**IN THE SUPREME COURT OF CALIFORNIA**

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| PITZER COLLEGE,<br>*Petitioner*,<br><br>vs.<br><br>INDIAN HARBOR INSURANCE COMPANY,<br>*Respondent*. | Case No. S239510 |

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 Ca1.5th 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 Ca1.4th 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*, Treslller 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 is contrary to fundamental public policy in California." (*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]. Protecting

[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.)

there is no injured third-party. (See *Howard v. American Nat. Fire Ins. Co.*, *supra*, 187 Cal.App.4th at 530, 115 Cal.Rptr.3d at p. 70.) Indian Harbor's argument that the Policy only provides third-party insurance is inconsistent with the terms of the Policy and should be rejected. Specifically, the term "REMEDIATION EXPENSE" under the Policy is inclusive of "REMEDIATION COSTS" which are defined as:

> reasonable and necessary costs incurred by the POLICYHOLDER to restore, repair or replace real or personal property [including real or personal property of the insured] to substantially the same condition it was in prior to being damaged during work performed during the course of incurring REMEDIATION EXPENSE.

The Policy therefore unambiguously provides for indemnity of the policyholder's direct losses, which constitutes a first-party claim. (See *AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807, 822, 274 Cal.Rptr. 820, 799 P.2d 1253 [explaining a court must give effect "to every part" of the policy with "each clause helping to interpret the other"].)

Because this case involves a first-party claim, the policy justifications for strict enforcement of the consent provision within Section VII B. of the Policy do not exist and the provision fails to serve its customary purpose; *i.e.*, to prevent collusion between a policyholder and a third-party claimant, and give the insurer control over the defense and settlement of claims. (See *Gribaldo, Jacobs, Jones & Associates v. Agrippina Versicherunges A.G.*, *supra*, 3 Cal.3d at p. 449, 91 Cal.Rptr. 6.)

The consent provision here does not protect Indian Harbor against collusion (since there is no injured third-party) and it does not give complete control of the remediation to Indian Harbor. Instead, the provision simply advances the purpose of a notice provision as an aid to Indian Harbor in "investigating, settling, and defending the claim." (*Truck Ins. Exchange v. Unigard Ins. Co.*, *supra*, 79 Cal.App.4th at p. 975, 94 Cal.Rptr.2d at p. 522.)

Public policy considerations for imposing the notice-prejudice rule including the adhesive nature of insurance contracts, the inequity of technical forfeiture, and the interests of public welfare, should prevail here. Because the consent clause in the subject policy amounts, in essence, to a notice provision in the context of this first-party claim, the notice-prejudice rule should apply and, as noted below, Pitzer fully complied with the notice provisions of the policy.

For these reasons, the Court should also answer the second certified question in the affirmative and apply the notice-prejudice rule to the consent provision in this case.

### D. Even if the Notice-Prejudice Rule Does Not Apply, the Consent Provision Is Nonetheless Unenforceable Because the Policy Is Ambiguous.

When interpreting a policy provision, the court must the court must "look first to the language of the contract in order to ascertain its plain meaning or the meaning a layperson would ordinarily attach to it." (*Waller*

*v. Truck Ins. Exchange, Inc*. (1995) 11 Cal.4th 1, 18, 44 Cal.Rptr.2d 370, 378, 900 P.2d 619, 627 [internal citation omitted].) Terms are construed in their "'ordinary and popular sense,' unless 'used by the parties in a technical sense or a special meaning is given to them by usage.'" (*AIU Ins. Co. v. Superior Court*, *supra*, 51 Cal.3d at p. 821, 274 Cal.Rptr. 820 [quoting Cal. Civ. Code § 1644].)

A policy provision is ambiguous if it is "susceptible to two or more reasonable constructions despite the plain meaning of its terms within the context of the policy as a whole." (*Palmer v. Truck Ins. Exchange* (1999) 21 Cal.4th 1109, 1115 [90 Cal.Rptr.2d 647, 652–53, 988 P.2d 568, 572–73 [citing *Foster–Gardner, Inc. v. National Union Fire Ins. Co.* (1998) 18 Cal.4th 857, 868, 77 Cal.Rptr.2d 107, 959 P.2d 265].) An ambiguity may appear either on the face of the policy; *i.e.*, contradictory or inconsistent language in different portions of the policy, or in context, when the provision in question is sought to be applied to a particular claim under the policy. (See *Delgado v. Heritage Life Ins. Co.* (1984) 157 Cal.App.3d 262, 271, 203 Cal.Rptr. 672, 677.)

When faced with ambiguous policy language, the court must first attempt to determine whether coverage is consistent with the policyholder's "objectively reasonable expectations." (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1265, 10 Cal.Rptr.2d 538, 545, 833 P.2d 545, 552.) It has been held that "any ambiguity or uncertainty in an insurance policy is

to be resolved against the insurer and ... if semantically permissible, the contract will be given such construction as will fairly achieve its object of providing indemnity for the loss to which the insurance relates." (*Delgado v. Heritage Life Ins. Co.*, *supra*, 157 Cal.App.3d at p. 271, 203 Cal.Rptr. 672 [internal quotations and citations omitted].)

The first policy provision set out on the Declarations Page of the Indian Harbor policy, expressly advises the policyholder in all capital letters and bold type-face included in an outlined box, that:

**THIS IS A "CLAIMS-MADE AND REPORTED" POLICY, THIS POLICY REQUIRES THAT A CLAIM BE MADE AGAINST THE INSURED DURING THE POLICY PERIOD AND REPORTED TO THE COMPANY DURING THE POLICY PERIOD OR, WHERE APPLICABLE, THE EXTENDED REPORTING PERIOD. IN ADDITION, THIS POLICY MAY HAVE PROVISIONS OR REQUIREMENTS DIFFERENT FROM OTHER POLICIES YOU MAY HAVE PURCHASED. PLEASE READ CAREFULLY.**

**THIS POLICY CONTAINS PROVISIONS WHICH LIMIT THE AMOUNT OF LEGAL EXPENSE THE COMPANY IS RESPONSIBLE TO PAY. LEGAL EXPENSE SHALL BE APPLIED AGAINST THE SELF-INSURED RETENTION AMOUNT STATED IN ITEM 4. BELOW AND IS SUBJECT TO THE LIMITS OF LIABILITY STATED IN ITEM 3. BELOW.**

(Emphasis added.) This exact same wording is also repeated on the first page of the "Pollution and Remediation Legal Liability" policy. Notably absent from these proclamations is any indication that the mandated "reporting" requirement that a pre-requisite to coverage is that the claim be reported during the policy period is that such a mandate is subject to any additional terms or conditions of the policy. Indeed, other claims made

policy forms often provide a similar admonition but with clarifying language such as "coverage within this Policy is generally limited to loss from claims first made against the Insured during the Policy Period and reported to the Company as the policy requires."

Here, the Indian Harbor Policy includes three coverage parts within the Pollution and Remediation Legal Liability coverage and the parties agree that Coverage B ("Remediation Legal Liability") is implicated here. Pursuant to the express terms of that coverage part:

> **B. Coverage B -- REMEDIATION LEGAL LIABILITY**
>
> The Company will pay on behalf of the INSURED for REMEDIATION EXPENSE and related LEGAL EXPENSE resulting from any POLLUTION CONDITION on, at, under or migrating from any COVERED LOCATION:
>
> 1. for a CLAIM first made against the INSURED during the POLICY PERIOD which the INSURED has or will become legally obligated to pay; or
> 2. that is first discovered during the POLICY PERIOD,
>
> provided that the INSURED reports such CLAIM or POLLUTION CONDITION to the Company, in writing, during the POLICY PERIOD or, where applicable, the EXTENDED REPORTING PERIOD.

Coverage parts A and C similarly provide that Indian Harbor "will pay on behalf of the INSURED" all covered losses "resulting from any POLLUTION CONDITION" for "which the INSURED has or will become legally obligated to pay as a result of as a result of a CLAIM first made against the INSURED during the POLICY PERIOD and reported to the Company, in writing, by the INSURED, during the POLICY PERIOD or, where applicable, the EXTENDED REPORTING PERIOD." (Emphasis

added.) As a result, in the first two pages of the Subject Policy, Pitzer is expressly advised -- in four separate places and without any limiting language -- that the only notice requirements are that the claim be "reported to the Company, in writing … during the Policy Period" or any extended reporting period. Pitzer specifically complied with these requirements.

Nine pages after the Coverage B Insuring Agreement, the Indian Harbor policy states as part of Section VII ("Reporting, Defense, Settlement and Cooperation") that, "as a condition precedent to the coverage hereunder":

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

(Section VII A.) Once again, the "as soon as practicable" reporting requirements of the first two conditions set out under the "Reporting, Defense, Settlement and Cooperation" nowhere advises Pitzer that the "as soon as practicable" requirement might be subject to additional terms or conditions.

Here, the policy period for the subject policy was July 23, 2010 through July 23, 2011. Pitzer first became aware of the presence of

discolored soil on its property on January 10, 2011 (during the Policy Period); it discovered that the discolored soil was caused by lead contamination on January 11, 2011 (during the Policy Period); and Pitzer reported the contamination and related remediation activities to Indian Harbor in writing on July 11, 2011 (also during the Policy Period.)[5]

As noted above, Section VII A. requires that, "in the event … any POLLUTION CONDITION is first discovered by the INSURED … that results in a LOSS or REMEDIATION EXPENSE," the insured must advise Indian Harbor "of the particulars … as soon as practicable."

The term "remediation expense" is defined as:

> "expenses caused by a POLLUTION CONDITION and incurred to investigate, assess, remove, dispose of, abate, contain, treat, or neutralize a POLLUTION CONDITION…. REMEDIATION EXPENSE shall also include any (i) monitoring and testing costs, or (ii) punitive, exemplary or multiplied damages, where insurable by law. REMEDIATION EXPENSE shall also include RESTORATION COSTS.

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[5] It is disingenuous for Indian Harbor to complaint about a purported two week delay by Pitzer in providing notice of the remediation efforts undertaken when the carrier itself waited twice that long to even acknowledge that Pitzer had submitted a claim in writing on July 11, 2011; Indian Harbor did not acknowledge that claim until August 10, 2011. Indeed, this month-long delay by Indian Harbor to simply acknowledge the submission of a claim confirms Pitzer's fears that involving the carrier during the emergency remediation efforts would have served to delay the process. Even after acknowledging receipt of the claim a month after it was received, Indian Harbor then delayed another seven months before denying Pitzer's claim outright based upon late notice and the choice of law provision. This eight month long process again served to confirm Pitzer's fears of delay and obfuscation.

(Emphasis added.)

The term "restoration costs" is defined as:

> "any reasonable and necessary costs incurred by the POLICYHOLDER to restore, repair or replace real or personal property to substantially the same condition it was in prior to being damaged during work performed during the course of incurring REMEDIATION EXPENSE."

(Emphasis added.)

Applying the plain meaning rule to the foregoing terms, the policyholder is not required to provide notice under Section VII(A) until it has actually incurred a remediation expense. This necessarily implies that a policyholder could not incur a remediation expense without commencing remediation.

Moreover, the requirements under Section VII A. 1. are clearly limited to third-party claims since they require Pitzer to forward any demands received from a third-party. Section VII A. 2. -- which could be applied in the context of a first-party claim -- fails to set forth any time limitation for providing "notice." The requirement to notify Indian Harbor of a claim "as soon as practicable" in the second sentence of Section VII A. 2. is unambiguously limited to situations where the policyholder originally provided ***oral*** notice of a remediation expense.

A reasonable policyholder interpreting the various notice provisions of the policy, according to the order in which they appear in the policy (and the emphasis utilized by Indian Harbor in certain places) would logically

conclude that, in a time sensitive situation, Pitzer is not obligated to provide notice of a remediation expense until it has actually commenced remediation and has incurred costs to investigate or abate a pollution condition. Further, Pitzer would also reasonably conclude that there is no time limitation for providing notice of a first-party claim for remediation expenses other that the remediation must be reported during the policy period or as soon as practicable (which is not defined in the policy) after such remediation expenses have been incurred.

This reasonable interpretation is inconsistent with the consent provision of Section VII B. which states:

> "No costs, charges or expenses shall be incurred, nor payments made, obligations assumed or remediation commenced without the Company's written consent which shall not be unreasonably withheld…."

In addition to the exception that Indian Harbor shall not "unreasonably withhold" written consent for Pitzer to commenced remediation, Section VII is further subject to another exception to the "no voluntary payments" provision; *i.e.*, "[t]his provision does not apply to costs incurred by the INSURED on an emergency basis…." (Emphasis added.) Note well that this latter exception also incorporates the term "incurred" much like the definition of the terms "remediation expense" and "restoration costs."

The Subject Policy is therefore ambiguous on its face regarding the interplay between notice and consent. The notice requirements listed

throughout the policy, including Section VII A., are not triggered unless the policyholder has incurred a remediation expense, but the policyholder cannot incur a remediation expense without the insurer's consent pursuant to Section VII B. Such inconsistent language must be construed against the insurer and in favor of finding coverage, consistent with the policyholder's reasonable expectations. (See *Delgado v. Heritage Life Ins. Co.*, *supra*, 157 Cal.App.3d at p. 271, 203 Cal.Rptr. 672.)

Even if this Court finds the notice-prejudice rule inapplicable to the consent clause in this case, A*micus Curiae* respectfully urges the Court provide additional guidance to the Ninth Circuit Court of Appeals regarding the impermissibly ambiguous terms of this Policy.

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## CONCLUSION

In accordance with the foregoing, A*micus Curiae* United Policyholders respectfully requests that this Court answer both certified questions in the affirmative and (1) confirm the notice-prejudice rule is a fundamental policy of California for purposes of choice-of-law analysis; and (2) find the notice-prejudice rule applicable to the consent provision in this case.

Dated: August 28, 2017. Respectfully submitted,

**POLSINELLI LLP**

By: _____

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## CERTIFICATE OF WORD COUNT

The test of this brief consists of 6,352 words as counted by the Microsoft word version 2010 word processing program used to generate the brief.

Dated: August 28, 2017.

By: _____

Richard C. Giller
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*Attorneys for Amicus Curiae*
*United Policyholders*

## 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 Polsinelli LLP and my business address is 2049 Century Park East, Ste. 2900 Los Angeles, CA 90067. On August 29, 2017, I served the following documents described as:

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

on the interested parties in this action by placing true and correct copies thereof enclosed in sealed envelopes addressed as follows:

| | |
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☒ BY MAIL: By placing a true and correct copy of such document(s) enclosed in a sealed envelope addressed to the offices indicated above. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

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the transmittal report bearing the date, time and sending facsimile machine telephone number shall be attached to the original proof of service.

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

Dated: August 29, 2017.

**Cassini Quarles**