

California Supreme Court rules late notice no bar to insurance claims, Business Insurance, ft. Christine Magarian

Christine Magarian, partner from the Kaufman Dolowich & Voluck LLP Los Angeles office, was quoted in an article written by Judy Greenwald for Business Insurance published August 30, 2019.

In what is described as a pro-policyholder ruling, the California Supreme Court held Thursday that it is a fundamental policy that California policyholders can proceed with their claims even if they give late notice, unless their insurer can prove it substantially prejudices it.

The state high court also held in Pitzer College v. Indian Harbor Insurance Co. that the late notice provision applies to policy provisions requiring written consent before incurring expenses. It is applicable only to first-party coverages.

The case involves a coverage dispute between Axa XL unit Indian Harbor and Pitzer College in Claremont, California. Pitzer had purchased an insurance policy from Indian Harbor that covered the college for legal and remediation expenses resulting from pollution conditions discovered during the July 2010-July 2013 policy period. The policy provided that New York law applied.

In January 2012, Pitzer discovered darkened soils at the construction site for a new campus dormitory and determined remediation would be required.

Pitzer's environmental consultants said the least expensive and most expeditious option was to conduct lead removal on-site using a transportable treatment unit. It did so, at a total cost of \$2 million. Indian Harbor's expert later said the remediation could have been performed at a lower cost.

Pitzer did not obtain Indian Harbor's consent before beginning remediation, and did not inform it of the remediation until three months after it was completed and six months after it discovered the contaminated soil, according to the ruling.

Indian Harbor denied coverage based on the college's failure to give notice as soon as practicable and its failure to obtain the insurer's consent before beginning remediation.

Pitzer filed suit against Indian Harbor, and the U.S. District Court in Los Angeles granted Indian Harbor's motion for summary judgment.

The District Court held that New York law, which does not have a late notice provision, applied. It said, although a state's "fundamental policy" can override a choice of law provision, Pitzer had failed to establish California's notice-prejudice rule was such a policy. It also held summary judgment was warranted because Pitzer did not comply with the policy's consent provision.

The case was appealed to the 9th U.S. Circuit Court of Appeals in San Francisco, which asked the California Supreme Court to decide whether the state's notice-prejudice law is a fundamental policy. It also asked the court to decide whether, if this is the case, the notice-prejudice rule applied to the consent provision.

The Supreme Court held that the policy is fundamental. The rule "protects insureds against inequitable results that are generated by insurers' superior bargaining power," said the decision.

It said it also "protects the public from bearing the costs of harm that an insurance policy purports to cover." It did not explicitly rule whether the notice-prejudice rule is applicable in this case.

The court said also said the notice-prejudice rule is applicable to the consent provision, but only applicable to first-party coverages.

There is a dispute in this case as to whether Indian Harbor's policy provides first-party or third-party coverage. The court said it would leave it to the 9th Circuit to determine that issue.

Christine Magarian, vice chair of the general liability practice group at Kaufman Dolowich & Voluck LLP in Los Angeles, who represents insurers, also said the ruling would be considered pro-policyholder. Its effect "may be to override a choice of law provision in a policy" where that state may have laws more favorable to the insurer, she said.