S239510

IN THE SUPREME COURT OF CALIFORNIA

PITZER COLLEGE,
Petitioner,

vs.

INDIAN HARBOR INSURANCE COMPANY,
Respondent

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

RESPONDENT'S ANSWERING BRIEF

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INTRODUCTION

To avoid the financial consequences of its disregard of its insurance policy's enforceable requirements, Pitzer asks this Court to create new law. Pitzer, a sophisticated entity, bought a specialized claims-made pollution liability insurance policy with a New York choice of law clause, and with requirements of prompt notice of pollution and of obtaining consent prior to commencing remediation and incurring costs. However, upon discovering soil contamination, Pitzer provided its insurer no notice and conducted a $2 million remediation without ever seeking insurer consent. Under New York law, even Pitzer agrees that those policy requirements bar Pitzer's claim. Its risk manager and broker understood right away that Pitzer's claim would be denied. Pitzer nevertheless brought its lawsuit in the hope of having the courts create new law to relieve it of those requirements. The trial court correctly refused to do this and properly granted summary judgment in favor of Indian Harbor. On appeal, the Ninth Circuit has asked, via certified questions, whether this Court will create such new law, which this Court has recast as follows:

(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?

Pitzer's Opening Brief seeks to further recast these questions as a generalized issue of consumer protection under California insurance law. But this is a transparent effort to draw attention away from the fact that answering "yes" to either question would constitute an unprecedented change in the prior decisions of this Court, *Nedlloyd Lines B.V. v. Superior Court* (1992) 3 Cal.4th 459 (enforcing choice of law provision to bar common law tort claims) and *Gribaldo, Jacobs, Jones & Associates v.*

Agrippina Versicherunges A. (1970) 3 Cal.3d 434 (enforcing consent requirement regardless of prejudice), and the way in which these decisions have since been applied by California courts for decades. The sound policy reasons expressed in this precedent militate the conclusion that the common law notice-prejudice rule is not a "fundamental" policy of California and that the notice-prejudice rule does not apply to consent provisions in insurance policies. Accordingly, this Court should answer "no" to each certified question.

In *Nedlloyd*, this Court directed that California courts shall follow the Restatement approach enforcing choice of law provisions, reflecting California's "strong" policy favoring the enforcement of freely negotiated choice of law clauses. In adopting the Restatement, *Nedlloyd* held that this policy is so important that only a "*fundamental*" policy can override it. And, in *Nedlloyd*, this Court adopted the approach that the "fundamental" policy required to ignore this important contract provision must be a limitation on the freedom of contract that is so vital to California that it is set forth in its written laws (constitution or statute); subsequently, it has also recognized contractual unconscionability as a "fundamental" policy.

Since *Nedlloyd*, no California appellate court has found any common law cause of action or limitation on a defense to be so fundamental as to prevent the enforcement of a contractual choice of law. Pitzer, however, seeks to undo the strict approach of *Nedlloyd* such that any judicially recognized common law policy could be found to trump the parties' choice of law. However, this is not what this Court said in *Nedlloyd*, is contrary to how courts have applied *Nedlloyd*, is inconsistent with this Court's pronouncement of what constitutes a "fundamental" policy in other contexts, and is not good policy.

California's common law notice-prejudice rule applicable to occurrence policies is a creation of the judiciary and so does not meet the

Nedlloyd test. In addition, the common law rule adding the element of prejudice to proving a late notice defense is, as a matter of policy, less significant than the very existence of the common law torts of breach of fiduciary duty and bad faith, which *Nedlloyd* found not to be "fundamental." The notice-prejudice rule has never been found to be a "fundamental" policy and cannot be considered one, as it is a rule of limited application that is subject to numerous exceptions recognized by California courts. In fact, the notice-prejudice rule has never been applied in the context of a claims-made-and-reported policy between sophisticated parties and should not be. The enforcement of these parties' agreement to New York law comports with their reasonable expectations and so does not impinge on any "fundamental" policy.

Pitzer also seeks to create new law by creating a "first-party insurance" exception to a rule that has been recognized for decades since this Court's decision in *Gribaldo*: enforcement of insurer consent requirements before costs are incurred does not require a showing of prejudice. The differences between notice and consent provisions, and the irrelevance of prejudice to breach of consent requirements, have been recognized by California courts for many years.

Pitzer's requested change in law to extend the notice-prejudice rule to remediation liability insurance lacks merit for two reasons. To begin with, the relevant coverage here is not first-party coverage; it covers an insured's potential liability for remediation and thus is third-party coverage. Therefore, the policy reasons California courts have applied consent provisions in third-party policies according to their terms, without needing proof of prejudice, have equal applicability to the policy and coverage at issue here. Further, insurers generally should be able to contractually require and enforce consent provisions in either the first-party or third-party context, consistent with prior precedent, and it would be bad policy to

create an exception for this type of coverage to allow an insured to incur costs without insurer involvement and consent.

For these reasons, Indian Harbor respectfully urges this Court to answer the certified questions in the negative.

FACTS

I. THE POLLUTION AND REMEDIATION LEGAL LIABILITY INSURANCE POLICY

Indian Harbor Insurance Company ("Indian Harbor") issued to Pitzer College ("Pitzer") a Pollution and Remediation Legal Liability policy, in effect from July 23, 2010 to July 23, 2011, written on a claims-made-and-reported basis. (ER 219.)

The coverage that is in dispute in this case is for "Coverage B – REMEDIATION LEGAL LIABILITY," which states, in part, that Indian Harbor "will pay on behalf of" Pitzer for "REMEDIATION EXPENSE and related LEGAL EXPENSE resulting from any POLLUTION CONDITION." (ER 221.) "REMEDIATION EXPENSE" is defined as certain expenses incurred "to the extent required by" a law enacted to address a "POLLUTION CONDITION" or a "legally executed state voluntary program governing the cleanup of a POLLUTION CONDITION." (ER 224.)

As a "condition precedent" to coverage, the policy requires notice to Indian Harbor of the discovery of pollution conditions "as soon as practicable." (ER 230.) The policy also requires Indian Harbor's written consent before incurring expenses, making payments, assuming obligations or commencing remediation, which consent "shall not be unreasonably withheld." (ER 230.)

The policy also states that New York law applies to "[a]ll matters arising hereunder including questions related to the validity interpretation, performance and enforcement of this Policy."[1]
(ER 234.)

Pitzer was no stranger to this policy or its terms, as it had been insured by similar Pollution and Remediation Legal Liability policies since 1999, as an additional named insured on policies issued to Claremont University Consortium ("CUC"). (ER 211 at ¶¶ 13-14; SER 9, 13, 23, 25, 67; SER 357-358 at 22:1-23:20.) CUC, founded in 1925, is "the central coordinating and support organization for The Claremont Colleges," which is comprised of seven colleges, including Pitzer. (Website: http://www.cuc.claremont.edu/ceo-welcome/ (last visited 6/20/17).) CUC is a separate legal entity from the colleges. (SER 265 at 24:15-17.) "CUC provides 28 vital services and programs for The Claremont Colleges and operates the programs and central facilities on behalf of the member colleges." (Website: http://www.cuc.claremont.edu/ceo-welcome/ (last visited 6/20/17); SER 344 at 46:3-14.)

One of the services CUC provides for its member colleges is insurance. (ER 161-162 at ¶¶ 6-7; SER 261 at 20:22-20:25.) Like many sophisticated entities, CUC has a dedicated insurance administrator and insurance personnel that handle risk management for the member colleges. (ER 162 at ¶ 7; SER 268 at 27:1-8; SER 339 at 16:3-22.)

For all insurance issues, Pitzer "work[s] through . . . CUC. CUC provides the central services for us, as well as the other Claremont colleges,

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[1] It is not disputed that New York law bears a "substantial relationship" to the parties or transaction or that there was a "reasonable basis" for the parties' choice of law. (*Nedlloyd, supra*, 3 Cal.4th at 466; ER 210-211 at ¶¶ 3-12 (discussing New York contacts and reasons for choice of New York law).)

and they purchase insurances on our behalf." (SER 261 at 20:22-25; SER 262 at 21:15-16 ("The insurances are purchased as a group . . .").) Pitzer "rel[ies] on CUC" with respect to insurance issues. (SER 262 at 21:23-25.) CUC provides centralized purchase of insurance for the colleges (SER 265 at 24:17-22), and the insurance premium charged to CUC is distributed back to the colleges (SER 267 at 26:13-14). Therefore, CUC is Pitzer's agent for purposes of insurance purchasing and for claims. (SER 339, at 16:3-22; SER 344 at 46:3-14.)

Since at least 1999, CUC's Business and Financial Affairs Committee has received presentations regarding the various insurance coverages and has voted on renewals of insurance policies. (SER 8-11, 16, 18-19, 21-36, 75-79, 82-98, 100-102, 104-116; ER 160-161 at ¶ 3.) With respect to the relevant policy, CUC was represented by an insurance broker throughout this process: Wells Fargo Insurance Services of Arizona, Inc., an arm of a national commercial broker.[2] (ER 220; SER 118-155; SER 157-158.) In June 2010, the Business and Financial Affairs Committee received a presentation from CUC's Insurance Administrator and broker regarding the recommended insurance, including the insurance policy at issue in this case, and voted to renew the policy with Indian Harbor. (SER 157-158.) The policy as purchased has nine endorsements (ER 237-254), and it provides $5 million in limits for a premium of $27,535 (ER 219).

II. PITZER'S DISCOVERY OF THE POLLUTION CONDITION IN JANUARY 2011 AND CLEANUP OF SAME IN MARCH AND APRIL 2011

While the policy was in effect and during construction of a new dormitory on Pitzer's campus, Pitzer learned of lead contamination on its

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[2] This broker tendered the claim to Indian Harbor on behalf of Pitzer, and it advocated on Pitzer's behalf during the claims-handling stage. (SER 231, 248.)

property. Specifically, on January 10, 2011, Yuet Lee (Pitzer's Vice President for Administration and Treasurer, the officer responsible for insurance) learned of the discovery of darkened/discolored soils at the site. (SER 162; SER 295-297 at 85:24-87:13; SER 308-309 at 146:21-147:9.) Test results on January 11, 2011 demonstrated that Pitzer had a "contamination situation," and, by January 21, 2011, Pitzer believed that remediation would be required. (SER 307 at 145:12-14; SER 325-326 at 28:10-29:1.) However, the contamination did not pose any emergency: the contamination was entirely on-site, no nearby dorms were evacuated, and no restrictions were placed beyond the project boundaries. (SER 327-328 at 35:24-36:3; SER 329-330 at 43:23-44:8.)

The removal of the lead contamination did not begin immediately. First, after a couple of weeks of study, Pitzer's consultants provided Pitzer a proposed Soil Management Plan on or around February 1, 2011. (SER 169; SER 312 at 150:7-12.) Then, for the next two weeks (until February 16, 2011), there were "[g]enerally no activities" at the site. (SER 332 at 49:5-19.) In the two weeks that followed, from February 16, 2011 to February 27, 2011, Pitzer commenced a "Remediation Strategy and Pricing" phase, during which time it was weighing its remediation options, ultimately deciding to conduct lead removal using an onsite treatment system called a Transportable Treatment Unit ("TTU"). (SER 162-163; SER 333 at 69:1-10.)

Actual lead removal did not begin until March, and Pitzer ultimately completed the remediation on April 9, 2011. (SER 163-164; SER 335 at 91:2-4.) Pitzer claims to have paid nearly $2 million for the remediation. (ER 65 at ¶ 8; SER 177.)

Indian Harbor's expert later opined that the way Pitzer conducted the remediation overlooked options that could have materially reduced the eventual cost and that Pitzer had conducted the remediation in a way that

waived subrogation rights against others responsible for the contaminated soil. (ER 257-261 at ¶¶ 1-22.)

Mr. Lee's after-the-fact excuse for not reporting the discovery of contamination to Indian Harbor (or to CUC or its broker), and for not consulting with Indian Harbor before incurring expenses or commencing remediation, was that he claimed he did not think about insurance during this time. (SER 299 at 93:13-19; SER 300 at 94:1-7; SER 313 at 163:3-15; SER 320 at 194:2-10.) However, if he had wanted to, he admitted that he had time and opportunity to call CUC, the broker, or Indian Harbor: "I had time to call my parents. I could have called anybody . . . I could have called my mom and said, you know, 'Hey, are you free on Saturday to have lunch?' I could have called anybody." (SER 310-311 at 148:22-149:16); "I had time to make phone calls about anything that needed to be called on topics that needed to be discussed. . . . I could have called anybody." (SER 313 at 163:16-23). While he did not contact CUC, the broker, or Indian Harbor during this time, he did notify Pitzer's President and other Pitzer administrators of the remediation efforts; Mr. Lee also took the time to contact Pitzer's attorney regarding potential sources to fund the remediation, and, on March 11, 2011, Pitzer's attorney advised Mr. Lee that "private insurance recovery" was one such source. (ER 161 at ¶ 5; SER 304-306 at 142:20-144:15; SER 314-316 at 165:12-167:24.) But Mr. Lee apparently ignored this advice for over three months.

Mr. Lee first asked CUC about coverage for the remediation by no later than June 17, 2011. (SER 218.) In response, on June 28, 2011, CUC's Insurance Administrator encouraged Mr. Lee to report the remediation to Indian Harbor, even though she understood that coverage likely would be denied:

> The pollution liability policy provides coverage for remediation and legal expenses resulting from any pollution condition at any covered location.
>
> There is an [sic] voluntary payment exclusion that states as follows: [citing Section VII.B. of policy.]
>
> Based on this exclusion, this claim will likely be denied however we should proceed to file it. If you could please provide me the date that the condition was discovered, the inspection report, the recommendation for remediation and the invoice for the cleanup. . . .

(SER 220.) On July 7, 2011, CUC's Insurance Administrator followed up with Mr. Lee by email, stating that "[d]ue to the lapse in time," the remediation claim should be submitted "as soon as possible," and Mr. Lee acknowledged this email. (SER 222, 225.) On July 8, 2011, the broker also advised that notice could be accomplished in a phone call, although "it is very unlikely we will prevail." (ER 228.)

III. PITZER'S NOTICE TO INDIAN HARBOR SIX MONTHS AFTER DISCOVERY OF THE POLLUTION CONDITION AND THREE MONTHS AFTER COMPLETING THE REMEDIATION

Pitzer did not give notice to Indian Harbor of its discovery of the pollution condition until July 11, 2011, when its broker apparently decided to act (while Pitzer continued to delay), and called an underwriter for Indian Harbor. (SER 231; SER 363-364 at 16:5-17:7; SER 365-366 at 19:22-20:4; ER 211-212 at ¶ 16.) Indian Harbor acknowledged receipt of notice to CUC, with a copy to the broker, on August 10, 2011, asking whether Pitzer sought coverage, requesting other information, and noting that pre-notice costs would not be covered under the policy. (SER 233-234.)

In an internal broker email sent that same day, one broker observed:

> I can't say I disagree with XL's position. . . . If insured wants to pursue, we should involve Bob Williams in our SF office. I have found Bob to be a great resource in these situations. He

> recently helped me negotiate a settlement with Ace on an environmental claim (we got $.50 on the loss). My client's claim also had consent issues, although not []as significant and blatant as your situation.

(ER 237.) The other broker responded that he advised CUC that "it will certainly be an uphill battle, and expectations of recovery should be low." (SER 236.)

CUC forwarded the Indian Harbor initial position letter to Pitzer on August 12, 2011, advising Pitzer of Indian Harbor's position, and recognizing the correctness of Indian Harbor's denial: "The policy is very clear on the reporting requirements. . . . Based on the above coverage opinion, it's doubtful that Pitzer will receive any recovery for this loss. Please let me know if Pitzer would like to continue to pursue this claim." (SER 240.)

After receiving no response for seven months, Indian Harbor denied coverage for the claim on March 16, 2012, based on late notice and the failure to obtain consent. (SER 244-246; SER 367 at 44:2-12.)

IV. THE LAWSUIT, SUMMARY JUDGMENT, AND APPEAL

Pitzer filed this lawsuit against Indian Harbor for Declaratory Relief and Breach of Contract in the Los Angeles Superior Court on July 8, 2013. On August 12, 2013, Indian Harbor removed the case to the Central District of California, on the basis of diversity jurisdiction. On April 24, 2014, Indian Harbor filed a motion for summary judgment. The District Court held oral argument and granted Indian Harbor's motion on May 22, 2014, based on both New York's late notice and consent law and California consent law. (ER 3.) Judgment was entered on June 3, 2014. (ER 1.) Pitzer appealed to the Ninth Circuit Court of Appeal on June 24, 2014. (ER 39.) The Ninth Circuit heard oral argument on October 5, 2016 and

certified questions to this Court on January 13, 2017. This Court granted certification on March 22, 2017.

ARGUMENT

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

A. To Override a Contractual Choice of Law Provision, the Policy Must be "Fundamental," Which Means That It Must Be Set Forth in a Statute, Constitution, or Principle of Unconscionability, and Designed to Restrict Freedom of Contract

1. Under *Nedlloyd*, the Policy Necessary to Override the Parties' Contractual Choice of Law Must Be "Fundamental," Not Just "Strong"

In *Nedlloyd Lines B.V. v. Superior Court* (1992) 3 Cal.4th 459, this Court for the first time "considered the enforceability of a contractual choice-of-law provision." (*Id.* at 464.) In that case, this Court considered whether a plaintiff could assert common law tort claims for breach of the covenant of good faith and fair dealing (bad faith) and breach of fiduciary duty, as to a shareholder agreement that specified Hong Kong law (which did not recognize such tort claims), where the courts below had applied California law and so granted leave to amend on demurrers to the claims. (*Id.* at 463, 467-71.)

In *Nedlloyd*, this Court confirmed that California has a "strong policy favoring enforcement" of choice of law provisions. (*Id.* at 464-465.) The Court viewed the plaintiff's arguments as seeking to create claims "by disregarding the law [plaintiff] voluntarily agreed to accept as binding," a result that would "undermine California's policy of respecting the choices made by parties to voluntarily negotiated agreements." (*Id.* at 471.)

After analyzing its prior decision on forum clauses and prior intermediate appellate decision on choice of law clauses, this Court decided

to adopt and direct California courts to follow the Restatement Second of Conflicts of Laws ("Restatement section 187"). In setting out the test that California courts should apply pursuant to Restatement section 187, this Court stated that in the last step of the analysis a court determines "whether the chosen state's law is contrary to a *fundamental* policy of California. If there is no such conflict, the court shall enforce the parties' choice of law." (*Id.* at 466 (emphasis in original).)

The Court ultimately reversed the leave to amend to assert the claims, finding no fundamental California policy was offended by completely depriving the plaintiff of its bad faith and fiduciary duty causes of action. (*Id.* at 468, 471.) The Court reasoned that California's bad faith law did not reflect "a government regulatory policy designed to restrict freedom of contract" and, as to fiduciary duty, there was "no California statute or constitutional provision designed to preclude freedom of contract in this context." (*Id.* at 468, 471.)

The term "fundamental" – not "strong" – is used in Restatement section 187 to describe how important a public policy must be to override a contractual choice of law. In discussing and applying the relevant portion of the test, this Court in *Nedlloyd* used the word "fundamental" twelve times, including one time where it italicized the word (*id.* at 466) and one time where it used the word in quotation marks: "We next consider whether application of the law chosen by the parties would be contrary to 'a fundamental policy' of California" (*id.* at 468). The decision never used the word "strong" to describe the required policy necessary to supersede parties' agreement to a particular state's law; in fact, it only used the word "strong" to describe California's public policy of enforcing choice of law provisions. (*Id.* at 465.) The words used in the *Nedlloyd* decision establish

that Pitzer is wrong in contending that the Court's use of the term "fundamental" was not significant.[3]

Moreover, "fundamental" and "strong" are not synonyms of one another, and their dictionary definitions are distinct. (*Compare* Merriam Webster (10th Ed.), p. 472, "fundamental" (e.g., "serving as an original or generating source" or "belonging to one's innate or ingrained characteristics") *with* Merriam Webster (10th Ed.), p. 1166, "strong" (e.g., "not mild or weak" or "well established").)

It makes sense that the modern approach as articulated in Restatement section 187 and *Nedlloyd* involves a careful choice of words in requiring a "fundamental" policy to overcome a choice of law clause. Logically, something more than a "strong" policy should be necessary to overcome California's equally "strong" public policy in favor of enforcing parties' choice of law. (*Nedlloyd, supra*, 3 Cal.4th at 465; *see also Washington Mutual Bank, FA v. Superior Court* (2001) 24 Cal.4th 906, 917.)

In arguing it should only have to offer a "strong public policy" to avoid the choice of law provision that undermines its claim, Pitzer cites to a pre-*Nedlloyd* case: *Frame v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1971) 20 Cal.App.3d 668. As noted by Justice Kennard in her *Nedlloyd* concurrence and dissent, "strong policy" was used before *Nedlloyd* adopted Restatement section 187. (*Nedlloyd, supra*, 3 Cal.4th at 479-480.) Therefore, the wording of the test as used in these pre-*Nedlloyd* cases should not be relied on in identifying the proper standard.

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[3] Justice Kennard's concurrence and dissent in *Nedlloyd* noted the existence of a distinction between the historical California "strong" articulation and the Restatement's "fundamental" standard, describing the two as only "similar." (*Nedlloyd, supra*, 3 Cal.4th at 479, 483.)

This Court has substantively addressed the choice of law test two times following *Nedlloyd*.[4] In *Washington Mutual Bank*, *supra*, 24 Cal.4th 906, the Court used only "fundamental" to describe the standard (and then ultimately remanded the case to the trial court for a choice of law determination). In *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148, the Court cited both *Nedlloyd* and *Washington Mutual* in setting forth the correct "fundamental" standard in comments to guide the Court of Appeal on remand. The word "strong" does show up two times in *Discover Bank*, both times when quoting *America Online, Inc. v. Superior Court* (2001) 90 Cal.App.4th 1, which in turn was quoting the pre-*Nedlloyd* case *Hall v. Superior Court* (1983) 150 Cal.App.3d 411.[5]

Of the 27 published post-*Nedlloyd* Court of Appeal cases that have addressed the *Nedlloyd* test, 20 have used "fundamental" in describing the standard necessary to overcome parties' choice of law (and not "strong"). In light of the overwhelming number of cases that have used "fundamental" and not "strong" to describe the necessary policy, the very few cases that have referred to a "strong" policy as being the standard – mostly in dicta – do not provide a reasoned basis to depart from the actual standard specified in *Nedlloyd*. (*Discover Bank*, *supra*, 36 Cal.4th 148 (*see* discussion in prior paragraph); *Maxim Crane Works, L.P. v. Tilbury Constructors* (2012) 208 Cal.App.4th 286 (used both "strong" and "fundamental," but relative importance of the required policy was not material because the court found there was no policy implicated); *America Online*, *supra*, 90 Cal.App.4th 1

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[4] *Advanced Bionics Corp. v. Medtronic, Inc.* (2002) 29 Cal.4th 697, *as modified* (Mar. 5, 2003) cites *Nedlloyd* but the Court expressly stated it was not reaching choice of law issues.

[5] On remand, the Court of Appeal correctly applied the "fundamental" standard. (*Discover Bank v. Superior Court* (2005) 134 Cal.App.4th 886, 893.)

(quoted pre-*Nedlloyd* case *Hall*, involved a policy as expressed in a statute, and considered choice of forum, not choice of law); *Application Group, Inc. v. Hunter Group, Inc.* (1998) 61 Cal.App.4th 881 (used the term "strong" in citing to pre-*Nedlloyd* cases, but otherwise used the term "fundamental"); *Weber, Lipshie & Co. v. Christian* (1997) 52 Cal.App.4th 645 (dicta).)

Pitzer incorrectly implies that *Nedlloyd* approved of the use of the "strong" policy wording used in prior Court of Appeal cases. (*See Mencor Enterprises, Inc. v. Hets Equities Corp.* (1987) 190 Cal.App.3d 432, 435-436; *Hall, supra*, 150 Cal.App.3d at 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.) The *Nedlloyd* decision observed that these prior cases, "although not always explicitly referring to the Restatement, also overwhelmingly reflect the modern, mainstream approach adopted in the Restatement."[6] (*Nedlloyd, supra*, 3 Cal.4th at 464.) The Court then stated that it was "reaffirm[ing] this approach," by adopting Restatement section 187. (*Id.*) However, it was the "fundamental" standard of Restatement section 187, and not the prior phrasing of the "strong" policy standard,[7] that *Nedlloyd* directed that California courts use in future cases.

This Court should confirm that a policy must be "fundamental" in order to override California's "strong" public policy in favor of choice of law provisions.

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[6] As relevant to the discussion in the next section, each of these four cases concerned a public policy derived from statute or constitution.

[7] Notably, none of the prior cases cited by *Nedlloyd* had discussed California's "strong" public policy of enforcing choice of law provisions, so the need to articulate a higher standard than "strong" may have been less apparent.

2. *Nedlloyd* Established That a "Fundamental" Policy is One Set Forth in a Statute or Constitution (Now Expanded to a Principle of Unconscionability), and Designed to Restrict Freedom of Contract

Nedlloyd twice articulated what constitutes a "fundamental" policy, once for each cause of action it addressed. The first time the Court found there was no fundamental policy because there was no "government regulatory policy designed to restrict freedom of contract." (*Nedlloyd*, *supra*, 3 Cal.4th at 468.) The second time the Court found no fundamental policy because there was "no California statute or constitutional provision designed to preclude freedom of contract in this context." (*Id.* at 471.) Thus, *Nedlloyd* applied a practical test to determine what constitutes a fundamental policy sufficient to override the parties' contractual choice of law: the policy must be a government regulatory policy (i.e., set forth in a statute or constitution) that is designed to restrict or preclude freedom of contract. In practice, the test has been expanded to address situations where application of the chosen law violated an established rule of contractual unconscionability under California law.[8] (*See, e.g.*, *Discover Bank*, *supra*, 36 Cal.4th 148.)

Pursuant to *Nedlloyd*, as expanded by *Discover Bank*, for a California policy to overcome California's "strong" public policy of enforcing parties' choice of law, the California policy must be so important that it is enacted into law or the clause is so unfair as to be unconscionable. (*See, e.g.*, *Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1145 (holding that one of the recognized measures of unconscionability is when

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[8] Pitzer argues Indian Harbor did not until appeal acknowledge that unconscionability could constitute a "fundamental" policy. Pitzer is mistaken. Indian Harbor's Reply brief in the trial court made that very point. (MSJ Reply at 14:15-15:6.)

a contract provision "shock[s] the conscience").) Under this approach, a common law cause of action or limitation on defense is insufficient to overcome the strong public policy of enforcing parties' agreement regarding choice of law.

This Court's analysis in *Nedlloyd* that limited a "fundamental" policy to that set forth in a constitution or statute did not arise in isolation, as it appears to parallel this Court's pronouncements on what constitutes a fundamental public policy in the context of *Tameny* claims (*Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167). In *Tameny*, the Court created an exception to the at-will employment rule if the employee could show he or she was discharged in contravention of a "fundamental public policy." (*Id.*) In *Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083 (decided six months before *Nedlloyd*), the Court cautioned that "'public policy' as a concept is notoriously resistant to precise definition, and that courts should venture into this area, if at all, with great care and due deference to the judgment of the legislative branch." (*Id.* at 1095.) The Court in *Gantt* therefore held that an employee must show that the interests they seek to protect are "carefully tethered to fundamental policies *that are delineated in constitutional or statutory provisions*." (*Id.* at 1095 (emphasis added); *see also Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 889 (repeating standard and noting it allows employers to have "adequate notice of the conduct that will subject them to tort liability").) It seems likely that this Court had in mind its cautionary view of six months earlier in *Gantt* when it decided in *Nedlloyd* to limit a "fundamental" public policy to one tethered to constitutional or statutory provisions before a California court should consider overriding California's "strong" public policy of enforcing parties' contractual choice of law.

While Pitzer recognizes that *Nedlloyd* "articulated the standard" for when a California policy negates parties' choice of law (OB pp. 20-21),

Pitzer attempts to abbreviate the test *Nedlloyd* applied to permit Pitzer to argue that a common law rule can be a fundamental policy. This would be a chance in established law that is unwarranted. Specifically, Pitzer ignores the first part of the test (that it be set forth in a government regulatory policy, *i.e.*, a statute or constitution) and wishes to satisfy only the second part of the test (a restriction on freedom of contract).[9] The reason Pitzer does so is obvious: it cannot demonstrate the first requirement. However, Pitzer cannot pick and choose the portion of the *Nedlloyd* test it wants to apply.

Pitzer's alleged support for its broad view of what can be a fundamental policy that trumps a choice of law provision are not helpful to it. For instance, Pitzer suggests that fundamental policies should be found in common law that benefits policyholders, noting that Comment (g) to Restatement section 187 states:

> [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 by Pitzer (OB pp. 24-25).)

However, this comment is entirely consistent with the actual test used in *Nedlloyd* and Indian Harbor's argument: a fundamental policy may be found in what is codified by statute, but there is no suggestion that common law rules about coverage defenses can constitute a "fundamental" policy.

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[9] Pitzer states: "A rule is designed to restrict freedom of contract when private parties to a contract cannot contract around the rule." (OB p. 21.) However, not just any "rule" can be a fundamental policy: *Nedlloyd* specifically identified "government regulatory policy," "statute," or "constitutional provision."

In addition, here we are not dealing with a consumer/"person" that needs the protection of the courts "against the oppressive use of superior bargaining power" – Pitzer is a sophisticated private institution that had others (including insurance professionals) negotiating and buying specialized insurance on its behalf.

Indian Harbor does not disagree with Pitzer that cases and the Restatement section 187 have said there is no bright-line rule, as not every statute will be considered a fundamental policy. However, that does not justify a departure from *Nedlloyd*'s specific articulation of the restricted approach to be followed in determining what is a fundamental policy in this context. In addition, a jurisdiction can develop its own practical approach for applying this standard, as this Court did in *Nedlloyd*, following the approach it had recently taken in *Gantt*.

Pitzer's argument that the *Nedlloyd* test should be read loosely to elevate common law policies over choice of law clauses is belied by the actual outcomes in the appellate decisions that have applied it. A review of all of the published California Court of Appeal decisions that have been issued since *Nedlloyd* reveals that the only time a choice of law provision has not been enforced based on the "fundamental" prong of the *Nedlloyd* test has been when the selection of another state's law was contrary to a policy set out in a statute, constitution, or rule of unconscionability:

- *Discover Bank, supra*, 36 Cal.4th 148: class action waiver was unconscionable under California law[10];
- *Rincon EV Realty LLC v. CP III Rincon Towers, Inc.* (2017) 8 Cal.App.5th 1: waiver of jury trial in contract violates California constitution and statute;

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[10] Pitzer correctly notes that this case was abrogated by *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333.

- *Pinela v. Neiman Marcus Group, Inc.* (2015) 238 Cal.App.4th 227: arbitration provision unconscionable;
- *Samaniego v. Empire Today LLC* (2012) 205 Cal.App.4th 1138: arbitration provision unconscionable;
- *Aronson v. Advanced Cell Technology* (2011) 196 Cal.App.4th 1043: unilateral attorneys' fees provision was contrary to fundamental policy set forth in California Civil Code section 1717;
- *Brack v. Omni Loan Co., Ltd.* (2008) 164 Cal.App.4th 1312: chosen law conflicted with "fundamental California policy as manifested in the Finance Lenders Law";
- *Klussman v. Cross Country Bank* (2005) 134 Cal.App.4th 1283: class action waiver unconscionable under California law;
- *ABF Capital Corp. v. Grove Properties Co.* (2005) 126 Cal.App.4th 204: unilateral attorneys fee provision was contrary to a fundamental policy set forth in California Civil Code section 1717;
- *Application Group*, *supra*, 61 Cal.App.4th 881: noncompetition clause unenforceable under Cal. Bus. & Prof. Code § 16600 and 17200.

Most of the time, however, the California Courts of Appeal enforce the choice of law provision in post-*Nedlloyd* decisions, in keeping with California's strong public policy of doing so as memorialized in that decision. No such case has enforced a public policy existing solely in judicially-created common law concerning causes of action or defenses.

This same result can be seen in reported Ninth Circuit cases applying California law: the Ninth Circuit has declined to enforce choice of law

provisions only when the relevant policy violates a statute, constitution, or principle of unconscionability; for example:

- *First Intercontinental Bank v. Ahn* (9th Cir. 2015) 798 F.3d 1149: rejecting unilateral attorneys' fees provision as contrary to Cal. Civil Code § 1717;
- *Ruiz v. Affinity Logistics Corp.* (9th Cir. 2012) 667 F.3d 1318: rejecting choice of GA law when in conflict with legislation protective of employment rights;
- *Bridge Fund Capital Corp. v. Fastbucks Franchise Corp.* (9th Cir. 2010) 622 F.3d 996: rejecting choice of TX law in conflict with CFIL statute protecting franchisees;
- *Omstead v. Dell, Inc.* (9th Cir. 2010) 594 F.3d 1081: rejecting choice of TX law in conflict with principle of unconscionability of class action waivers.

The outlier trial court decision cited by Pitzer as its support for finding a fundamental public policy in the common law rules that apply to insurance, *Tri-Union Seafoods, LLC v. Starr Surplus Lines Ins. Co.* (S.D. Cal. 2015) 88 F.Supp.3d 1156, runs directly afoul of *Nedlloyd*, was incorrectly decided, and should not be relied on to change California law. In *Tri-Union*, the district court found that the tort remedy for an insurer's breach of the implied covenant of good faith and fair dealing is a "fundamental" public policy of California; therefore, the court disregarded the parties' New York choice of law. (*Id.* at 1170.) This outcome directly contradicts *Nedlloyd*, which addressed the same cause of action, finding that the tort of bad faith is not a "fundamental" policy. *Nedlloyd* did so in the context of a more protected relationship between the parties – a fiduciary's duty to its principal – than the insurer-insured relationship at issue in *Tri-Union*. (*See, e.g., Vu v. Prudential Prop. & Cas. Ins. Co.* (2001) 26 Cal.4th 1142, 1150-1151 (holding that the insured-insurer

relationship does not rise to the level of a fiduciary relationship).) If this Court in *Nedlloyd* did not find the right to a common law cause of action arising out of a fiduciary relationship to be "fundamental," the *Tri-Union* district court likewise should not have found the right to a common law cause of action arising out of a lesser relationship (the insured-insurer relationship) to be "fundamental," and thus should not have refused to enforce the choice of law clause. The *Tri-Union* opinion conflicts with *Nedlloyd* and should be disregarded.

As a means of balancing conflicting policies, the *Nedlloyd* standard as applied in that case is superior to the looser approach advocated by Pitzer because it gives contracting parties the predictability and consistency they were aiming to achieve in having a choice of law provision in the first place. In her concurring and dissenting opinion in *Nedlloyd*, Justice Kennard recognized this important objective:

> Parties enter into contracts to allocate risks and to bring certainty, order, and predictability to their mutual relations. One of the principal aims of contract law is to assist contracting parties in achieving this objective by making the outcome of legal disputes clear and predictable. When the parties are residents of different jurisdictions, or their activities span state or national borders, the potential application of the varying legal rules of different jurisdictions undermines the parties' efforts to avoid unexpected legal consequences. When the parties have anticipated and provided for this problem by including in their agreement a choice-of-law provision, courts should generally give effect to the provision. In so doing, courts protect the parties' reasonable expectations and establish a legal climate in which commerce can flourish.

(*Nedlloyd*, *supra*, 3 Cal.4th at 494 (concurring and dissenting opinion); *see also* Comment (e) to Restatement section 187.)

Indian Harbor respectfully urges this Court to reaffirm the *Nedlloyd* "fundamental policy" test and limit "fundamental" policies to those found in statutes, constitutions, or principles of unconscionability, and that restrict

freedom of contract. The *Nedlloyd* test strikes the best balance between honoring parties' intent and expectations, while safeguarding California's most important policies.

B. California's Notice-Prejudice Rule is Not a "Fundamental" Policy of the State That Should Supersede the Choice of Law Clause in This Policy

As discussed above, the appropriate "fundamental" policy test for avoiding an agreed choice of law requires that the policy be set forth in a statute, constitution, or principle of unconscionability designed to restrict freedom of contract. The notice-prejudice rule is not set forth in any applicable statute[11] or constitution and does not arise out of any unconscionability concerns;[12] it is a judicially created rule, adding an element to the late notice defense in occurrence policies. Therefore, this Court should find that the common law notice-prejudice rule is not a fundamental policy.

However, the lack of any foundation in government regulatory policy is not the only defect in Pitzer's novel argument that the notice-prejudice rule is fundamental. As the trial court observed, there is no

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[11] In the uninsured motorist context, the notice-prejudice rule *is* set forth in a statute. (*See* Cal. Ins. Code, § 11580.23.) Accordingly, the notice-prejudice rule may be a fundamental policy in the context of insurance for uninsured motorists, but not in others. Other states have codified broader applications of the notice-prejudice rule (*see, e.g.*, Md. Code Ann., Ins. § 19-110; N.Y. Ins. Code § 3420(a)(5); Wis. Stat. Ann. § 631.81), but California has not done so.

[12] Time limitations in insurance policies are not unconscionable and have been repeatedly upheld by California courts. (*See infra*, pp. 36-37.) In addition, the notice requirement in insurance policies has never been found to be unconscionable; nor should it be: under California law, these provisions are enforceable in occurrence policies as long as the insurer proves the additional "prejudice" element.

applicable precedent for the notion that the notice-prejudice rule is a "fundamental" policy of California, generally or for this type of claims-made policy. (ER 13.) No case has ever held that California's notice-prejudice rule is a "fundamental" California policy. In fact, no reported case nationwide has held that the notice-prejudice rule defeats the parties' contractual choice of law when the notice-prejudice rule is a judicial creation.[13] The District Court's ruling in this case was consistent with national precedent enforcing New York choice of law provisions in the face of "public policy" challenges based on common law notice-prejudice rules. (*See, e.g., St. Paul Fire and Marine Ins. Co. v. Board of Com'rs of Port of New Orleans* (E.D. La. 2009) 646 F.Supp.2d 813, aff'd (5th Cir. 2011) 418 Fed.Appx. 305; *St. Paul Travelers Companies, Inc. v. Corn Island Shipyard, Inc.* (S.D. Ind. 2006) 437 F.Supp.2d 837, aff'd on other grounds (7th Cir. 2007) 495 F.3d 376.)

This Court should not create new law that the notice-prejudice rule is a "fundamental" policy here because: (1) California's notice-prejudice rule generally is not similar to a "fundamental" policy; (2) California's notice-prejudice rule has not been applied to a claims-made-and-reported policy, and it should not apply to this policy; and (3) no public interest is offended

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[13] In its Reply in the Ninth Circuit, and in rebuttal oral argument there, Pitzer relied on *In re ATP Oil & Gas Corp.* (Bankr. S.D. Tex. June 5, 2015) 531 B.R. 694, 2015 WL 3545091, which declined to apply a New York choice of law provision to a late notice coverage defense. Pitzer argued that the *ATP* court had found the notice-prejudice rule to be a "fundamental" Texas policy. However, that was a mischaracterization of the decision, as the Texas court actually found that a Texas statute against such provisions invalidated the choice of law provision before it. As California has no such statute, the case is irrelevant to the issues before this Court. Pitzer has apparently dropped its argument related to *ATP*, as it has not cited the case to this Court.

if the parties' rights are governed by the New York law specified by their contract.

1. California's Notice-Prejudice Rule Generally is Not Similar to a "Fundamental" Policy

a. The Nature of the Notice-Prejudice Rule is Not Similar to a "Fundamental" Policy

California's notice-prejudice rule has never been treated as a "fundamental" policy. It is not a public policy that bars prompt notice provisions or that renders them unenforceable. Rather, it simply adds one judicially created element (prejudice) to a defense based on breach of the prompt notice provision. Adding this additional element to a defense bears no analytic similarity to the very small group of fundamental policies that have been found by California courts to be so important that they overcome the parties' choice of law: the right to bring a class action (*Discover Bank & Klussman*); the right to jury trial (*Rincon*); the unconscionability of certain arbitration provisions (*Pinela & Samniego*); the bar to unilateral fee clauses (*Aronson & ABF*); the statutory rights of borrowers (*Brack*); and the bar to noncompetition clauses (*Application Group*). (*See supra* at pp. 29-30.)

Changing the elements of a contractual defense (which the notice-prejudice rule does) is not like the absolute rights and prohibitions recognized as fundamental in the foregoing cases; instead it is much more akin to changing the burden of proof on a common law tort claim, which was permitted to be increased by chosen law in *General Signal Corp. v. MCI Telecom. Corp.* (9th Cir. 1995) 66 F.3d 1500, 1506 (enforcing choice of New York law that imposed higher burden of proof for fraud claim). And finding that Pitzer's agreement to New York law deprives it of the benefit of this additional element of proof for Indian Harbor's late notice defense is analytically at least equal to, and probably less fundamental than,

exactly what this Court permitted in *Nedlloyd* itself, where the plaintiff's agreement to Hong Kong law deprived the plaintiff of the implied rights to a fiduciary duty and the covenant of good faith and fair dealing, as well as the right to bring tort claims to enforce those rights. California appellate courts have never found that common law rights regarding claims and defenses should trump a choice of law clause; to do so would be to undermine California's strong public policy in favor of such clauses and the very purpose of such clauses.

b. The Scope of the Notice-Prejudice Rule is Not Similar to a "Fundamental" Policy

California's notice-prejudice rule has not been applied in a way that supports it being found to be a "fundamental" policy – it is a rule of limited application with numerous and varied exceptions.

Every one of the cases that Pitzer cites for the importance and settled nature of California's notice-prejudice rule concern the prompt notice provision in an occurrence-based third-party liability insurance policy, where the policy insures injury or damage during the policy period, and claims may arise long after the policy period.[14] However, the rule has not been treated as "fundamental" for all provisions in such occurrence policies, and it has not even been applied to other timed notice requirements in such policies. For instance, in *Venoco, Inc. v. Gulf Underwriters Ins. Co.* (2009) 175 Cal.App.4th 750, 760, a general liability occurrence policy contained a pollution exclusion but also a pollution "buy-

[14] This Court several times has recognized important distinctions between occurrence policies and claims-made policies. (*See, e.g., Montrose Chemical Corp. v. Admiral Ins. Co.* (1995) 10 Cal.4th 645, 688–89 (discussing the differences); *Bay Cities Paving & Grading, Inc. v. Lawyers' Mutual Ins. Co.* (1993) 5 Cal.4th 854, 865 ("Depending on the question before a court, the type of policy – 'claims-made' or 'occurrence' – can be significant to the outcome.").)

back," which provided pollution coverage when certain requirements were met, including that the insured gave notice within 60 days of an accident. (*Id.* at 755-756.) The insured argued that the notice requirement was subject to the notice-prejudice rule or was against public policy, but the Court of Appeal disagreed, finding that the notice-prejudice rule "does not apply to every time limit on any insurance policy." (*Id.* at 760.)

As discussed further in Section II below, and as Pitzer concedes, it is well-established that the notice-prejudice rule also does not apply to the consent provision of occurrence-based liability policies. (*See, e.g., Insua v. Scottsdale Ins. Co.* (2002) 104 Cal.App.4th 737, 746; *Jamestown Builders, Inc. v. General Star Indemnity Co.* (1999) 77 Cal.App.4th 341, 349.)

Moreover, prejudice need not be shown when an insured fails to comply with a first-party policy's contractual time limitation to bring a lawsuit against an insurer. (*See, e.g., State Farm Fire & Cas. Co. v. Sup. Ct.* (1989) 210 Cal.App.3d 604, 612 (no prejudice required); *see also CBS Broad. Inc. v. Fireman's Fund Ins. Co.* (1999) 70 Cal.App.4th 1075, 1084 (these provisions do not violate California public policy); *see also* Cal. Ins. Code § 550.)

Perhaps most relevant to this matter, California courts have found that the notice-prejudice rule is not applicable to the insuring agreement requirement in a claims-made policy that a claim must be reported during the policy period. (*See, e.g., Pacific Employers Ins. Co. v. Superior Court* (1990) 221 Cal.App.3d 1348, 1357 (holding that the notice-prejudice rule does not apply to claims-made policies); *see also Burns v. International Ins. Co.* (9th Cir. 1991) 929 F.2d 1422, 1425 (in the claims-made policy context, the Court rejected the argument that the notice-prejudice rule has been universally adopted in California as a matter of public policy).)

A common law rule of such limited scope should not be considered so "fundamental" as to override a contractual choice to govern by another state's law.

2. California's Notice-Prejudice Rule Has Not Been Applied to Claims-Made-And-Reported Policies and Should Not Be Applied to This Policy

As discussed above, California courts and the Ninth Circuit have repeatedly found that the notice-prejudice rule does not apply to the insuring agreement's policy period reporting requirement in claims-made policies. No California court has yet addressed whether the rule applies to the separate prompt notice requirement in the conditions of a claims-made policy with a reporting requirement, and Indian Harbor respectfully urges this Court to expressly hold that the notice-prejudice rule does not apply at all in the context of this type of policy, at least one that is between sophisticated parties.

The New Jersey Supreme Court case recently reached this conclusion in *Templo Fuente De Vida Corp. v. National Union Fire Ins. Co. of Pittsburgh* (2016) 224 N.J. 189, holding that the insurer did not need to demonstrate prejudice to deny coverage based on the failure to comply with the notice "as soon as practicable" requirement as expressed in a condition in a claims-made-and-reported Director's & Officers liability policy, even though New Jersey applied a notice-prejudice rule to occurrence liability policies. (*Id.* at 210.)

Noting "the conceptual differences between 'claims made' and 'occurrence' policies," the *Templo Fuente* court stated: "Both 'claims made' and 'occurrence' policies contain reporting requirements, but the importance and terms of those requirements differ. The distinctive roles that reporting requirements play in 'claims made' versus 'occurrence'

policies not only addresses the basic difference between the two policies, but informs our judicial interpretation of those requirements." (*Id.* at 202.)

New Jersey's highest court reasoned that a no-prejudice rule in claims-made policies fulfilled the reasonable expectations of the parties. (*See id.* at 205.) In particular, the court noted that insureds on claims-made policies are usually more sophisticated than insureds on occurrence policies. (*Id.* at 208-209.) The court found that the insured was such a sophisticated party, based on the fact that it was not an individual, but an "incorporated business entity that engaged in complex financial transactions." (*Id.* at 208.) Further, the policy was "not a simple personal liability insurance policy." (*Id.*) The insured "listed itself as having at least fourteen full-time employees, two part-time employees, and a human resources department." (*Id.*) The court also noted that a broker had been involved in procuring the policy on the insured's behalf. (*Id.*)

Similarly, here, CUC and Pitzer, both named insureds on the policy, are sophisticated insureds. CUC has been in existence for almost a century. (Website: http://www.cuc.claremont.edu/ceo-welcome/ (last visited 6/20/17).) It performs a number of centralized services for the seven Claremont colleges, including insurance services: CUC has a dedicated Insurance Administrator and other insurance personnel that handle the risk management functions for the member colleges, including insurance purchasing and handling claims. (ER 161-162 at ¶¶ 6-7; SER 268 at 27:1-8; SER 339 at 16:3-22.) Pitzer was founded in 1963 and has a President, multiple Vice Presidents, a Board of Trustees, and a sophisticated administration. (Website: http://pitweb.pitzer.edu/ (last visited 6/15/17).) Since at least 1999, CUC, as Pitzer's agent, has purchased similar specialized Pollution and Remediation Legal Liability policies as part of its comprehensive insurance program, following yearly presentations and recommendations from its national commercial broker and Insurance

Administrator. (ER 211 at ¶¶ 13-14; SER 9, 13, 23, 25, 67; SER 357-358 at 22:1-23:20.) The policy negotiated and eventually issued included nine endorsements and provided for $5 million in limits for a premium of only $27,535, shared among the seven member colleges.[15] (ER 219-220; SER 267 at 26:13-14).

CUC and Pitzer, therefore, are sophisticated entities for whom strict application of the notice provisions of this claims-made policy is within their reasonable expectations. In fact, the loss of coverage by the breach of the policy's notice and consent conditions is exactly what CUC and its broker both actually expected: as CUC told Pitzer, "[t]he policy is very clear on the reporting requirements," and so coverage for the remediation likely would be denied. (SER 220, 240.) Enforcing the policy's prompt notice requirement is simply applying the unambiguous terms of the insurance policy. As the New Jersey Supreme Court noted in *Templo Fuente* in enforcing the prompt notice provision: "We need only enforce the plain and unambiguous terms of a negotiated Directors and Officers insurance contract entered into between sophisticated business entities." (*Templo Fuente*, *supra*, 224 N.J. at 209.)

Pitzer argues that the insurance policy is a contract of adhesion, but it has provided no proof of this. In fact, evidence is to the contrary: the insured is a sophisticated entity who negotiated the policy through an Insurance Administrator and a broker; there were endorsements to the policy; and the policy cost a relatively modest sum. (*See*, *supra*, pp. 15-

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[15] This can be compared with the quoted premiums for the occurrence-based general liability policies in the same year as this policy, which ranged from approximately $200,000 to $350,000. (*See* SER 135.)

16.) In addition, no California court has found that a claims-made policy between sophisticated parties is a contract of adhesion.[16]

Sophisticated parties like CUC and Pitzer do not need additional judicially-created consumer protections against unfair bargaining power when they are purchasing specialized claims-made-and-reported policies for business risks. The public policy of relieving ordinary consumers from prospective forfeiture with respect to standardized occurrence-based liability policies should not be extended to claims-made-and-reported policies. Indian Harbor urges this Court to follow the lead of the New Jersey Supreme Court and hold that the notice-prejudice rule will not be extended to any part of these types of policies, which would also answer the question of whether the rule is a fundamental policy with respect to such specialized insurance.

3. No Public Interest is Offended By Applying the New York Law Permitting the Insurer to Enforce the Notice Provision As Agreed in the Contract

The parties agreed that New York law would apply to resolution of their disputes. While Pitzer asserts that the inclusion of the choice of law provision in the contract is a "tactic" and implies untoward conduct by Indian Harbor, there is no evidence in the record of any improper motive. Rather, the record reflects that the New York choice of law was included to maintain uniformity, clarity, and consistency in the application of Indian Harbor's policies, for the benefit of itself and its policyholders. (ER 211, at

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[16] Regardless, under established California law, Pitzer should still be held to the choice of law provision in the policy; this Court has stated: "California . . . has no public policy against the enforcement of choice-of-law provisions contained in contracts of adhesion where they are otherwise appropriate." (*Washington Mut., supra*, 24 Cal.4th at 917-918 (holding that the *Nedlloyd* analysis applies "in the context of consumer adhesion contracts").)

¶ 12.) New York law applies to *all* provisions of the policy, not just the late notice provision. Indian Harbor did not include the New York choice of law provision in order to circumvent California's notice-prejudice rule, and Pitzer was unable to demonstrate any evidence of this contention. And it was Pitzer that failed to timely notify Indian Harbor first of the discovery and then later the anticipated remediation. Indian Harbor simply applied the contract according to its terms, in exactly the way that the people who negotiated the contract (CUC and the broker) expected, given the clear contract provisions.

The State of New York has a well-articulated separate interest in having its law govern commercial transactions when the parties have so chosen, as they have here. (*See* N.Y. General Obligations Law § 5-1401 (2015) (requiring enforcement of qualifying New York choice of law provisions "whether or not such contract, agreement or undertaking bears a reasonable relation to this state").) The New York Court of Appeals, the highest court in New York, has stated that the goal of this New York law is "to promote and preserve New York's status as a commercial center and to maintain predictability for the parties." (*IRB-Brasil Resseguros, S.A. v. Inepar Investments, S.A.* (2012) 20 N.Y.3d 310, 315-16; *see also Indian Harbor Ins. Co. v. City of San Diego* (S.D.N.Y. 2013) 972 F.Supp.2d 634, 651, *aff'd* (2d Cir. 2014) 586 Fed.Appx. 726; *Usach v. Tikhman* (S.D.N.Y. Dec. 7, 2011) No. 11-cv-1472, 2011 WL 6106542, at *6 (for agreements governed by statute, the parties' choice of law provision is enforceable even if application would violate a fundamental public policy of another, more interested jurisdiction) (quoting *Tosapratt, LLC v. Sunset Props., Inc.* (2011) 86 A.D.3d 768, 926 N.Y.S.2d 760, 763 (slip op.) (internal quotation marks omitted).)

This interest is not unique to New York. California recognizes and shares exactly this same interest, and it has a substantively identical statute

enforcing choice of law when parties have selected California law to govern their contract. (Cal. Civil Code § 1646.5.)

Pitzer's denigration of New York courts' enforcement of the notice provision as "tortured and Kafkaesque" demeans New York jurisprudence, is incorrect, and is belied by Pitzer's own brief, where it succinctly (in one paragraph) summarizes New York law. Specifically, for decades, New York common law did not require a showing of prejudice to apply the late notice defense except in certain limited circumstances not relevant here. (*See, e.g., Briggs Ave LLC v. Ins. Corp. of Hannover* (2008) 11 N.Y.3d 377, 381-82.) Since 2009, New York Insurance Statute § 3420 requires prejudice to be shown to avoid coverage for late notice for certain policies "issued or delivered" in New York. (*See* N.Y. Ins. Code § 3420(a)(5).) Per Section 3420(i), section 3420 does not apply to maritime insurance (N.Y. Ins. Code § 2117(b)(3)) or worker's compensation insurance, and Section 3420(a) only applies to policies "insuring against liability for injury to person . . . or against liability for injury to, or destruction of, property" (N.Y. Ins. Code § 3420(a)). New York courts consistently have enforced the statute according to its limited terms, applying the decades-old common law no-prejudice rule when the statute does not apply. (*See, e.g., Indian Harbor Ins. Co., supra*, 586 Fed.Appx. at 729 fn.3 (applying NY choice law to deny coverage for late notice by California insured under a substantially similar pollution liability policy); *Briggs Ave LLC, supra*, 11 N.Y.3d 377 at 381-82.)

Pitzer argues that "California's choice of law rules should prevent this inequitable result." (OB p. 12.) However, there is nothing inequitable in holding sophisticated entities to the terms of the contracts they enter. Nor is it California's policy to disregard a choice of law simply because doing so benefits a California insured – "[t]he mere fact that the chosen law provides greater or lesser protection than California law, or that in a

particular application the chosen law would not provide protection while California law would, are not reasons for applying California law." (*Century 21 Real Estate LLC v. All Professional Realty, Inc.* (9th Cir. 2015) 600 Fed.Appx. 502, 504, quoting *Medimatch, Inc. v. Lucent Tech. Inc.* (N.D. Cal. 2000) 120 F.Supp.2d 842, 862.)

Pitzer has not cited any compelling reason New York law should not be applied here.

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For the above reasons, Indian Harbor respectfully requests that this Court answer the first certified question in the negative.

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

For almost half a century, this Court has recognized that insurance policies' consent provisions are enforceable according to their terms. (*Gribaldo, Jacobs, Jones & Associates v. Agrippina Versicherunges A.* (1970) 3 Cal.3d 434, 448-449.) Since then, California courts have uniformly refused to require a showing of prejudice to enforce the consent provision, despite repeated urgings by insureds. (*See, e.g., Low v. Golden Eagle Ins. Co.* (2003) 110 Cal.App.4th 1532, 1545; *Insua, supra*, 104 Cal.App.4th at 746; *Jamestown Builders, supra*, 77 Cal.App.4th at 349; *see also Faust v. The Travelers* (9th Cir. 1995) 55 F.3d 471, 472; *Dietz Intern. Public Adjusters of California, Inc. v. Evanston Ins. Co.* (C.D. Cal. 2011) 796 F.Supp.2d 1197, 1214, *aff'd* (9th Cir. 2013) 515 Fed.Appx. 680.)

California is not alone in this approach; courts around the country have enforced consent provisions according to their terms, without imposing a prejudice requirement. (*See, e.g., Travelers Property Casualty Company of America v. Stresscon Corporation* (Colo. 2016) 370 P.3d 140; *Piedmont Office Realty Trust, Inc. v. XL Specialty Ins. Co.* (2015) 297 Ga. 38; *Perini/Tomkins Joint Venture v. Ace American Insurance Co.* (4th Cir.

2013) 738 F.3d 95; *Tenneco, Inc. v. Amerisure Mutual Insurance Co.* (2008) 281 Mich. App. 429; *New York Central Mut. Fire Ins. Co. v. Danaher* (3rd Dep't. N.Y.S. 2002) 290 A.D.2d 783; *Augat v. Liberty Mutual Ins. Co.* (1991) 410 Mass. 117.)

Pitzer does not advocate for disturbing this line of cases; therefore, there is no reason for this Court to revisit *Gribaldo* or its progeny. However, Pitzer asks this Court to create a new exception to this consistently applied rule that has never been recognized and is contrary to both the sound reasoning in existing case law and the good reasons for applying a consent provision according to its terms.

Specifically, Pitzer asks this Court to find – contrary to its title, coverage name, and coverage terms – that the policy is a first-party policy and that the no-prejudice rule and its reasoning do not apply to first-party policies. The policy is not a first-party policy: it insures against *liability* for remediation, not *loss* to property value. Regardless of how the policy is classified, however, the consent provision should be enforced according to its terms, and California courts' recognized justifications for the no-prejudice rule in the context of consent provisions have at least equal applicability here.

A. The Policy is Not a "First-Party" Policy

Pitzer over-simplifies the distinction between first-party and third-party policies and, based on that, concludes that the policy here is a first-party policy. Just because the remediation was of Pitzer's own property does not mean that the policy is a traditional first-party policy, as argued by Pitzer. (OB p. 42.) A closer analysis of the distinction between the two types of policies makes it clear that the relevant coverage under the policy is third-party coverage.

First-party coverage is for *loss*, while third-party coverage is for *liability*. First-party coverage, for example, provides insurance for the loss

of the insured's life, house, car, or other personal property. In contrast, third-party coverage provides insurance for amounts the insured becomes legally liable to pay. Pitzer is not seeking to recover the loss of its land; it is seeking amounts for alleged legally required clean-up of that land, which implicates third-party insurance like the policy here.

The analysis in *Montrose Chemical Corp. v. Admiral Ins. Co.* (1995) 10 Cal.4th 645, cited extensively by Pitzer, confirms that the policy is a third-party policy and not a first-party policy. *Montrose* describes that "a first party insurance policy provides coverage for loss or damage sustained directly by the insured . . . ." (*Id.* at 663.) However, the amounts sought here are not for "loss or damage" sustained by Pitzer (e.g., the value of damage to its property), but rather are for the alleged costs of remediation to the extent required by law or "a legally executed state voluntary program ['VCP']. . . ."[17] (ER 224.) Similarly, in *Garvey v. State Farm Fire & Casualty Co.* (1989) 48 Cal.3d 395, 406, this Court stated: "Property insurance, unlike liability insurance, is unconcerned with establishing negligence or otherwise assessing tort liability." (citation omitted). Here, Pitzer's liability needs to be established as part of determining coverage, because there is only coverage under the policy if Pitzer is "*required*" to do remediation.

Montrose also states:

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[17] California's VCP, for instance, is a streamlined cleanup program undertaken through an agreement with the California Environmental Protection Agency's Department of Toxic Substances Control. (*See* https://www.dtsc.ca.gov/SiteCleanup/Brownfields/upload/BF_FS_VCP.pdf (last visited 6/15/17).) The VCP agreement is negotiated with the DTSC, and cleanup is undertaken pursuant to that agreement with the goal of obtaining a site certification of completion or "No Further Action" letter from the DTSC, which concludes any cleanup obligations at the site. (*Id.*) Thus, a VCP is a form of settlement of potential legal liability to regulators.

> 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.

(*Montrose*, *supra*, 10 Cal.4th at 663; *see also id.* (comparing the "loss" caused by "enumerated perils" required for first-party insurance versus the "duty" that triggers third-party liability).) Here, Indian Harbor did not agree to pay money to Pitzer "upon the happening" of the pollution but agreed to "pay on behalf of" Pitzer expenses it became legally obligated to pay to remediate a pollution condition (i.e., if such remediation is required by law or VCP). If Pitzer has no legal obligation to pay for the remediation, there is no coverage.

The distinction between loss on the one hand (first-party) and liability on the other hand (third-party) also is illustrated in the difference in limits purchased, as described in *Montrose*: "First party property coverage is typically purchased in an amount sufficient to cover the insured's maximum potential loss (e.g., fire insurance typically covers the value of the property insured). . . . Third party liability coverage differs substantially. . . . [A]t best, the insured makes an educated guess about its potential exposure to third parties." (*Id.* at 664 (internal quotation marks omitted).) The policy here had specified round-number limits of liability ($5 million) not tied to property value, making it unlike a first-party policy.

While Pitzer wishes to ignore the title of the policy and headings in the policy, it cannot explain why they are incorrect, and in fact these titles and headings accurately summarize the terms of the policy, which are for legal obligations (third-party liability) only. By way of example:

- The word "Liability" is in the title of the policy ("Pollution and Remediation Legal Liability Policy") and in the title of

the applicable Coverage B ("Remediation Legal Liability"). (ER 221.)

- The definition of "REMEDIATION EXPENSE" is limited to "expenses . . . to the extent *required by*" law or an executed VCP. (ER 224 (emphasis added).)

- The insuring agreement states that Indian Harbor will pay amounts "on behalf of" the insured. (ER 221.)

In addition, there is only one consent provision in the policy, and the same provision applies to both coverage of liability for remediation of the insured's own property (as involved in this claim) and coverage of liability for damage to the property of others (which Pitzer admits is a third-party liability coverage). Pitzer's acknowledgment that the notice-prejudice rule does not apply to policy's consent requirement for the defense and settlement of claims by injured third parties cannot be reconciled with and undermines its argument that this Court should make new law applying the notice-prejudice rule for proceeding with remediation of the insured's own property without consent, when there is only one consent requirement in the policy that applies to all coverages.

The policy is a third-party liability policy, the type for which consent provisions have been routinely enforced by California courts. Consistent with such precedent, which Pitzer does not challenge, upon determining that third-party liability coverage is what is at issue here, this Court should answer the Ninth Circuit's second question in the negative.

B. Under the Policy, Indian Harbor Must Be Given the Opportunity to Consent to Remediation and Other Costs

Pitzer's contention that the policy's consent provision is unique and gives Indian Harbor only a "veto right" is contrary to both the policy wording and persuasive authority. But for the "unreasonably withheld" language, the provision is substantively the same to those enforced by the

leading California cases on consent provisions. (*See, e.g., Gribaldo, supra,* 3 Cal.3d at 441; *Jamestown Builders, supra,* 77 Cal.App.4th at 345-346.) Consent provisions with this type of "unreasonably withheld" language have been considered by courts in California and elsewhere, and have been applied no differently. (*See, e.g., National Bank of California v. Progressive Cas. Ins. Co.* (C.D. Cal. 2013) 938 F.Supp.2d 919, 937; *Schwartz v. Liberty Mut. Ins. Co.* (2d Cir. 2008) 539 F.3d 135, 141; *Piedmont Office Realty Trust, Inc., supra,* 297 Ga. at 38–39; *Petro v. Travelers Cas. and Sur. Co. of America* (N.D. Fla. 2014) 54 F.Supp.3d 1295, 1305.)

Under the policy, Indian Harbor has more than a veto right. The consent provision requires "written consent" before "remediation [is] commenced" and costs are incurred. Further, Indian Harbor's obligation in the event of discovery of a pollution condition is to "pay on behalf of" the insured for "REMEDIATION EXPENSE and related LEGAL EXPENSE," which necessarily requires Indian Harbor to be involved in the remediation and the defense of Pitzer. (ER 221.) Significantly, the "pay on behalf of" language also appears in Coverage A and the portion of Coverage B that responds to a "CLAIM" (*id.*), which Pitzer does not dispute are third-party liability coverages.[18]

The "unreasonably withheld" language simply provides that, once consent is sought, Indian Harbor can withhold consent – it just cannot do so "unreasonably." However, for the "unreasonably withheld" language to come into play, Indian Harbor had to have been given the opportunity to consent in the first instance, which it never was. Therefore, even if Indian

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[18] Notably, the third-party liability policy at issue in *Montrose* required the insurer to "pay on behalf of the insured," just like the remediation legal liability coverage here. (*Montrose, supra,* 10 Cal.4th at 656; ER 221.)

Harbor has only a "limited" veto right (which is not supported by the policy language), Indian Harbor was completely deprived of that right.

The vast majority of cases discussing the "unreasonably withheld" language are, predictably, in the context of situations where the insured sought consent, but it was denied, and they enforce the clause in the same way that *Gribaldo* did. (*See, e.g., Piedmont Office Realty Trust, Inc., supra*, 297 Ga. 38 ("unreasonably withheld" language did not change fact that insurer did not give consent to settlement); *Petro, supra*, 54 F.Supp.3d at 1306 (finding that the insurer had not "unreasonably withheld" consent as a matter of law).) These cases find the consent requirement should be applied according to its terms and reasonable denials of consent bar coverage.

As one federal case applying California law illustrates in the context of a consent provision with the "unreasonably withheld" language, where consent is not sought, there is no coverage. (*National Bank of California, supra*, 938 F.Supp.2d 919.) In *National Bank*, a directors and officers policy had the obligation to reimburse certain defense costs incurred by the insured and contained a similar consent provision to that at issue here, with the same "unreasonably withheld" proviso. (*Id.* at 937.) Some defense costs had been incurred by the insured before tendering the claims to the insurer. (*Id.*) Just as Pitzer argues here that the consent provision does not apply to amounts incurred by the insured itself, the insured in *National Bank* argued that "[t]he logic underlying the exclusion of pre-tender fees is inapplicable where, as here, Progressive owes no duty to defend and as such never undertakes [the Bank's] defense." (*Id.* at 939.) Relying on *Jamestown*, the court rejected the argument, finding that there was no coverage for defense fees and costs incurred prior to tendering the claim to the insurer, with no different treatment on account of the "unreasonably withheld" language. (*Id.*)

Similarly, in a case almost identical to the one before this Court, in *SI Venture Holdings, LLC v. Catlin Specialty Ins.* (S.D.N.Y. 2015) 118 F.Supp.3d 548, the insurer issued a pollution liability insurance policy with a consent provision and the "unreasonably withheld" proviso. (*Id.* at 549-550.) The insured discovered contamination at one of its properties and proceeded to clean it up, but it only notified the insurer six months later. (*Id.*) The court upheld application of the consent provision to deny coverage. (*Id.*) The court, rejecting the insured's public policy argument, noted that the consensus in New York (much like the consensus in California) is that "consent provisions are typically upheld to their letter" and that the insured's position would "effectively strip" insurers of the ability to reasonably object to "compliance-related expenditures that an insured party intends to make." (*Id.* at 550, 552-553.) The court noted that the "unreasonably withheld" language provides the insured with adequate protection. (*Id.*) This case demonstrates that consent provisions like the one here are enforceable and that the "unreasonably withheld" language has no application when the insured never sought the insurer's consent.

Pitzer further suggests that Indian Harbor had an obligation to consent to the remediation, so consent was irrelevant, because the remediation was "reasonable." However, whether a proposed remediation was "reasonable" is a different inquiry than whether the insurer "unreasonably withheld" consent. (*See, e.g., Hilco Capital, LP v. Federal Ins. Co.* (Del. 2009) 978 A.2d 174, 180-181 (in the context of a consent provision that provided that consent "shall not be unreasonably withheld," the insured must prove that the insurer "did not have a reasonable basis for its decision to withhold consent to the settlement. It is not enough for the [insured] parties to show that the settlement offer was reasonable . . . .").) Here, Indian Harbor was never given the opportunity to determine whether

the intended remediation was appropriate, or if other approaches were better, and so Pitzer cannot bootstrap presumed consent by hindsight.[19]

Indian Harbor had the right to consent to the costs before they were spent, but it was deprived that right. Under clear California law as applied for decades, Pitzer's failure to obtain Indian Harbor's consent precludes coverage as a matter of law.

C. A Prejudice Requirement Should Not Be Read into the Consent Provision in First-Party Policies

Even if this Court were considering first-party coverage, this Court should not for the first time in California jurisprudence apply the notice-prejudice rule to a consent provision. Doing so would ignore the important distinctions California courts have drawn between notice and consent provisions that justify the different approaches. In addition, the policy reasons identified by California courts for the no-prejudice rule in the context of consent provisions has at least equal applicability to the specialty claims-made policy at issue here.

1. There is a Critical Distinction Between Notice and Consent Provisions That Justify the Different Treatment of These Provisions

California courts have consistently recognized that there is a difference between notice provisions and consent provisions that justifies

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[19] In fact, the evidence supports that the remediation was not reasonable (and that, if Indian Harbor had been given the opportunity to consent, it could have reasonably withheld consent) because Indian Harbor's unrebutted expert stated that remediation costs could have been reduced by "approximately 50% of the total response cost identified by Pitzer" (ER 261 at ¶ 18) and Pitzer forewent a method of remediation that would have preserved subrogation rights (ER 260 at ¶ 15). (*See* Indian Harbor Ninth Circuit Answering Brief at pp. 25-28.) Either of these deficiencies creates an issue of fact as to the remediation's reasonableness and would have been a reasonable basis for Indian Harbor to withhold consent.

the different approach regarding prejudice. Specifically, with a notice provision, the breach permits the insurer to deny coverage completely and *going forward* based on the insured's failure to timely provide notice – this is the "forfeiture" of coverage occasioned by a breach of the notice provision.

In contrast, with the consent provision, the breach permits the insurer to deny coverage for *past* costs (i.e., costs incurred prior to obtaining the insurer's consent), but it does not affect the insurer's going forward obligation. Thus, there is no forfeiture of coverage; there is simply no coverage to begin with: "[T]he no-voluntary-payments provision does not result in a forfeiture of the policy, but only affects voluntarily incurred costs already made by the insured." (*Jamestown Builders*, *supra*, 77 Cal.App.4th at 351; *see also Stresscon Corporation*, *supra*, 370 P.3d at 144 ("the [consent] contract clause at issue in this case, far from amounting to a mere technicality imposed upon an insured in an adhesion contract, was a fundamental term defining the limits or extent of coverage.").)

The result here is a complete loss of coverage, but only because Pitzer spent every penny it now seeks from Indian Harbor without ever asking for Indian Harbor's consent. For instance, if Pitzer had notified Indian Harbor on March 1, 2011, Pitzer would have incurred some costs (e.g., costs of investigation), but would not have incurred the lead removal costs yet. If applied pursuant to its terms, the notice provision would preclude coverage even for the lead removal costs that Pitzer had not yet incurred (which is why California courts call this a "technical forfeiture" of coverage). However, applied pursuant to its terms, the consent provision would only preclude coverage for the past costs (e.g., cost of investigation), but would not preclude coverage for the lead removal costs if Pitzer obtained and received Indian Harbor's consent to incur those costs on a going forward basis. Here, Pitzer incurred *all* expenses without ever asking

for Indian Harbor's consent, so Pitzer's invocation of the technical forfeiture line of cases is misplaced; instead, coverage is precluded by a simple application of the *Gribaldo* rule.

Pitzer's argument that the consent provision is a "glorified notice provision" (OB p. 48) violates the well-recognized contract interpretation rule that "[a]ny contract must be construed as a whole, with the various individual provisions interpreted together so as to give effect to all, if reasonably possible or practicable." (*People v. Doolin* (2009) 45 Cal.4th 390, 413 n.17 (quoting *City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 473); *see also* Cal. Civ. Code §§ 1641, 1858.)

There is no basis in California policy or the policy language to treat consent provisions like notice provisions by requiring a showing of prejudice.

2. The Policy Justifications for the No-Prejudice Rule for Consent Provisions Applies With at Least Equal Force Here

This Court and other California courts have articulated a number of policy reasons for enforcing consent provisions without a showing of prejudice. While no California court – other than the District Court in this case – has done so in the context of a remediation legal liability policy, analogous policy reasons exist for such insurance.[20] No court has found that these policy reasons do not apply to this type of insurance. Moreover, no court has stated that these are the only possible policy justifications for enforcing the provision as written or that other policy reasons cannot exist.

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[20] In fact, such policy reasons were described as supporting the denial of coverage for remediation performed without consent by the S.D.N.Y. District Court in *SI Venture Holdings, LLC, supra*, 118 F.Supp.3d 548, 553.

In *Gribaldo*, this Court stated that consent provisions "prevent collusion as well as invest the insurer with the complete control and direction of the defense or compromise of suits or claims." (*Gribaldo, supra*, 3 Cal.3d at 449.) Pitzer dismisses the collusion argument, essentially arguing that collusion between a vendor of services and Pitzer cannot happen. However, preventing collusion is analogous to preventing the insured from overpaying on remediation for business reasons or due to ignorance, as Pitzer did here. Pitzer states that "in the murky world of settlements of tort cases . . . it is difficult or impossible to second-guess the precise amount of any settlement." (OB p. 43.) However, it is just as difficult for an insurer to second-guess the scope of investigation and options for remediation costs after evidence is destroyed by undertaking remediation. The record here reflects complete disagreement regarding whether the remediation was reasonable in cost, and these issues should have been addressed before the remediation was performed. The consent provision plays just as important a role in this type of policy as it does in a policy like the one at issue in *Gribaldo*.

Jamestown Builders discussed that 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." (*Jamestown Builders, supra*, 77 Cal.App.4th at 346.) Similarly, here, Indian Harbor aims to control the remediation and approve costs through the consent provision, as discussed above. In addition, an insurer's right to consent to incurred costs allows the insurer to safeguard its subrogation rights. Here, for example, those subrogation rights were lost. (ER 260 at ¶ 15.)

Pitzer argues that the following three "policy rationales" for the notice-prejudice rule "apply to the consent provision in the present case": "(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." (OB p. 46.)

However, all three of these arguments would apply to the consent provision in *Gribaldo* and *Jamestown Builders* too, but it is settled law in California that consent provisions are treated differently than notice provisions. By proceeding without consent, the insured is not entitled to coverage.

In addition, these purported "policy rationales" do not apply here. For one, as discussed above, no California court has found a specialty claims-made policy between sophisticated parties to be adhesive. (*Cf. Templo Fuente*, *supra*, 224 N.J. 189 (holding that such policies were not adhesive).) Second, the "public policy objective of compensating tort victims" is a red herring: the consent provision is only implicated when the insured has performed at its own cost. Thus, any public interest is already met (as it was here) when the lead was remediated. (*See, e.g.*, *Maxim Crane Works, L.P.*, *supra*, 208 Cal.App.4th at 293 (stating that the public policy of compensating workers has "nothing to do with this case. Gorski has been compensated. Maxim has cited no authority showing that California has a fundamental policy regarding which of two purses must be opened to compensate an injured Californian.").) Lastly, there is no "inequity" here. Under the policy, Indian Harbor – a remediation legal liability insurer – has a material right to approve the choice of remediation it will pay for. Pitzer easily could have complied with the consent provision but did not. It is therefore not inequitable to enforce the consent provision.

There are no policy justifications for imposing a prejudice rule to the consent provision here. At the very least, this Court should not find that

such a rule, even if it might be imposed in a case governed by California law, would be a "fundamental" policy of California such that it would override the parties' choice of New York law in the context of the consent provision.

* * *

For the above reasons, Indian Harbor respectfully requests that the Court answer the second certified question in the negative.

CONCLUSION

For the foregoing reasons, Indian Harbor respectfully urges this Court to answer both certified questions in the negative.

Dated: June 23, 2017

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CERTIFICATE OF WORD COUNT

This certifies that this brief complies with the type-volume limitation set forth in California Rules of Court Rule 8.204. Specifically, this brief uses a proportional typeface and 13-point font and contains 13,867 words.

Dated: June 23, 2017

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CERTIFICATE OF SERVICE

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

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

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X	BY U.S. MAIL: ☒ I enclosed the documents in a sealed envelope or package addressed to the person(s) set forth below, and placed the envelope for collection and mailing following our ordinary business practices, which are that on the same day correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in San Francisco, California, in a sealed envelope with postage fully prepaid.
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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.

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

Dated: June 23, 2017

/s/ Trina C. Morgan
Trina C. Morgan