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IN THE SUPREME COURT OF CALIFORNIA

PITZER COLLEGE,
Petitioner,

vs.

INDIAN HARBOR INSURANCE COMPANY,
Respondent.

Case No. S239510

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

APPLICATION AND BRIEF OF *AMICUS CURIAE* UNITED POLICYHOLDERS IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Pursuant to California Rules of Court, Rule 8.200(c), proposed *amicus*, United Policyholders, hereby respectfully applies to this Court for leave to file the accompanying Brief of *Amicus Curiae* in Support of Petitioner Pitzer College ("Pitzer") in the above-captioned case.[1]

United Policyholders ("UP") is a non-profit organization based in California that serves as a voice and information resource for insurance consumers in the 50 states. The organization is tax-exempt under Internal Revenue Code §501(c)(3). UP is funded by donations and grants and does not sell insurance or accept money from insurance companies.

UP's work is divided into three program areas: *Roadmap to Recovery*™ (disaster recovery and claim help for victims of wildfires, floods, and other disasters); *Roadmap to Preparedness* (insurance and financial literacy and disaster preparedness); and *Advocacy and Action* (advancing pro-consumer laws and public policy). UP hosts a library of tips, sample forms and articles on commercial and personal lines insurance products, coverage and the claims process at www.uphelp.org.

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[1] No party or counsel for any party authored any portion of the brief. No party or counsel for any party made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity other than the *amicus curiae,* its members and its counsel made a monetary contribution intended to fund the preparation or submission of the brief. (California Rules of Court, rule 8.520(f)(4).)

UP monitors the insurance sales, claims and law sectors, conducts surveys and hears from a diverse range of individual and business policyholders throughout California on a regular basis. The organization interfaces with state regulators in its capacity as an official consumer representative in the National Association of Insurance Commissioners. UP provides topical information to courts via the submission of *amicus curiae* briefs in cases involving insurance principles that matter to people and businesses.

UP's consumer surveys recently assisted this Court in *Association of California Insurance Companies v. Jones* (2017) 2 Cal.5th 376, and this Court has adopted UP's arguments in *TRB Investments, Inc. v. Fireman's Fund Ins. Co.* (2006) 40 Cal.4th 19 and *Vandenberg v. Superior Court* (1999) 21 Cal.4th 815. UP has filed *amicus curiae* briefs in nearly 400 cases throughout the United States.

UP seeks to fulfill the "classic role of amicus curiae by assisting in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that escaped consideration." (*Miller-Wahl Co. v. Commissioner of Labor & Indus.* (9th Cir. 1982) 694 F.2d 203, 204.) This is an appropriate role for *amicus curiae*. As commentators have stressed, an amicus curiae is often in a superior position to "focus the court's attention on the broad implications of various possible rulings." (See

Robert L. Stern et al., *Supreme Court Practice* (6th ed. 1986) 570-571 [citation omitted].)

UP is familiar with all the briefs that have been previously filed in this case. UP has experience with the legal issues of this case, and believes its experience in these issues will make its proposed brief of assistance to this Court in deciding the important certified question on which the Ninth Circuit sought guidance from this Court.

UP therefore respectfully requests leave to file the attached amicus curiae brief presenting additional authorities and discussion in support of Petitioner's arguments.

INTRODUCTION

This case involves Pitzer's pursuit of indemnification for lead-remediation expenses under a Pollution and Remediation Legal Liability Policy ("the Policy") issued by Indian Harbor Insurance Company ("Indian Harbor"). In 2011, Pitzer learned of lead contamination on its property and incurred approximately $2 million in remediation expenses to remove the contamination. Indian Harbor denied Pitzer's claim for coverage under the Policy relying exclusively on its notice and consent provisions.

The Policy contains a New York choice-of-law provision. In contrast to the overwhelming majority of states throughout the country

(including California),[2] New York common law strictly enforces notice provisions without requiring the insurer to demonstrate actual prejudice. California has rejected this draconian approach and adopted the "notice-prejudice rule" which mandates that late notice cannot serve as a forfeiture of coverage unless the insurer demonstrates actual and substantial prejudice resulting from such late notice.

By way of certified questions from the Ninth Circuit Court of Appeals, this case provides an opportunity for this Court to confirm that the notice-prejudice rule is a fundamental public policy of California such that insurance companies like Indian Harbor cannot avoid their contractual obligation to provide coverage for legitimate claims simply by inserting random out-of-state choice-of-law provisions in their policies requiring application of the laws of a state having little to no connection to the policyholder, its insured locations or to the situs of the loss at issue. Interestingly, even the State of New York appreciates the fundamental public policy underlying protecting its own citizens against arbitrary choice-of-law provisions in insurance policies as evidenced by New York Insurance Law §3420(a)(5). That statue precludes policy forfeitures based upon claims of late-notice absent actual and substantial prejudice to the

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[2] *See* Todd S. Shenk & Aon Hussain, *50-State Survey: Late Notice & the Prejudice Requirement*, Tresller LLP (Dec. 2016), http://www.tresslerllp.com.

insurance company in connection with any insurance policy "issued or delivered" in the state of New York.

The issues considered by this Court will have an impact far beyond the parties to this action. An untold number of California corporations and small-business owners, as well as out of state business with land and/or operations located in this State, as well individual California citizens and residents are covered by insurance policies that contain choice-of-law provisions. Because liability insurance also protects third-parties who have been injured or damaged by the policyholder, this State also has an overriding interest in ensuring that arbitrary and disproportionate forfeitures of insurance, based on application of discriminatory foreign laws, are prohibited. Further, the unequal treatment by application of New York law in favor of businesses and individuals situated within that State for which the notice-prejudice rule applies to avoid policy forfeitures, over out-of-state businesses and individuals should not be condoned. As such, this Court should answer both certified questions in the affirmative.

STATEMENT OF QUESTIONS PRESENTED

The Supreme Court of California has formulated the following questions for review in this case:

1. Is California's common law notice-prejudice rule a fundamental public policy for the purpose of choice-of-law analysis?

2. If the notice-prejudice rule is a fundamental public policy for

the purpose of choice-of-law analysis, can the notice-prejudice rule apply to the consent provision in this case?

ARGUMENT

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

A. The Notice-Prejudice Rule Is Deeply Rooted in California's Public Policy Protecting the Interests of the Policyholder.

Nearly 40-years ago, this Court acknowledged that "[t]he field of insurance so greatly affects the public interest that the industry is viewed as a 'quasi-public' business, in which the special relationship between the insurers and policyholders requires special considerations." (*Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 820, 169 Cal.Rptr. 691, 620 P.2d 141.) The relationship between an insurer and a policyholder is inherently unbalanced due to the adhesive nature of insurance contracts which places the insurer in a superior bargaining position. (*Id.* at p. 820, 169 Cal.Rptr. 691, 620 P.2d 141.)

The court in *20th Century Ins. Co. v. Superior Court* (2001) 90 Cal.App.4th 1247, 109 Cal.Rptr.2d 611, recognized the "significant public interest" in the special relationship between the policyholder and insurer and further noting that such a relationship distinguishes insurance contracts from other types of contracts. (*Id.* at 1266, 109 Cal.Rptr.2d at 626.) Indeed, contracts of insurance are not only interpreted under traditional contract

principles but, in addition, "insurance policies are construed in light of applicable public policy, promoting the protection of the policyholder and the public at large." (*Id.*). This sentiment was aptly stated by this Court in *Glickman v. New York Life Ins. Co.* (1940) 16 Cal.2d 626, 635, 107 P.2d 252:

> "[T]he object and purpose of insurance is to indemnify the policyholder in case of loss, and ordinarily such indemnity should be effectuated rather than defeated. To that end the law makes every rational intendment in order to give full protection to the interests of the policyholder."

(*Id.* at p. 635, 107 P.2d 252 [*citing* 1 Couch, Cyc. of Ins. Law, p. 402 *et seq.*]; see also *Haisten v. Grass Valley Medical Reimbursement Fund, Ltd.* (9th Cir. 1986) 784 F.2d 1392, 1403 [finding the "[p]rotection of California residents from the potential risk of injury thought to be created by insurance and from the unscrupulous practices of insurance companies which profit from premiums from California" constituted strong public policy]; see also *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 690, 254 Cal.Rptr. 211, 765 P.2d 373 [explaining the "[unique] features characteristic of the insurance contract make it particularly susceptible to public policy considerations."].)

The significant public policy concerns for the less powerful policyholders, prompted California courts to adopt the notice-prejudice rule. The notice-prejudice rule precludes an insurer from denying coverage based on a policyholder's breach of a condition of the policy, unless the

insurer can demonstrate that it has or will be substantially prejudiced thereby. (See e.g., *Campbell v. Allstate Ins. Co.* (1963) 60 Cal.2d 303, 32 Cal.Rptr. 827, 384 P.2d 155.) This rule embodies California's longstanding public policy in favor of protecting California policyholders and the general public welfare. (See *Service Management Systems, Inc. v. Steadfast Ins. Co.* (9th Cir. 2007) 216 Fed.Appx. 662, 664 [stating there is a "strong public policy behind [California's] notice-prejudice rule" (emphasis added)]; see also *Campbell, supra,* 60 Cal.2d at p. 307, 32 Cal.Rptr. 827 [emphasizing the "public policy of this state" is in favor of compensating policyholders]; *Bollinger v. National Fire Ins. Co.* (1944) 25 Cal.2d 399, 405, 154 P.2d 399 [finding California public policy discourages a technical forfeiture of policyholder's rights].)

California's notice-prejudice rule goes far beyond the general principle that disproportionate forfeiture should be avoided in the enforcement of contracts. Rather, it is a mandatory rule regulating insurance contracts. This concept was explained by the United States Supreme Court in *UNUM Life Ins. Co. of Am. v. Ward,* (1999) 526 U.S. 358, 119 S. Ct. 1380, 143 L. Ed. 2d 462:

> "It is no doubt true that diverse California decisions bear out the maxim that 'law abhors a forfeiture' and that the notice-prejudice rule is an application of that maxim. But it is an application of a special order, a rule mandatory for insurance contracts, not a principle a court may pliably employ when the circumstances so warrant.... In short, the notice-prejudice rule is distinctive most notably because it is a rule firmly

applied to insurance contracts, not a general principle guiding a court's discretion in a range of matters."

(*Id.* at 369–71, 119 S.Ct. 1380 [emphasis added] [internal quotation marks and citations omitted].)

B. California's Common Laws (Including the Notice-Prejudice Rule) Should Be Considered for the Purpose of Choice-of-Law Analysis.

The Restatement (Second) of Conflict of Laws § 187(2)(b) ["Conflict Restatement"], provides that the law of the state chosen by the parties to govern their contractual rights (arguably New York here) will be applied "unless ... application of [that law] would be contrary to a fundamental public policy of a state [California] which has a materially greater interest that then chose state in the determination of the particular issue...." As explained by the court in *Brack v. Omni Loan Co.* (2008) 164 Cal.App.4th 1312, 80 Cal.Rptr.3d 275, "[t]o be fundamental within the meaning of Restatement (Second) of Conflict of Laws § 187, a policy must be a substantial one." (*Id.* at 1323.) It is equally well established in California that there are no "bright-line rules for determining what is and what is not contrary to a fundamental policy of California." (*Discover Bank v. Superior Court* (2005) 134 Cal.App.4th 886, 893, 36 Cal.Rptr.3d 456, 460; see also *Nedlloyd Lines B.V. v. Superior Court* (1992) 3 Cal.4th 459, 483, 11 Cal.Rptr.2d 330, 346, 834 P.2d 1148, 1164 [adopting Conflict Restatement §187].)

Comment g to Conflict Restatement § 187 provides several important guidelines for determining when a particular public policy constitutes a "fundamental" policy such that it triggers the exception to applying the "law of the state chosen by the parties to govern their contractual rights":

- "No detailed statement can be made of the situations where a 'fundamental' policy of the state of the otherwise applicable law will be found to exist."
- "To be 'fundamental,' a policy must in any event be a substantial one."
- "To be 'fundamental' within the meaning of the present rule, a policy need not be as strong as would be required to justify the forum in refusing to entertain suit upon a foreign cause of action under the rule of § 90.
- "[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."

As set forth in California Insurance Code § 16, "the word 'shall' is mandatory and the word 'may' is permissive," thus the use of the phrase "may be embodied in a statute" as used in Comment g, indicates that statutory edicts are one of a number of ways in which a fundamental public

policy may be expressed. In fact, this rule of construction and contract interpretation is nearly universally accepted and yet, Indian Harbor seeks to transform the concept set forth in comment g to Conflict Restatement § 187 that a fundamental public policy "***may*** be embodied in a statute" into a bright line, mandatory requirement that, unless a certain legal concept is embodied in a statute, it cannot be deemed to be a "fundamental" policy of the state. Such a position is not supported by either California law or a plain reading of comment g to Conflict Restatement § 187.

The court in *Steadfast Ins. Co. v. Casden Properties, Inc.* (2007) 837 N.Y.S.2d 116, 41 A.D.3d 120, refused to enforce an insurance "policy endorsement waiving the requirement that an insurer must demonstrate prejudice in order to disclaim [coverage] for untimely notice" on the basis that such an endorsement was "void as against public policy" of the State of California. (*Id.* at 117, 41 A.D.3d at 121.) In making this ruling, the court in *Casden Properties* noted that "California law is imbued with a strong public policy against technical forfeitures in the insurance context" [*Id.*] and cited *Service Management Systems, Inc. v. Steadfast Ins. Co.* (9th Cir. 2007) 216 Fed.App'x. 662, which expressly recognized "California's strong public policy behind the notice-prejudice rule." (*Id.* at 664, emphasis added.) Accordingly, even courts in the state l chosen by the parties to govern their contractual rights here, recognize the substantial public policy under California law underlying the notice-prejudice rule.

In other contexts, California courts have concluded that a particular rule of law constituted a "fundamental public policy" of this State despite the lack of any statutory scheme incorporating such a policy.[3] For example, the court in *Klussman v. Cross Country Bank* (2005) 134 Cal.App.4th 1283, 36 Cal.Rptr.3d 728, concluded "Delaware's approval of class action waivers, especially in the context of a 'take it or leave it' arbitration clause <u>is contrary to fundamental public policy in California</u>." (*Id.* at 1298, 36 Cal.Rptr.3d at 740); accord *Davis v. Chase Bank USA, N.A.* (9th Cir. 2008) 299 F. App'x 662.

Indeed, these cases concluded that protecting parties in a weaker bargaining position (like Pitzer here) is a fundamental public policy of California. (Accord *McKee v. AT & T Corp.* (2008) 164 Wash. 2d 372, 385, 191 P.3d 845, 852 ["New York law, which allows waiver of class-based relief, conflicts with our state's fundamental public policy to protect consumers through the availability of class action. [Citations]. <u>Protecting</u>

[3] *See e.g.*, *Fundingsland v. Omh Healthedge Holdings, Inc.*, (S.D. Cal. May 26, 2016) 2016 WL 3022053, at *9 ("California law 'holds, as a matter of public policy, that a litigant cannot waive its right to a jury trial by entering into a contract that contains a pre-dispute jury trial waiver clause.' [Citations]. Because this rule is more protective than the federal 'knowing and voluntary' standard, 'district courts sitting in diversity must apply California's rule on pre-dispute jury trial waivers to contracts governed by California law.' [Citations]. Consequently, there is a possibility that California's law governs this issue, notwithstanding that the parties' choice-of-law provision designates Delaware law and this action was filed in federal court." The court reached this conclusion despite the fact that no statutes embodied the rule that a litigant cannot waive its right to a jury trial in such a manner.)

parties in a position of weaker bargaining power from exploitation is among the types of fundamental public policy contemplated by *Restatement, supra,* § 187(2)(b) cmt. g.]; emphasis added.)

In *Tri-Union Seafoods, LLC v. Starr Surplus Lines Ins. Co.* (S.D. Cal. 2015) 88 F.Supp.3d 1156, 1168-69, the court held that, under Conflict Restatement § 187, the failure of New York law to recognize a tort remedy for an insurer's breach of the implied covenant of good faith and fair dealing was contrary to the fundamental public policy in California. In reaching its decision, the *Tri-Union* court relied on the "special relationship" between the policyholder and insurer and that, "[u]nlike most other contracts , ... an insurance policy is characterized by elements of adhesion, public interest and fiduciary responsibility." (*Id.* [emphasis added] [internal citation omitted].) The fundamental public policy at issue in *Tri-Union* was not statutorily created.

Indian Harbor has argued that the *Tri-Union* decision "runs directly afoul of *Nedlloyd*" and "was incorrectly decided." This is incorrect. In *Nedlloyd Lines B.V. v. Superior Court* (1992) 3 Cal.4th 459, 11 Cal.Rptr.2d 330, 834 P.2d 1148, a shipping company filed a breach of contract claim against its shareholders who had fiduciary duties under the contract. The elements of adhesion and public interest -- which are implicated in insurance policies -- were not at issue with the contract analyzed in *Nedlloyd*. (*Id.*, *supra*, at p.485, 11 Cal.Rptr.2d at p. 347.) As such, Indian

Harbor's arguments as to the significance of the *Tri-Union* case are wholly without merit.

Decisional authority impacting the insurer/policyholder relationship, including the notice-prejudice rule, are a matter of substantial public interest and should be considered in a choice-of-law analysis. This is particularly appropriate in matters involving insurance because the common law decisions of state courts are one of the principal sources of the laws by which states regulate insurance. (See Robert E. Keeton, *Basic Text on Insurance Law* § 8.1(b), at 542 (1971) ["Insurance transactions and institutions are subject to regulation, in a broad sense, not only at the hands of administrative agencies specially created for this purpose but also at the hands of legislatures and courts."].)

As a result, the notice-prejudice rule is a fundamental public policy of this State.

C. The Notice-Prejudice Rule Is a Fundamental Public Policy of California That Protects the Interests of Policyholders and the Public at Large.

California's notice-prejudice rule embodies this State's fundamental public policy of protecting California policyholders from technical forfeitures of coverage. California policyholders should not be denied the protections of a fundamental policy of this state simply because the well-entrenched rule of law has not been codified or promulgated by statute. Whether established by common law or by statute, the notice-prejudice rule

has the same regulatory effect on the insurance industry. Because this mandatory rule for insurance contracts in California implicates substantial public policy concerns as recognized by numerous judicial proclamations to that effect, it constitutes a fundamental policy of the state and must be considered for purposes of choice-of-law analysis.

For these reasons, this Court should answer the first certified question in the affirmative and confirm the notice-prejudice rule is a fundamental policy of the state for purposes of choice-of-law analysis.

II. THE NOTICE-PREJUDICE RULE SHOULD BE APPLIED TO THE CONSENT PROVISION IN THIS CASE.

A. There Are Significant Differences Between First-Party and Third-Party Insurance Claims.

California law treats *first-party* insurance differently than *third-party* insurance. (See *Garvey v. State Farm Fire & Casualty Co.* (1989) 48 Cal.3d 395, 406, 257 Cal.Rptr. 292, 298, 770 P.2d 704, 710; see also *Howard v. American Nat. Fire Ins. Co.* (2010) 187 Cal.App.4th 498, 530, 115 Cal.Rptr.3d 42, 70, *as modified on denial of reh'g* (Sept. 9, 2010) ["There are material differences in the purposes of first party insurance policies (that obligate the insurer to pay damages claimed by the policyholder itself) and third party insurance policies (that obligate the insurer to defend, settle, and pay damages claimed by a third party against the policyholder)."]; *Shell Oil Co. v. Winterthur Swiss Ins. Co.* (1993) 12 Cal.App.4th 715, 765 ["First party coverage for damage to the

policyholder's own property is not the same as third party liability insurance and should be treated differently."].) As set out below, this case implicates first-party insurance coverage.

Under first-party insurance, the insurer agrees to indemnify the policyholder for its direct losses. (*Howard v. American Nat. Fire Ins. Co.*, *supra*, 187 Cal.App.4th at 530, 115 Cal.Rptr.3d at 70.) Third-party insurance provides coverage for a third-party's claim against the policyholder. (*Id.*) In a third-party claim, an insurer cannot rely on a genuine coverage dispute to refuse settlement and also faces potential liability beyond the policy limits if the policyholder can demonstrate that he has suffered damages from an insurer's breach of the duty to defend. (*Id.* at p. 521–22, 115 Cal.Rptr.3d at p. 63].) Therefore, the insurer's claims and settlement procedures for handling first- and third-party claims "differ significantly." (*Id.* [internal citation and quotations omitted].)

B. The Policy Justifications for Strict Enforcement of Consent Provisions Do Not Exist in First-Party Insurance Claims.

A consent or no-voluntary payment provision generally states that the policyholder will not, except at his or her own expense, voluntarily make a payment, assume any obligation, or incur any expense, without the insurer's consent. (See *Truck Ins. Exchange v. Unigard Ins. Co.* (2000) 79 Cal.App.4th 966, 974–975, 94 Cal.Rptr.2d 516.) Its purpose "is to prevent collusion as well as to invest the insurer with the complete control and

direction of the defense or compromise of suits or claims." (*Gribaldo, Jacobs, Jones & Associates v. Agrippina Versicherunges A.G.* (1970) 3 Cal.3d 434, 449, 91 Cal.Rptr. 6, 476 P.2d 406 [internal citation and quotation omitted].) Application of the notice-prejudice rule to a consent provision in the context of a first-party claim has not been analyzed by California courts.[4]

The policy justifications for strict enforcement of a consent provision in a third-party policy simply do not exist in the context of a first-party claim. Most importantly, the risk of harm to the insurer for breach of a consent provision in a first-party claim is significantly diminished. There is no risk of collusion between the policyholder and a third-party since there is no injured third-party here. The insurer is also not concerned with defense costs and may not be foreclosed from challenging, at a later date, the reasonableness of amounts expended before notice. As such, the insurer's interest in directing or controlling a first-party claim is limited and militates against strict enforcement of a consent provision.

C. The Notice-Prejudice Rule Should Apply to the Consent Provision in This Case.

As Pitzer correctly sets forth in its opening brief, this case involves a first-party claim because Pitzer seeks indemnification for direct losses and

[4] In cases analyzing third-party insurance claims, California courts have held that a policyholder's breach of a consent provision does not require a showing of prejudice. (See *Truck Ins. Exchange v. Unigard Ins. Co.*, *supra*, 79 Cal.App.4th at p.974-975, 94 Cal.Rptr.2d 516.)