Case No. S239510

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA
EN BANC

PITZER COLLEGE,

Plaintiff and Petitioner,

v.

INDIAN HARBOR INSURANCE COMPANY,

Defendant and Respondent.

After Order Certifying Questions by the U.S. Court of Appeals for the Ninth Circuit

APPLICATION BY COMPLEX INSURANCE CLAIMS LITIGATION ASSOCIATION AND AMERICAN INSURANCE ASSOCIATION FOR PERMISSION TO FILE AN AMICI CURIAE BRIEF IN SUPPORT OF DEFENDANT AND RESPONDENT INDIAN HARBOR INSURANCE COMPANY

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APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF

TO THE HONORABLE TANI GORRE CANTIL-SAKAUYE, CHIEF JUSTICE OF THE SUPREME COURT OF CALIFORNIA:

Under California Rule of Court 8.520(f), the Complex Insurance Claims Litigation Association ("CICLA") and American Insurance Association ("AIA") respectfully request leave to file the attached amici curiae brief in support of Defendant-Respondent Indian Harbor Insurance Company.

CICLA and AIA are leading trade associations of property and casualty insurance companies. Their members write a substantial amount of insurance, both in California and nationwide, and offer all types of property-casualty insurance, including personal and commercial auto insurance, commercial property and liability coverage for small business, workers' compensation, homeowners' insurance, medical malpractice coverage, and product liability insurance. They have participated in many critical insurance cases throughout the country, including important cases before this Court.[1]

The issues presented in this case will substantially impact insurers and insureds in California and nationally. Specifically, Pitzer asks this Court to override the parties' agreement to an insurance policy that

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[1] See, e.g., *Fluor Corp. v. Superior Court of Orange Cnty.* (2015) 61 Cal.4th 1175; *Hartford Cas. Ins. Co. v. J.R. Marketing L.L.C.* (2015) 61 Cal.4th 988; *State v. Cont'l Cas. Co.* (2012) 55 Cal.4th 186.

undisputedly designates New York as the choice of law. According to Pitzer, application of a prejudice requirement to consent clauses or claims-made-and-reported policies' notice provisions is mandated by California public policy. This Court should reject Pitzer's contention that it should be relieved of the contract terms it agreed to on asserted public-policy grounds. To the contrary, California has long recognized and protected the freedom to contract. This principle, embodied in numerous decisions of California appellate courts and throughout the Civil Code, is *itself* a fundamental public policy of this State, to which this Court should give due deference as it addresses the certified questions.

With their national perspective and in-depth knowledge of the insurance system, CICLA and AIA provide a unique perspective on the issues presented that the parties' briefs have not fully addressed. CICLA and AIA therefore respectfully submit that their participation may assist the Court in deciding this case.

No party or counsel for a party in the pending appeal authored, in whole or in part, or funded the preparation of the proposed amici brief.

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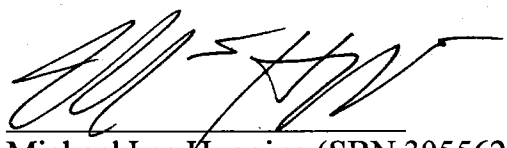
Dated: September 13, 2017

CROWELL & MORING LLP



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[PROPOSED] BRIEF OF AMICI CURIAE COMPLEX INSURANCE CLAIMS LITIGATION ASSOCIATION AND AMERICAN INSURANCE ASSOCIATION IN SUPPORT OF DEFENDANT AND RESPONDENT INDIAN HARBOR INSURANCE COMPANY

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INTRODUCTION

Insurers underwrite billions of dollars in property and casualty insurance in California each year with the expectation that insurance contracts will be enforced as written. Here, Pitzer expressly agreed to buy an insurance policy that undisputedly designates New York as the choice of law. Nevertheless, Pitzer now contends that its policy terms must be overridden. According to Pitzer, application of a prejudice requirement to consent clauses or claims-made-and-reported policies' notice provisions is mandated by California public policy. Therefore, Pitzer contends the Court must apply California law and judicially impose a prejudice requirement on the parties' agreement.

However, neither California nor New York law supports application of a prejudice requirement to the Indian Harbor policy. Whether or not California law would apply a prejudice requirement to the clauses at issue, the parties agreed that their dispute will be governed by New York law. The very purpose for having a choice-of-law provision is that the chosen body of law will govern future disputes, no matter which party the laws might favor in any particular dispute. To impose California law here would usurp the parties' contractual agreement that New York law applies, and would set dangerous precedent. It would defy fundamental principles of California law requiring the enforcement of clear contract terms. It would undermine the confidence of insurers and California-based insureds that choice-of-law provisions they bargain for will be enforced. And such a ruling would offend principles of comity by

overriding another state's ability to govern a dispute merely because its laws would reach a different result.

This Court should reject Pitzer's contention that it should be relieved of the contract terms it agreed to on asserted public-policy grounds. Allowing contracting parties to specify the law governing their agreement is not abhorrent to California's interests. To the contrary, California has long recognized and protected the freedom to contract. This principle is *itself* a fundamental public policy of this State, to which this Court should give due deference as it addresses the certified questions.

ARGUMENT

I. A PREJUDICE REQUIREMENT IS NOT APPLICABLE TO THE INDIAN HARBOR POLICY ISSUED TO PITZER.

Pitzer purchased a specialty claims-made-and-reported pollution liability insurance policy from Indian Harbor Insurance Company to cover Pitzer for remediation expenses caused by pollution-related damage during the relevant policy period. The policy provides that "all matters arising hereunder" including questions relating to the validity, interpretation and performance of the policy are to be determined under New York law. (*Pitzer College v. Indian Harbor Insurance Company* (9th Cir., Jan 13, 2017) No. 14-56017, op. at 5, fn.1.)

The policy also explicitly states that no costs, charges or expenses shall be incurred, or obligations assumed or remediation commenced, without Indian

Harbor's consent (such consent not to be unreasonably withheld). *Id.* at 6. Further, the Indian Harbor policy provides that, if Pitzer seeks coverage for remediation expenses, it must "report[] such CLAIM . . . to the company, in writing, during the POLICY PERIOD." (*Pitzer College v. Indian Harbor Ins. Co.* (9th Cir. 2017) 845 F.3d 993, 995 n.2 (*Pitzer*).) Also, Pitzer must provide notice as soon as practicable of any claim.

Pitzer did not obtain Indian Harbor's consent before incurring costs, charges and expenses for remediation. Additionally, Pitzer did not inform Indian Harbor of the claim until three months after it had completed remediation, and six months after it discovered the soil contamination. Under New York law, the consent clause and notice requirement would bar coverage without regard to proof of prejudice. California law does not require a different result.

A. This Court Should Not Judicially Impose an Extra-Contractual Prejudice Requirement on the Consent Provision in Pitzer's Policy.

The consent provision in Pitzer's insurance policy states: "No costs, charges, or expenses shall be incurred, nor payments made, obligations assumed or remediation commenced without the Company's written consent. . ." (ER 64-65.) Consent provisions such as this—often referred to as "no voluntary payments" provisions—impose an obligation on the insured that is separate and distinct from notice requirements.

Consent clauses appear in all types of property and casualty insurance policies, including first- and third-party liability coverages, and are essential to the insurance bargain. Such provisions are "widely recognized as being[] fundamental to the insurer's ability to control its exposure, and so to its willingness to insure and its setting of the premium." (1 Barker & Kent (2d ed. 2017) *New Appleman Ins. Bad Faith Litigation*, § 4.05; see also *Diamond v. Mass. Bonding & Ins. Co.* (7th Cir. 1955) 226 F.2d 396, 399 [stating that "[a]n insurance company could hardly be expected to do business on any other basis"]; *Coil Anodizers, Inc. v. Wolverine Ins. Co.* (Mich. Ct. App. 1982) 327 N.W.2d 416, 418 (*Coil Anodizers*).)

A typical no-voluntary-payments provision states that a policyholder may not, except at his or her own expense, "voluntarily make any payment, assume any obligation or incur any expense other than for first aid to others at the time of the accident." (*Augat, Inc. v. Liberty Mut. Ins. Co.* (Mass. 1991) 571 N.E.2d 357, 359, fn.3.)[2] This requirement defines and limits an important aspect of the scope of coverage, where the insurer agrees to pay indemnified loss in exchange for the insured's agreement not to voluntarily make payments or incur costs without the insurer's consent. Under a policy such as Indian Harbor's, a policyholder that violates the policy terms by making voluntary

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[2] See also *Faust v. The Travelers* (9th Cir. 1995) 55 F.3d 471, 472; *Crystal Geyser Water Co. v. American Motorists Ins. Co.* (N.D. Cal. Sept. 28, 1995) No. C-94-1531 (MHP), 1995 WL 590330 at *7.

payments, incurring expenses, or commencing remediation without the insurer's consent ignores critical limits on the coverage provided by the policy.

1. Consent is a precondition to coverage.

Obtaining consent before making payments or incurring expenses for remediation is a condition precedent to the pollution liability coverage provided under the Indian Harbor policy. New York law enforces this provision as written. California law does not require a different result. California appellate courts have found that a no-voluntary-payments provision, "unlike a notice provision or a cooperation clause, can be enforced without a showing of prejudice because 'the existence or absence of prejudice to [the insurer] is simply irrelevant to [its] duty to indemnify costs incurred *before* notice.'" (*Low v. Golden Eagle Ins. Co.* (Cal. App. 1st Dist. 2003) 2 Cal. Rptr. 3d 761, 771 [quoting *Truck Ins. Exchange v. Unigard Ins. Co.* (2000) 79 Cal.App.4th 966, 977].) The insurer's consent to the costs incurred is a *condition precedent* to the insured's right to be indemnified; a fortiori the right to be indemnified cannot relate back to payments made or obligations incurred before notice was provided and the insurer's consent was obtained. *Id.*

2. Consent is essential to managing risk.

Under a policy such as Indian Harbor's, insurers need to have control over the charges and expenses incurred for remediation in order to manage the risk that the insurer assumes. Insurance is not meant to afford a policyholder an unlimited source of funds to dispense as it wishes. External constraints on

coverage, such as no-voluntary-payments provisions, prevent over-utilization of funds under the insurance policy. To the extent a policyholder were permitted to freely decide when and how much in costs to pay, so long as the expenses are associated with the environmental clean-up, it would be difficult, or impossible, for its insurer to restrain costs and properly maintain reserves to fund the coverage it has underwritten.[3] Therefore, the Indian Harbor policy places a straightforward requirement on the policyholder to obtain the insurer's consent before making payments or proceeding with a remediation plan.

In explaining the need for insurer oversight and approval for coverage of any costs or obligations its policyholder may assume, other courts have noted, "[w]e are all apt to be generous when it comes to spending the money of others." (*Piper v. State Farm Mut. Auto. Ins. Co.* (Ill. App. Ct. 1953) 116 N.E.2d 86, 87 [quoting *Wisconsin Zinc Co. v. Fidelity & Deposit Co.* (Wis. 1916) 155 N.W. 1081, 1085; see also *Insua v. Scottsdale Ins. Co.* (2002) 104 Cal. App. 4th 737, 745 [similarly worded clause barred coverage for defense costs incurred by insured prior to tender of defense to insurer].) For these

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[3] An insurer's ability to exercise control over costs accepted or payments to be made under the policy is important to the availability and affordability of insurance. (See George Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 Yale L.J. 1521, 1548 ["Where insureds, *ex post*, can affect the level of claimed losses, the variance in expected risks increases."].) The no-voluntary-payment provision's consent requirement protects that necessary insurer right to exercise scrutiny over charges and expenses to be incurred.

reasons, courts apply the no-voluntary-payments provision according to its plain terms and refuse to impose a prejudice limitation on the parties' agreement. (See, e.g., *Travelers Prop. Cas. Co. of Am. v. Stresscon Corp.* (Colo. 2016) 370 P.3d 140, 142, as mod. on denial of rehg. (May 23, 2016) [holding that insurer did not have to show prejudice under the policy's no-voluntary-payments provision]; *Jamestown Builders, Inc. v. General Star Indem. Co.* (1999) 77 Cal. App. 4th 341, 349-50 [no-voluntary-payment provision precluded recovery of pre-tender expenses]; *MacDermid, Inc. v. Travelers Indem. Co.* (Conn. Super. May 19, 2017) X04HHDCV126067744S, 2017 WL 2622646, at *6 [stating that the insurance policy's no-voluntary-payments clause, "far from amounting to a mere technicality imposed upon an insured in an adhesion contract, [is] a fundamental term defining the limits or extent of coverage"] [citation and quotation marks omitted].)

With insurance policies like the one provided here by Indian Harbor, insurers bargain for the right to participate in and negotiate the terms and costs of the remediation plan and bring their considerable experience to bear in determining the most appropriate techniques and measures to be undertaken.[4]

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[4] *F.L. Aerospace* illustrates the application of a no-voluntary-payments provision in the third-party liability context. (*F.L. Aerospace Corp. v. Aetna Casualty & Surety Co.* (E.D. Mich. Aug. 23, 1988) No. 87-CV-60070-AA [slip op.], aff'd on other grounds, [897 F.2d 214 (6th Cir. 1990)].) In that case, a policyholder settled claims relating to environmental pollution without first notifying its insurer of the existence of those claims. The court found that such (Continued...)

The no-voluntary-payments provision enforces that important right of the insurer to participate in and consent to the determination of costs and remedial action necessary for the cleanup.

This is not a minor technicality. Companies with potential responsibility for environmental cleanup spend millions of dollars to contest cleanup plans proposed by environmental enforcement authorities, and to negotiate remedial investigations and agreements. Insurance companies who agree to cover remediation expenses caused by pollution-related damage have contracted for the right to be involved in those discussions. That right is enforced by the no-voluntary-payments provision, which requires insurer consent to cleanup plans and expenses (and provides such consent shall not be unreasonably withheld). (See ER 64-65.)

B. This Court Should Not Judicially Impose an Extra-Contractual Prejudice Requirement on the Prompt Notice Provision in Pitzer's Policy.

Pitzer's policy states that, if Pitzer seeks coverage for remediation expenses, it must "report[] such CLAIM . . . to the company, in writing, during the POLICY PERIOD." (*Pitzer*, *supra*, 845 F.3d at 995, fn.2.) It further requires Pitzer to provide notice as soon as practicable of any claim. Pitzer did not provide notice as soon as practicable because it did not inform Indian

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payments were "voluntary" and therefore frustrated the insurer's bargained-for contractual right "to contest the liability of the insured instead of having its money given away by an agreement to which it was not a party." (*Id.* at 18 [quoting *Coil Anodizers*, *supra*, 120 Mich. App. at 118].)

Harbor of the claim until three months after it had completed remediation, and six months after it discovered the soil contamination.

New York law would enforce the prompt notice provision in the Indian Harbor policy as written. California law does not require a different result. Contrary to Pitzer's contentions, there is no fundamental California policy or law requiring that prejudice apply to a denial of coverage for Pitzer's failure to give notice of the remediation claim as soon as practicable.[5] A notice-prejudice rule is applied to occurrence-based policies under California law. It is not appropriate for, and should not be extended to, other types of coverage, such as the Indian Harbor policy.[6] In fact, many California courts have held that that prejudice is not relevant to at least the reporting requirement of claims-made-and-reported policies. (See, e.g., *KPFF, Inc. v. California Union Ins. Co.* (1997) 56 Cal. App. 4th 963, 972; *Pacific Employers Ins. Co. v.*

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[5] There are two separate notice requirements in the Pitzer policy: a requirement that, if it seeks coverage for remediation expenses, any claim must be reported in writing during the policy period, and further that notice of any claim must be provided as soon as practicable.

[6] The Indian Harbor policy is a form of claims-made coverage. Claims-made policies are unlike traditional occurrence-based policies, where insurers must respond and pay for claims that are received years—even decades—after the policies expired. Claims made policies require that the claim be made and reported within the policy period, thereby providing a fixed date after which the insurance company will not be subject to liability under the policy. Under a claims-made policy, the timing of the claim and prompt notice to the insurer are critical to the risk and the insurer's ability to "close the books" on exposure.

Superior Ct. (1990) 221 Cal. App. 3d 1348; *Ace Capital Ltd. v. ePlanning, Inc.* (E.D. Cal. Mar. 7, 2013) 2013 U.S. Dist. LEXIS 32613 at *23-26.) [7]

Other courts have strictly enforced "as soon as practicable" notice provisions, as well as reporting provisions, in claims-made-and-reported policies. Thus, the New Jersey Supreme Court in *Templo* rejected the application of any prejudice requirement on the notice or reporting terms of claims-made coverage. (*Templo Fuente De Vida Corp. v. Natl. Union Fire Ins. Co. of Pittsburgh* (N.J. 2016) 129 A.3d 1069, 1081; accord *Gulf Ins. Co. v. Dolan, Fertig and Curtis* (Fla. 1983) 433 So.2d 512, 515; *Bianco Professional Ass'n v. Home Ins. Co.* (N.H. 1999) 740 A.2d 1051, 1057-58).

Courts in California and elsewhere also have refused to read a prejudice requirement into special environmental coverages containing specific time-limited elements. For instance, in *Venoco*, the California Court of Appeals held that a prejudice requirement would not be read into a time-limited pollution coverage buy-back, which required notice within 60 days of a

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[7] As the court explained in *Helfand*, "[t]he hallmark of a "claims made" policy is that exposure for claims terminates with expiration or termination of the policy, thereby providing certainty in gauging potential liability which in turn leads to more accurate calculation of reserves and premiums. The benefit to the insureds is that the insurer can make coverage more available and cheaper than occurrence policies." (*Helfand v. Natl. Union Fire Ins. Co.* (Cal. App. 1st Dist. 1992) 13 Cal. Rptr. 2d 295, 305; see also *Slater v. Lawyers' Mut. Ins. Co.* (Cal. App. 2d Dist. 1991) 278 Cal. Rptr. 479, 483 [stating, with regard to application of the notice-prejudice rule, that the distinction between a claims- made insurance policy and an occurrence policy "is critical"].).

pollution incident. (*Venoco, Inc. v. Gulf Underwriters Insurance Co.* (2009) 175 Cal. App. 4th 750, 760.) As the *Venoco* court put it, prejudice does "not apply to every time limit in an insurance policy." *Id.* Similarly, a prejudice requirement did not apply to a time-limited pollution coverage endorsement in *Matador Petroleum Corp. v. St. Paul Surplus Lines Ins. Co.* (5th Cir. 1999) 174 F.3d 653, 659. In *Matador,* the policy covered a pollution incident that involved, *inter alia*, a release of pollutants that occurred within a 72-hour time period; that was known to the insured within 7 days of the occurrence; and that was reported to the insurer within 30 days of the occurrence. The policyholder, who did not report the incident until 38 days after it began, sought to impose a prejudice requirement on the notice provision. The court rejected any prejudice requirement, noting that courts strictly enforce notice provisions in claims-made-and-reported policies and that the parties' bargain here resembled a claims-made-and-reported agreement. The court saw no reason not to enforce the parties' agreement and refused to interfere with the public right to contract.

Consistent with these cases, California does not have fundamental law or policy requiring prejudice to enforce the prompt notice requirement under the Indian Harbor pollution liability policy. As with the policy's consent clause, there is no basis on which to override New York law enforcing this policy term.

II. THE COURT SHOULD HONOR THE PARTIES' CHOICE OF NEW YORK LAW, WHETHER OR NOT CALIFORNIA WOULD APPLY A PREJUDICE REQUIREMENT TO THE INDIAN HARBOR POLICY.

The Court should honor the parties' agreed upon New York choice-of-law provision. California law does not require the Court to override the policy and apply a prejudice rule to the consent clause or notice provision of the Indian Harbor policy.

A. California Law Favors Enforcing the Unambiguous Terms of a Contract and Effectuating Parties' Intent.

This Court has an important opportunity with this appeal to reinforce California's longstanding principle that courts will stand behind parties' intent to bind themselves to a particular state's laws, where such intent is expressed in clear and explicit terms of a contract. This core principle has been cemented in California law by this Court as well as California's legislature. (See Civ. Code, §§ 1636 [contract must be interpreted to give effect to parties' mutual intent], 1638 [contract language governs its interpretation], 1643 [contract to be interpreted in favor of contract, if consistent with parties' intent], 1646.5 [allowing parties to certain contracts to specify California law whether or not the contract "bears a reasonable relation to this state"]; *AIU Ins. Co. v. Superior Ct.* (1990) 51 Cal.3d 807, 821-22. Such enforcement supports a fundamental reason that parties enter into contracts: so that, in the event of a dispute, the parties' intent when they entered into the agreement governs. (See *Nedlloyd Lines B.V. v. Super. Ct.* (1992) 3 Cal.4th 459, 468-69 (*Nedlloyd*)

[stating that "the manifest purpose of a choice-of-law clause is precisely to avoid" protracted litigation battles concerning "only the threshold question of what law was to be applied to which asserted claims or issues"].)

Pitzer seeks to supplant the parties' explicit agreement to include a New York choice-of-law provision in the policy with California law, on the basis that fundamental California public policy allegedly requires the application of a prejudice requirement to the Indian Harbor consent and notice terms. Pitzer concedes that New York law would permit Indian Harbor to deny coverage under the insurance contract's provisions based on Pitzer's failure to obtain consent before incurring costs, and its untimely notice of claim, without having to show prejudice. Assuming arguendo that California law would not require the same result, such difference between California and New York law existed when Pitzer's policy was formed, and presumably factored into the parties' calculus for negotiating and deciding to agree to the contract's choice of law.

Pitzer now asks this Court to undo Pitzer's contractual undertaking and create an ad-hoc exception to the New York choice-of-law provision with respect to the contract's consent and prompt-notice provisions. Such judicial intervention is unwarranted—if Pitzer wanted New York law to govern all contract disputes except for those relating to the policy's consent clause and prompt-notice requirement, it should have made such a request before agreeing to a policy that does not provide any such exception.

Strong public policy considerations favor enforcement of the parties' choice of New York law. To begin with, a failure to enforce the provision would ignore the parties' intent at the time of the agreement, which by clear and express terms was to have New York law govern all disputes under the contract. Such a holding would contradict California's long history of enforcing contracts based on the parties' intent, regardless of any resulting detriment to one of the parties. (See *Wilson v. Brown* (1936) 5 Cal.2d 425, 428 ["It is elementary that, in the construction of any instrument, the intent of the parties is controlling."]; see also *New York Life Ins. Co. v. Hollender* (1951) 38 Cal.2d 73, 86 [finding that a reduction of the insured's disability benefits under the insurance contract's age-qualification provision was the necessary result of "a condition of the policy coverage to which the parties specifically agreed, and the principle of decision cannot be affected by hardships, advantages, or disadvantages which may result from a construction of the insurance contract according to the parties' intent plainly and unambiguously expressed"].) Such disregard for parties' intent would also undermine parties' confidence that contracts will be enforced as written. And as discussed more fully in the next section, the expectation that agreed contract terms will be enforced is the bedrock of the insurance industry.

Overriding the contract's choice-of-law provision here would suggest that parties cannot be trusted to make their own agreements as to which body of law they wish to govern their disputes. But California has historically

provided insureds the freedom to agree to insurance terms, including with respect to choice of law, especially where the insured is a sophisticated entity like Pitzer. (See, e.g., *Nedlloyd*, *supra*, 3 Cal.4th at 468-69 ["When a rational businessperson enters into an agreement establishing a transaction or relationship and provides that disputes arising from the agreement shall be governed by the law of an identified jurisdiction, the logical conclusion is that he or she intended that law to apply to *all* disputes arising out of the transaction or relationship."].) Here, Pitzer, an academic institution of higher learning, was represented by a union of colleges in the negotiation and purchasing of the subject insurance policy.

Additionally, Pitzer's failure to negotiate an exception in the insurance policy's New York choice of law is not a legitimate basis to frustrate the parties' reasonable expectations as to choice of law under the contract. If the parties had designated California choice of law, for example, Indian Harbor might have negotiated for a different premium, or offered different coverage terms. But because the parties agreed on New York choice of law, Indian Harbor did not have such an opportunity. Thus, if this Court were to carve out an exception to the policy's choice-of-law provision here, Pitzer will have enjoyed the benefit of coverage at the premiums set with the policy's New York choice-of-law provision and will have also gained the benefit of an ad-hoc exception to that choice of law provision in this dispute, where the insured

argues that California law might better serve Pitzer's interests. Such result would unjustly enrich Pitzer.

B. Straightforward Enforcement of Contract Terms is Vital to Insurance Underwriting.

As a matter of both policy and practice, California courts' reliable enforcement of unambiguous contract terms is vital to stability in the insurance market because insurers rely heavily on such enforcement to make rational business decisions regarding coverage. An insurance contract expresses an insurer's agreement to accept, in return for a premium, a bounded and defined risk. An insurer assesses that risk in large part based on the clear and express terms of the policy, which the insurer reasonably believes will be enforced in a dispute. Based on that assessment, the insurer makes vital business decisions such as whether and how much coverage to provide to a potential insured and at what cost.

This Court has recognized California's strong public policy favoring the enforcement of choice-of-law provisions in particular. (*Nedlloyd, supra*, 3 Cal.4th at 465; see also *Wm. R. Clarke Corp. v. Safeco Ins. Co.* (1997) 15 Cal.4th 882, 902 [acknowledging California's strong policy favoring enforcement of freely negotiated contractual provisions].) With the ability to anticipate which state's body of law will govern disputes, insurers can reasonably predict their rights and responsibilities under a policy and the likely outcome of potential disputes under such laws. Calculations based on the

parties' choice of law thus enable insurers to offer affordable coverage to insureds.

If insurers must anticipate that courts' enforcement of an unambiguous choice of law provision may depend on which party the chosen laws favor in a particular dispute, however, insurers will be unable to rely on the clear and explicit terms of an insurance policy. When insurers cannot reasonably rely on clear policy language to support rational premiums, adverse consequences fall on the insurance-buying public, including small and mid-sized businesses that cannot afford to self-insure. California courts, for example, have historically condemned the judicial redrafting of private contracts, acknowledging that judicially-created insurance coverage leaves "ordinary insureds to bear the expense of increased premiums necessitated by the erroneous expansion of their insurers' potential liabilities." (See *Garvey v. State Farm Fire & Cas. Co.* (1989) 48 Cal.3d 395, 408).[8]

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[8] This Court has recognized that restricting insurers' ability to control the scope of coverage through policy terms would undermine the general availability of coverage. (See *Foster-Gardner Inc. v. Nat'l Union Fire Ins. Co.* (Cal. 1998) 959 P.2d 265, 282 [enforcing policy language as written "encourages stability and efficiency in the insurance system"]). As the Fourth Circuit also has explained, enforcing policy terms as written is important: "If an insurance company cannot limit its risk . . ., it will be unable to determine the precise risks assumed under a contract, which in turn will prevent it from accurately pricing coverage. Not only will this hinder rational underwriting, but the higher premiums necessary to compensate for this rising uncertainty will be passed on to policyholders everywhere." (*Penn. Nat'l Mut. Cas. Ins. Co. v. Roberts* (4th Cir. 2012) 668 F.3d 106, 115 [internal citations omitted]).

C. Judicial Comity Favors This Court's Enforcement of the Insurance Contract's New York Choice of Law.

This Court may strengthen principles of judicial comity here by recognizing a high standard for when California courts will apply California law over the chosen law of another state. Comity refers to a state's deference to another state's laws, not as a matter of obligation but out of deference and respect, based on considerations of mutual utility and advantage and of business and social necessity. (*Blythe v. Ayres* (1892) 96 Cal. 532, 561; *Hutchinson v. Hutchinson* (1941) 48 Cal. App.2d 12, 22.) This appeal provides an important opportunity to strengthen comity between New York and California courts by enforcing a contract's New York choice of law, despite potential differences in how this case might be decided under California and New York law.

Assuming arguendo that New York and California would apply the notice-prejudice rule differently in this case, California courts nevertheless should not supplant an insurance policy's New York choice of law with California law merely based on such difference. Here, Pitzer urges the Court to prefer California law (which Pitzer argues would require Indian Harbor to show prejudice before denying Pitzer coverage based on failure to obtain consent to expenditures and untimely notice), over New York's plain enforcement of the insurance policy's requirements. This Court should decline to reach such a result based on principles of comity. To find otherwise would

encourage all states to prefer their own laws over the differing laws of a chosen state.

Additionally, such an unbalanced approach would deprive other states of opportunities to develop their law regarding consent provisions and untimely notice in cases where the parties had selected that state's laws to govern the issue. By deferring to New York law on this matter, California can acknowledge New York's important interests in developing its own laws regarding the enforcement of a contract's consent and prompt-notice requirements, particularly where the insured has submitted to New York law in an express choice-of-law provision.

New York is not the only state that would not apply a prejudice rule. In fact, nine states—Alabama, Arkansas, Colorado, Washington, D.C., Georgia, Idaho, Illinois, South Carolina, and Virginia—do not apply a prejudice requirement even to late notice under an occurrence-based policy. And at least three other states—Florida, Iowa, and Ohio—would apply a presumption of prejudice based on the insured's untimely notice. The list of jurisdictions that would not apply prejudice to a consent provision, or a prompt-notice provision in a claims-made-and-reported policy form, or either clause in specialty coverage such as the pollution liability form at issue here is much longer. Therefore, to supplant the parties' choice of New York law in the insurance policy at issue would also supplant the laws of many other states that California insureds might choose to govern their insurance agreements.

New York and California should be especially sensitive to principles of judicial comity with respect to one another. A finding in this case that California has a fundamental public interest in applying its own laws might lead New York courts in the reverse circumstance (i.e., where a New York insured has agreed to California choice of law) to find that New York has a fundamental public interest in avoiding California's rules of insurance contract construction. Such tug-of-war should be avoided between states such as New York and California, where substantial commerce flows between the two and insureds and insurers alike stand to benefit from the courts of each state predictably and respectfully deferring to the laws of one other based on the parties' choice of law. By honoring the parties' choice of law here, California can recognize the legitimacy of New York's legal doctrines and interest in developing its own legal principles on this issue, while inviting New York to do the same with respect to California.

CONCLUSION

CICLA and AIA respectfully submit that the Court is not compelled to override the parties' agreement in order to apply a prejudice requirement to the Indian Harbor policy's consent provision or to its prompt-notice requirement. Instead, the Court should honor the parties' choice of New York law, thereby advancing the interests of judicial comity and promoting stability in the insurance market.

Dated: September ___, 2017 CROWELL & MORING LLP

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CERTIFICATION OF WORD COUNT

The text of this Amici Curiae Brief contains 4,973 words, according to the word count generated by the word-processing program used to prepare the brief.

Dated: September ___, 2017 CROWELL & MORING LLP

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PROOF OF SERVICE

I, William Harry Morris, state:

My business address is 3 Embarcadero Center, 26th Floor, San Francisco, CA 94111. I am over the age of eighteen years and not a party to this action.

On the date set forth below, I served the foregoing document(s) described as:

APPLICATION BY COMPLEX INSURANCE CLAIMS LITIGATION ASSOCIATION AND AMERICAN INSURANCE ASSOCIATION FOR PERMISSION TO FILE AN AMICI CURIAE BRIEF IN SUPPORT OF DEFENDANT AND RESPONDENT INDIAN HARBOR INSURANCE COMPANY;

[PROPOSED] BRIEF OF AMICI CURIAE COMPLEX INSURANCE CLAIMS LITIGATION ASSOCIATION AND AMERICAN INSURANCE ASSOCIATION IN SUPPORT OF DEFENDANT AND RESPONDENT INDIAN HARBOR INSURANCE COMPANY; and

PROOF OF SERVICE

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Executed on September 12, 2017, at San Francisco, California.

William Harry Morris