

Case No. S239510

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA
EN BANC

SUPREME COURT
FILED

SEP 20 2017

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PITZER COLLEGE,

Plaintiff and Petitioner,

Deputy

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

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.

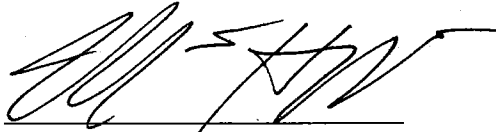
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Dated: September 13, 2017

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

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

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 reh'g. (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

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

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.*

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

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