal.App.4th 1, 13 (citing *Hall*).)

Last, and perhaps most meaningfully, *this Court* used the "strong public policy" formulation of the test interchangeably with the "fundamental public policy" formulation in the *Discover Bank* case discussed above. (*Discover Bank, supra*, 36 Cal.4th at 173-174.)

Indian Harbor has cited no authority (and there is no authority) for the proposition that this Court or any other California court has ever made a distinction between "strong" and "fundamental" public policies in this context. Accordingly, when California courts, the Ninth Circuit Court of Appeals, and other courts throughout the United States say repeatedly that California has a "strong" public policy embodied in the notice-prejudice rule, *they mean "strong,"* not "strong for certain purposes," or "strong but not that strong." Indian Harbor's "magic words" argument fails.

2. California law is not consistent with Indian Harbor's invented rule limiting "fundamental" policies to those found in statutes, constitutions, or arising from the unconscionability doctrine.

Indian Harbor's second principal argument before the Ninth Circuit on the notice-prejudice rule was that fundamental public policies under the *Nedlloyd* test could only arise from statutes, constitutions, or the doctrine of unconscionability. Indian Harbor's only citation in support of this rule is to an unpublished 2008 case in which the Ninth Circuit held that since it had already concluded that the judge-made rule in question was a California fundamental public policy, it "need not reach the question whether a state's fundamental public policy can be established only by the state's legislature or constitution." (*Davis v. Chase Bank USA, N.A.* (9th Cir. 2008) 299 Fed.Appx. 662, 663.)

California courts have never followed or employed such a rule. Instead, the standard was set by this Court in *Nedlloyd*, when it adopted the Restatement's "fundamental public policy" test. That test does not create any "bright-line" rule of the type urged by Indian Harbor. (*Discover Bank v. Sup. Ct.* (2005) 134 Cal.App.4th 886, 893 ("We are not aware of any bright-line rules for determining what is and what is not contrary to a fundamental policy of California."); *Tri-Union*, *supra*, 88 F.Supp.3d at 1168 (citing *Discover Bank*).) Comment (g) to the Restatement section upon which California's rule is based similarly demonstrates that no such

bright-line rule exists: "No detailed statement can be made of the situations where a 'fundamental' policy . . . will be found to exist." (Rest.2d Conflict of Laws, § 187, com. g, p. 568.)

Similarly, California state and federal courts considering whether judge-made rules can be "fundamental public policies" have, on at least two occasions, concluded that they can. (*Klussman v. Cross Country Bank, supra*, 134 Cal.App.4th at 1298 (concluding that judge-made rule against class action waivers is "fundamental public policy"); *Tri-Union*, *supra*, 88 F.Supp.3d at 1170 (concluding that judge-made doctrine of tort liability for insurer bad faith is "fundamental public policy").)

Moreover, the malleability of Indian Harbor's invented limiting rule, as it bends and stretches to accommodate counter-examples, demonstrates its lack of validity. At the trial court level, Indian Harbor argued for a rule that a "fundamental policy" could only arise from statutes or the constitution. When faced with a counter-example, rather than abandoning its purported rule, Indian Harbor contended to the Ninth Circuit that a "fundamental policy" could only arise from statutes, the constitution, *and* the judicial doctrine of unconscionability. Then, the Ninth Circuit's order certifying questions to this Court asked whether "common law rules other than unconscionability not enshrined in statute, *regulation*, or the constitution" could be fundamental public policies. (*Pitzer College v.*

Indian Harbor Ins. Co. (9th Cir. 2017) 845 F.3d 993, 994 (emphasis added).) "Rules" this malleable simply are not rules.

3. Indian Harbor has not cited a single case in which a California insured was denied coverage by a California court applying New York's strict notice rule.

Before the Ninth Circuit, Indian Harbor cited three cases as examples of situations in which California state or federal courts had applied New York law in delayed notice cases. One of those cases was an unpublished decision of the California Court of Appeal, which cannot be cited to this Court. The other two were *Rosco, Inc. v. TIG Insurance Co.* (9th Cir. 1998) 139 F.3d 907 and *Western International Syndication Corp. v. Gulf Insurance Co.* (9th Cir. 2007) 222 Fed.Appx. 589. Following a theme, the *Rosco* case was an unpublished Ninth Circuit decision from 1998, which was not citable to the Ninth Circuit for any purpose (See Ninth Circuit Rule 36-3(c)). The *Western* case was also unpublished, but was citable as a post-2006 unpublished case. (Ninth Circuit Rule 36-3(c).)

The insured in *Rosco* was a New York corporation with its principal place of business in New York, purchasing insurance from a New York broker. (*Rosco, supra*, 139 F.3d 907.) As a result, the Ninth Circuit applied the governmental interests tests and determined that New York law applied because more New York interests were implicated. (*Id.*) No California insured was involved.

By contrast, the *Western* case was factually comparable to this case. It involved a California insured that paid taxes and insurance premiums in California, maintained its primary place of business in California, and used a California agent to secure the insurance policy at issue. (*Western, supra*, 222 Fed.Appx. at 594.) Contrary to Indian Harbor's contentions to the Ninth Circuit, however, the court in *Western* did not apply New York law. Instead, it applied *California* law (i.e., the notice-prejudice rule), holding that, where a California insured's rights were at stake, "New York does not have an interest significant enough to justify the application of foreign law." (*Id.*)

Indian Harbor's resort to these cases (which are either wholly factually dissimilar or support Pitzer's position) demonstrates Indian Harbor's straining to find some legal support for the contention that California courts will permit a technical forfeiture of insurance coverage arising out of a delay in providing notice. There is none.

II. THE NOTICE-PREJUDICE RULE APPLIES TO THE CONSENT PROVISION IN THIS CASE

In addition to the notice-prejudice issue discussed above, this case implicates the question of whether this Court will apply the notice-prejudice rule to consent provisions under certain circumstances. In general, when faced with this question in previous cases involving third-party liability coverage, California courts have refused to do so, pointing to

the insurer's right to control defense and settlement of third-party claims. (See, e.g., *Jamestown Builders, Inc. v. General Star Indemnity Co.* (1999) 77 Cal.App.4th 341, 346.)

However, no California court has considered the question of application of the notice-prejudice rule outside the third-party liability coverage context. This case, which involves first-party coverage, squarely presents this question. Additionally, the policy at issue here presents a profound factual contrast with third-party liability policies in terms of the right of control over the handling of the insured risk. Rather than placing control into the hands of the insurer, as third-party liability policies do, this policy places control over remediation squarely in the hands of the insured, subject only to a very limited veto right for the insurer. This distinction is critical, as it undermines the basic rationale that California courts have always relied upon to distinguish their treatment of violations of notice and cooperation provisions from consent provisions.

A. This Case Involves First-Party Coverage

Indian Harbor has contended throughout this litigation and appears to contend even now that the coverage at issue in this case is third-party coverage, rather than first-party coverage. This distinction is an important one, as this Court discussed at length in *Montrose Chemical Corp. v. Admiral Ins. Co.* (1995) 10 Cal.4th 645, 663:

> To properly analyze the trigger of coverage issues presented in this case, it is necessary to first clearly distinguish between third party liability insurance . . . and coverage under a first party property insurance policy . . . . As we observed in both *Garvey* [48 Cal.3d 395, 399 fn.2] and *Prudential-LMI* [51 Cal.3d 674, 698-699], a **first party** insurance policy provides coverage for **loss or damage sustained directly by the insured** (e.g., life, disability, health, fire, theft and casualty insurance). A **third party** liability policy, in contrast, provides coverage for **liability of the insured to a 'third party'** (e.g., a CGL policy, a directors' and officers' liability policy, or an errors and omissions policy). In the usual **first party** policy, the insurer promises to **pay money to the insured upon the happening of an event**, the risk of which has been insured against. In the typical **third party** liability policy, the carrier assumes a contractual duty to **pay judgments the insured becomes legally obligated to pay as damages** because of bodily injury or property damage **caused by the insured**. (emphasis added).

This Court set forth several examples of differing legal treatment depending on the first-party or third-party nature of coverage, including:

- Differing causation analyses (*Montrose*, *supra*, 10 Cal.4th at 663-664);
- Differing party expectations (*Id.* at 664);
- Disparate treatment of the timing of discovery of the loss (*Id.* at 664-665); and
- The frequent presence of 12-month contractual limitations provisions in first-party policies, which are absent in third-party policies. (*Id.* at 665.)

This Court also lamented the failure of certain other courts to properly distinguish between first and third-party policies and to adapt their

analyses appropriately. (*Montrose*, *supra*, 10 Cal.4th at 665 ("Unfortunately, some courts have failed to draw these critical distinctions when discussing coverage issues under first and third party insurance policies.").)

The policy in the present case affords both third-party liability coverage and first-party coverage, as it provides for coverage (i.e., defense and indemnity) in the event of a lawsuit brought against Pitzer by a third party for environmental harm, but also provides coverage for remediation of Pitzer's own property in the event pollution is discovered. The coverage at issue in this case is the latter: Pitzer seeks reimbursement for remediation of its property. As this court wrote in *Montrose*, coverage for a loss sustained directly by the insured (i.e., damage or harm to the insured's property) is first-party coverage.

Indian Harbor's contentions to the contrary are based upon two principal arguments: first, that the titles of the policy and of the various coverage parts contain the word "liability," and second, that remediation is only covered if it is required by law or is part of a legally executed state voluntary program.

Indian Harbor's first contention fails for at least two reasons. First, the distinction between first and third-party coverage under California law flows from the nature of the insured risk, not from the title the insurer chooses to give the coverage in question. Second, the policy itself states

that "The descriptions in the headings of this Policy are solely for convenience and form no part of this Policy [sic] terms and conditions." (E.R. 234.)

Indian Harbor's second contention fails as well. The policy is designed to cover legally-required remediations or remediations that are part of a legally executed state voluntary program. The legal requirement of remediation or participation in a state voluntary program is the trigger of coverage, but the coverage itself is for repair or remediation of *Pitzer's own property*, a classic first-party coverage situation.

B. The Policy Justifications for Strictly Enforcing Consent Provisions Do Not Apply Here

In many respects, consent provisions in insurance contracts are quite similar to notice and cooperation provisions. All three are considered "conditions precedent" to coverage. All three also require the insured to take certain steps *after* a claim has arisen and *after* the insured's premiums have been paid. Thus, it is natural that insureds in previous cases sought to extend the notice-prejudice rule (which applies to notice and cooperation clauses) to consent provisions as well.

However, California courts have refused to do so. In the seminal case on this point, *Gribaldo, Jacobs, Jones & Associates v. Agrippina Versicherunges A.* (1970) 3 Cal.3d 434, 449, this Court explained why: the purpose of a consent provision is "to prevent collusion as well as invest the

insurer with the complete control and direction of the defense or compromise of suits or claims." Subsequent decisions have further explained this rationale:

> [Consent provisions] are designed to ensure that responsible insurers that promptly accept a defense tendered by their insureds thereby **gain control over the defense and settlement of the claim**. That means insureds cannot unilaterally settle a claim before the establishment of the claim against them and the insurer's refusal to defend in a lawsuit to establish liability. As the Supreme Court has recognized, **the decision to pay any remediation costs outside the civil action context raises "a judgment call left solely to the insurer . . ."** (*Jamestown Builders, Inc. v. General Star Indemnity Co.*, *supra*, 77 Cal.App.4th at 346 (emphasis added).)

In the third-party liability insurance context, where all previous decisions on this question have arisen, this line of thinking is sensible. Third-party liability policies invariably vest control over defense and settlement of claims in the hands of the insurer, for a variety of sound reasons, including the potential for a collusive settlement between a third-party plaintiff and the insured defendant. Settling without the insurer's consent deprives the insurer of this important right, thus prejudicing them in every instance.

Further, in the murky world of settlements of tort cases (including automobile accidents and the like), it is difficult or impossible to second-guess the precise amount of any settlement. This is why, in the good faith settlement context, this Court requires a challenger to the settlement to

show that the settlement is "out of the ballpark" with respect to the reasonable range of settlement in order to avoid a good faith settlement determination. (*Tech-Bilt, Inc. v. Woodward-Clyde & Associates* (1985) 38 Cal.3d 488, 499-500.) As this Court wrote, "damages are often speculative, and the probability of legal liability therefor is often uncertain or remote." (*Id.* at 499 (quoting *Stambaugh v. Sup. Ct.* (1976) 62 Cal.App.3d 231, 238).) As a result, imposing a prejudice requirement for breaches of a consent provision in the third-party liability context would impose a tremendous burden on the insurer.

However, *none of these reasons apply* to the present case. In this case (as in all first-party cases) there is no third-party claim to be defended or settled. Further, there is no third-party claimant to be negotiated with or defended against—eliminating or greatly reducing the potential for collusion. Indian Harbor may argue that collusion is possible in first-party cases between vendors of services and the insured (though there is no allegation or evidence thereof in this case), but collusion or fraud are much easier to detect in an ordinary contracting situation, where a vendor is providing services for fees, and where an "industry-standard" approach can be used to detect overbilling, than they are in the context of settlement of a third-party tort claim, where the plaintiff's damages are speculative or unknowably subjective, and where the basic facts are disputed or unknown. As a result, the burden on the insurer of proving prejudice arising from a

breach of the consent provision is much lighter than in the third-party context.

Significantly, unlike in *Jamestown*, under Indian Harbor's policy the decision to remediate and the method of remediation are not "a judgment call left solely to the insurer," but instead are squarely placed in the hands of the *insured*, subject only to the insurer's limited right to veto unreasonable remediation choices. In fact, it is frequently the case that first-party insurance policies place control over the associated repair, replacement, or remediation in the hands of the insured.

Particularly in the context of this environmental policy, it is easy to see why an insurer might choose to place control into the hands of the insured. If, for example, Indian Harbor dictated the method of remediation, and the remediation failed or caused additional damage, Indian Harbor's liability could expand beyond the limits of its policy, since Indian Harbor would potentially itself be a tortfeasor. By leaving the choice of remediation options and control of the remediation to Pitzer, Indian Harbor shields itself from such liability.

However, this choice should not come without consequences. By vesting control over the remediation in the insured, Indian Harbor voluntarily walks away from the very rights that the consent provision is designed to protect, undermining the core rationale for the traditional refusal to apply the notice-prejudice rule to consent provisions. In the

absence of such distinctions between consent provisions and notice or cooperation provisions, this Court should decline to treat them differently in this context, and should require a showing of prejudice.

C. The Policy Rationales for the Notice-Prejudice Rule Apply to the Consent Provision in the Present Case

As discussed above, courts and scholarly commentators have identified three principal policy rationales for the notice-prejudice rule: (1) the adhesive nature of insurance contracts, (2) the public policy objective of compensating tort victims (or, read more broadly, the impact of insurance policies on non-contracting parties, including the public), and (3) the inequity of the insurer receiving a windfall due to a technicality. All three apply to the consent provision in the present case, and support application of the notice-prejudice rule.

The first rationale (the adhesive nature of insurance contracts) is identical in its application to all provisions of insurance contracts, since it arises from the nature of the insurance contract as a whole. Just as a truly negotiated insurance contract might include a less restrictive notice provision, or a notice provision with an escape clause for the insured, a truly negotiated first-party insurance contract might include a less restrictive consent provision, particularly where (as here) the insurer has already ceded control over the insured risk.

The second rationale (the impact of insurance policies on non-contracting parties) applies with special force to the present policy, which protects the environment. Technical denials of insurance coverage for remediation of environmental hazards are likely to have profound negative implications for either taxpayers or the environment itself. This point was emphasized at oral argument before the Ninth Circuit by Judge Pregerson:

> California has a very strong public policy of protecting the environment, right, you agree with that? . . . It's a fundamental policy in the state of California to protect the environment. . . . You've got some very poisonous substances there—you want to get it out, lead. That has a lot of—it affects the brain, bad stuff. (Ninth Circuit Oral Argument, *Pitzer College v. Indian Harbor Ins. Co.*, (October 5, 2016) https://www.youtube.com/watch?v=nM9rcZpqZJg at 21:00.)

The third rationale (the inequity of the insurer receiving a windfall due to a technicality), which would not apply to consent provisions in the third-party context, applies strongly to the consent provision in this case. Here, due to the first-party nature of the coverage at issue, Indian Harbor cannot contend that a fundamental right of control over handling of the claim was violated by the lack of consent. Indeed, the policy itself places control over the remediation in the hands of the insured—Indian Harbor is *obligated* by the terms of the policy to consent to any reasonable remediation chosen by Pitzer. Thus, in essence, Indian Harbor's complaint is that it was denied the opportunity to place its contractually-required rubber stamp on the project, a purely technical violation because the policy

grants Indian Harbor no discretion to refuse consent for a reasonable remediation. Under the policy's terms, Indian Harbor's role is not to *control* the remediation, but instead solely to *pay* for any reasonable remediation. In effect, this renders the consent provision into a glorified notice provision, the strict enforcement of which would result in a forfeiture. California insurance law abhors this type of technical forfeiture of coverage.

D. The Basic Contract Doctrine of Materiality Supports Application of the Notice-Prejudice Rule to the Consent Provision Here

The third rationale for the notice-prejudice rule discussed above (the inequity of the insurer receiving a windfall due to a technicality) has sometimes been characterized as an expression of the basic contract doctrine of materiality:

> The Restatement (Second) of Contracts allows a court to excuse a party's failure to perform a condition in the contract if an inequitable forfeiture would occur and the condition is not a material part of the contract. [Citation.] "The insurer prejudice rule is essentially an application of this principle. By excusing non-performance of procedural requirements in cases where an insurer has not been prejudiced, the court is essentially excusing the nonoccurrence of an immaterial condition. If the insured's failure to perform the condition did not result in prejudice to the insurer, the rule assumes that the condition was not a material part of the insurance contract." (*Century Surety Company*, *supra*, 377 P.3d at 790 (quoting Suter, *Insurance Prejudice: An Analysis of an Expanding Doctrine in Insurance Coverage Law* (1994) 46 Me. L. Rev. 221, 235-236 (citing Rest.2d Contracts, § 229)).)

This line of reasoning helps explain why the notice-prejudice rule has not been previously applied to consent provisions in third-party liability coverage situations, but *should* be applied here. In third-party coverage situations, then notice and cooperation provisions are treated as immaterial in the absence of a showing of prejudice. By contrast, in the third-party context, the consent provision secures an important right for the insurer: the right to control defense and settlement of the case. Thus, in third-party cases, even where the insurer cannot prove actual prejudice, the insurer has—in a real, practical sense—been harmed by the loss of this right.

The policy at issue in this case stands in stark contrast to the usual third-party coverage situation. Here, the policy vests control over the handling of the claim in the hands of the insured, and affords the insurer only a limited right to veto unreasonable remediation choices by the insured. In the context of this type of coverage, a non-prejudicial breach of the consent provision is just as immaterial as a non-prejudicial breach of the notice or cooperation provisions. As a result, unlike in the third-party liability context, a strict denial of coverage arising from a breach of the consent provision amounts to a technical forfeiture of coverage of otherwise indisputably covered remediation costs. California law forbids insurance companies from reaping windfalls due to this type of technical forfeiture; applying the notice-prejudice rule to the consent provision at issue here would be a sensible and warranted extension of this principle.

CONCLUSION

For the foregoing reasons, this Court should honor its decades-old jurisprudential principle forbidding technical forfeitures of coverage in the insurance context by holding that the notice-prejudice rule is a fundamental public policy of the state of California and applying the notice-prejudice rule to the consent provision in the insurance policy at issue in this case.

Respectfully submitted,

MURTAUGH MEYER NELSON &
TREGLIA, LLP

Dated: April 21, 2017

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

The text of this brief consists of 10,628 words as counted by the Microsoft Word version 2010 word processing program used to generate the brief.

Dated: April 21, 2017

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

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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, 9th Floor, Irvine, CA 92614-6232. I am familiar with Murtaugh Meyer Nelson & Treglia, 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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/s/ *Brooke Cheney*
BROOKE CHENEY

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Case No. S239510
Ninth Circuit Case No. 14-56017
Our File No.: 575-14369

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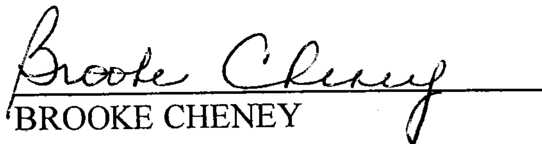

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