

## California Supreme Court Says California's Notice-Prejudice Rule May Override Policy's Choice-Of-Law Provision

09.27.19



(Article from *Insurance Law Alert*, September 2019)

For more information, please visit the [Insurance Law Alert Resource Center](#).

The California Supreme Court ruled that California's common law notice-prejudice rule is a fundamental public policy for the purpose of potentially overriding an explicit choice-of-law provision in an insurance policy. The court also held that the notice-prejudice rule applies to consent provisions in first-party policies. *Pitzer College v. Indian Harbor Ins. Co.*, 2019 WL 4065521 (Cal. Aug. 29, 2019).

Pitzer College discovered soil damage at a construction site on its campus and promptly commenced remediation work. Pitzer did not inform its insurer Indian Harbor of the issue until approximately three months after remediation had been completed. Indian Harbor denied coverage based on Pitzer's failure to give notice as soon as practicable and its failure to obtain consent prior to remediation. A California district court granted Indian Harbor's summary judgment motion, finding that Pitzer had violated the policy's notice and consent provisions. The district court applied New York law in accordance with the policy's choice-of-law provision. New York law does not require a showing of prejudice in order to deny coverage based on late notice for policies delivered and issued outside of New York. The district court also ruled that summary judgment was warranted based on Pitzer's failure to obtain consent prior to incurring remediation costs.

On appeal, the Ninth Circuit explained that if California's notice-prejudice rule is deemed a "fundamental public policy," it can override the parties' choice of New York law. Citing a lack of controlling precedent on this and other issues, the court certified the following questions to the California Supreme Court:

- (1) Is California's common law notice-prejudice rule a fundamental public policy for the purpose of choice of law analysis?
- (2) If so, does the notice-prejudice rule apply to the consent provision of the insurance policy in this case?

The California Supreme Court answered the first question in the affirmative. It reasoned that requiring an insurer to establish prejudice as a result of late notice is a fundamental state policy because it promotes fairness, protects against inequity among contracting parties with unequal bargaining power, and promotes the public interest by protecting the public from bearing the costs of harm that insurance purports to cover. The California Supreme Court remanded to the Ninth Circuit the issue of "whether California has a materially greater interest than New York in determining the coverage issue, such that the contract's choice of law would be unenforceable."

As to the second certified question, the court held that the notice-prejudice rule applies to consent provisions in first-party policies. The court explained that the rationale that justifies a showing of prejudice for violations of notice provisions applies with equal force to policy provisions that require consent prior to incurring costs. However, the court expressly limited this holding to first-party policies, noting that different concerns are implicated in the context of third-party coverage. The court remanded the matter for a determination of whether Indian Harbor’s policy provided first-party or third-party coverage.

Authors and  
Contacts

Bryce Friedman

Partner

[bfriedman@stblaw.com](mailto:bfriedman@stblaw.com)

[+1-212-455-2235](tel:+12124552235)

