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Supreme Court of Texas.
Paj, Inc., d/b/a Prime Art and Jewel, Petitioner,
v.
The Hanover Insurance Company, Respondent.
No. 05-0849.

October 18, 2006

Appearances:
Baxter W. Banowsky, Banowsky & Levine, P.C., Dallas, TX, for petitioner.
Robert Lynn Fielder, Fisk & Fielder, P.C., Dallas, TX, for respondent.

Before:

Chief Justice Wallace B. Jefferson, Don R. Willett, Harriet O'NEILL, David M. Medina, Paul W. Green, Nathan L. Hecht, Dale Wainwright, Phil Johnson, Scott A. Brister

CONTENTS

JUSTICE: Court is ready to hear argument in 0508 or 9, PAJ versus The Hanover Insurance Company. Justice Brister is sitting in this case but did not-- be part into argument.
COURT MARSHALL: May it please the Court. Mr. Banowsky for the argument for the petitioner, petitioner reserves 7 minutes for rebuttal.

ORAL ARGUMENT OF BAXTER W. BANOWSKY ON BEHALF OF THE PETITIONER

MR. BANOWSKY: Baxter Banowsky for the petitioner of PAJ. May it please the Court. This case involves a primarily a question about the interpretation of Commercial General Liability Policies in the State of Texas. A briefly, a PAJ -
JUSTICE: Please inform policies.
MR. BANOWSKY: - these are formed policies. And PAJ is in the business of-- not that-- it matters particularly the case, was a business of distributing jewelry. And from 1993 to 1999, PAJ obtained from the respondent, Hanover Insurance Company, a General Liability-- a Ge-- a Commercial General Liability Policies. And those policies provided among other things, "advertising injury" which provided defense and the amendment of a case or related to a claims of copyright infringement. In December of 1998, turned disputed name, the term of,

of the last policy of that Hanover issue. PAJ was sued offer copyright infringement. But fortunately for PAJ, PAJ-- at least the employees at PAJ who was responsible for responding to the Bureau in Lawsuit. We're not aware that, that there was a covered claim on the policy and the issue didn't come up and tell some months later, during their-- across as of meaning of their-- the Insurance Agent and looking at-- giving the renewal coverage on their General Liability Policy. That time, some months later, I believe the stipulation was four to six months later, the insurance company would placed unnoticed. In this case, the stipulate-- the case will decide it entirely on stipulated facts and among the stipulations were that the notice was not as soon as practicable case, four to six months after the lawsuit was filed.

JUSTICE: Is that matter or wonders of notice provision that to ensure this to be put on notice that can properly defend the insured?

MR. BANOWSKY: Well, certainly be, in order to tender defense, the insurance company has got to know that there is a case pending. And PAJ has not arguing that the insurance company did anything wrong for not tendering a defense during the period of time that it was not aware that there was a lawsuit pending. The question-- the other stipulation which is immaterial to this case is that the insurance company stipulated that it was not prejudiced by the-- a delay in receiving notice of suit. So the question that comes before this Court are-- are essentially two fold; number one, whether the notice provision is a condition, a condition precedent under the policy, and it so-- would affect that asked, and if not would affect that asked. Obviously, I think under this Court's ruling and Hernandez if the KF-- the term is not considered a tradition precedent. But it's considered a covenant under the policy that these are duties that the insurer, that the insurer has then under the plain analysis of Hernandez, the insurance company, in order to show materiality of a breach, would have to show that it was prejudiced but the insurer cannot view in this case. Nonetheless, even if the Court determines that the provision-- the notice provision is a condition and not a covenant, there are still ways of question whether or not under Texas Law as it currently exist or as it should exist whether the insurer should be allowed to catalyze on the wait notice in situations where it's not been prejudiced to anyway in order to basically create forfeiture situations.

JUSTICE: So that, should not bes-- should not be some guidelines of the-- depending on the type of litigation, you can wait months; you can wait weeks; you can wait, perhaps, even a couple of years, and insurer not to be prejudiced.

MR. BANOWSKY: Well, I think guidelines that are set forth-- and there's another section is can be drawn, and there had been amici a breached that have been filed. And that is between claims made all season in occurrence policies insured. The policy issued here is the first policy. Would that means is that the triggering events for coverage is that an occurrence happen during the policy period. There's no question that a cover to that occurred during the policy period here in a claims made policy. There are often a specific reporting requirements. There are specifically negotiating facts. Some claims made policies include where a call that extended the reporting requirements which says that the claim is got to be-- first made during the policy period and that, and that the parties made negotiates for some period of time after the policy of the claim to be reported. And so in that case, it's clearer that there made their-- well, be a specific guidelines. And the Courts that I have looked at to the statutes, have noticed that claimed made policies that the claims

history is an annual part in the underwriting in the selling of premiums going forward. And they need to know what they end and it's important for the insurer to know at the time is writing the new policies, what it's exposure is on it's old policies which not ...

JUSTICE: And those, those kinds of considerations may be part of what let us to say in Cutaia, that this is a matter for the terms department to work through, why isn't that still true?

MR. BANOWSKY: Well, if we look at Cutaia, one of the things that we see is that Cutaia-- because of his age involved policy language that was materially different in the language in the policies here. One of the things that we all know is as a result of the Court's decision, Cutaia, it, at least, it appears that as a result to that decision the insurance Court promulgated the rule which required a showing of prejudiced under the Bodily Injury and Property Damage of portions of a Commercial General Liability policy.

JUSTICE: But that-- that's-- does look like that. And we said, "Well, listen really separation to you." And when I did it, then why shouldn't we live with that decision?

MR. BANOWSKY: Well, you know, I tell you why. It's from couple of reasons, one at a time. There was no "advertising injury" that would have been offered to this policies, so would not have made sense, would not be possible for the Court to issue an order that also reflect to that. Additionally, the language has changed. And so since the Policy Language has changed and since the Board re-- is required to prove the Policy Language in the, in the formed policies that are promulgated. Then, it can't have affected it's, it's Administrative Review and changed by the way that is approves the policies in that ...

JUSTICE: What, why would you approve-- Why would it approve an endorsement for coverage A, the required prejudice and an endorsement from coverage B that doesn't?

MR. BANOWSKY: Well, the, the Board order, with respect to the endorsement that requires prejudice as the Court knows is, is a very old endorsement. It has and has been resend it. And I don't know that there been a reason to resend it. But the Cutaia Court, one of the things that came out-- but that Cutaia court was the distinction or the understanding of the acknowledgment that the plain wording of the contract require a finding of a condition precedent to coverage. The Court says that they are facing with the plain wording in the contract. And they also say-- in looking at from the history of this notion that notice provisions are, are conditions, it goes on as they after all, that's what the contract says. But that's not what our contract says. The Cutaia contract, it specifically included the languages he says. This is a condition precedent. I used that magic word.

JUSTICE O'NEILL: But Section 4 of this policy says Commercial General Liability conditions.

MR. BANOWSKY: It does say commercial conditions. And if you look at the policy under that effect-- that's really the only basis, I think, from an interpretation stand point define that this provision-- the subsection unnoticed could be a condition as that major heading above it just says, "conditions." But if you look at the other items, that are listed, there's nine of them. And addition to the notice, there's a nine of ... , (1) Bankruptcy, (3) Legal Action Against Us-- now, get back to that because it's not-- that's an important provision-- (4) Other Insurance, (5) Premium Audit, (6) Representations, (7) Separation of Insurance, (8) Transfer of Rights of Recovery Against Others, and (9) When We Do Not Renew. And so we can't say and if-- just look at the policy briefly, you can't come to the conclusion that all

of those provisions are conditions. And if all of those provisions are not conditions precedent from the fact that some heading has a term that says, "Conditions can't-- I mean, there's no way to did that personal." Importantly, 3) Legal Action Against Us, it or Cutaia Court, that simple provision said, "Unless you do certain things as a condition precedent, there's no coverage. Unlike the Cutaia Court in the PAJ policy, the provision says, "No person or organization has a right under this coverage part to sue, on this coverage part unless all it's true has been pop-- comply with and deletes the very important-- I think critically important provisions that was in Cutaia that says that that's a condition precedent." And in fact, if you read that section, it say-- and you determined that, that the notice provision is a condition. And what that means is that every requirement is placed on the policyholder in the entire policy with the exception of-- I guess-- paying the initial premium, is a condition because it's so brumley written that says, "Unless you could follow with every term on the policy, you don't have any coverage." And so if we're good to follow the logic that the respondents suggest, and that is the that-- the-- that, that is-- these two sections create a, a condition, then we have to assume that the only covenant that a policyholder makes as a covenant pay the premium. In this case, PAJ pay premiums for six years. The insurance company was not prejudiced by a delayed notice. And, and it suffered a complete forfeiture of it's rights under the policy. If you look at the decision at Hernandez, or ...

JUSTICE: Does it, does it matter if the insurer stipulated on the, on the notice provision that it was not prejudiced? What if there was no stipulation, their help, would it'd back to that it?

MR. BANOWSKY: Well, if there's no stipulation that it, then it's going to be a fact question. I think whether or not, there's a prejudice. In this case,-- I mean obviously, if prejudice is not required in the stipulation as a matter. It's our position that the stipulation matters because prejudiced is required and should be required. If prejudiced is not required, it doesn't matter. The prejudice is required in the insurance company that stipulate, that it maybe a fact question. It maybe that like so many cases have held and so many different context that prejudiced is assumed as a matter of law. Some of these got the default judgment against them and-- you know-- the insurance company and had enough to defend or whatever. There's lots of ways that prejudiced can be established even as a matter of law. But there's lots of context and one of these that this Court noted in Cutaia was that-- now, when it was the condition expressed and therefore, had to be the condition on the policy, it-- for also noticed that's a result was unjust. And the Court should recognized day that all of the cases that involve suggesting or upholding that these notice provisions are conditions involve and evolve from policies that used different language, 30; 40; 50 years ago. And the fact that the Cutaia Court determined that something was a condition based on language used 30, 40, or 50 years ago should not suggest that this Court should do, likewise, just because that's what we've always said. In fact, what the PAJ Court did, the Court of Appeals to this case did is it actually created, what I think is a new rule interpretation that says, "For those provisions that insurance policy is want to presume their conditions unless the ex-- in attempted created covenant is expressly created which stands excerpt contrast with this Court's holding at Hernandez that the insurance policies are contracts. And as contracts, the regular rules of construction require. That rule of construction does applied any other contract anywhere. So

to find that that rule applies here is to say that really insurance contracts, we treat them differently, and we have special rules for them that don't apply other contracts. And I see that my time is up, there any other questions?

JUSTICE: Say none. Counsel, thank you. Court is ready in the argument of the respondent.

COURT MARSHALL: May it please the Court. Mr. Fielder, over that argument for the respondent.

ORAL ARGUMENT OF ROBERT LYNN FIELDER ON BEHALF OF THE RESPONDENT

MR. FIELDER: May it please the Court. Of Justice have Cutaia is still good law. Cutaia, it was followed no less than five months ago by the Illinois Supreme Court in the case of Country Mutual Insurance Company versus Livorsi Marine, it appears in 2000, Illinois Lexis 623 ...

JUSTICE O'NEILL: What is that contract language cited there, the notice provision?

MR. FIELDER: The notice provision, it's very similar to-- I think it's very similar to the notice language in this contract.

JUSTICE O'NEILL: What does it say?

MR. FIELDER: That blank.

JUSTICE O'NEILL: Okay. Is this-- I mean-- this notice provision really the only thing that makes it a condition is that-- is the title on top condition.

MR. FIELDER: I put this ...

JUSTICE O'NEILL: I don't see any "unless" or "if" or-- you know, qualifying language as in Cutaia it said, "a condition precedent."

MR. FIELDER: And I could-- I would disagree with-- respectfully disagree with the Court that it fits the definition of condition precede use because it doesn't say it's one doesn't mean it is. In, in a light sense-- in, in a legal sense on, on paraphrasing, or I should say, a condition precedent is something that occurs subsequent to the making of a contract but must occur before liability attaches. That is exactly what we have here with this notice provision. A contract ...

JUSTICE O'NEILL: But you'd agreed that there's a presumption that a-- that something is a covenant must it's clearly a condition precedent, right?

MR. FIELDER: I would agree that-- with that. And, and ...

JUSTICE O'NEILL: But then what shall be-- what year it makes this clearly a condition precedent in this particular policy language?

MR. FIELDER: I think it clearly as a condition precedent because of the nature of what it does. It is something that comes after the formation of the contract but must occur before liability attaches. And that is precisely what the purpose of this is. It is a condition precedent liability ...

JUSTICE: Why-- you know, you spoke about purpose. What's the purpose of a notice requirement?

MR. FIELDER: The purpose of the notice requirement so that the insurer can in fact then put on notice and commend and defend the case.

JUSTICE: And what precluded the insurer from defending the case here?

MR. FIELDER: The insurer did defend the case. Now, once it was put on notice.

JUSTICE: Right. And, and so my question is: "Why, if the purpose was satisfied here, and you stipulated to know prejudiced, and why should, why should we construe this to a, a-- this allow coverage?"

MR. FIELDER: Well, you should follow this Court's prior ruling in Cutaia which still as good law. There is no prejudiced requirement in this policy. And ...

JUSTICE O'NEILL: And could ... Go ahead.

JUSTICE: You know, just, just I'm thinking about the underlying purpose of the provision was satisfying in this case so that the insurer wasn't prejudiced. And I'm, I'm just trying to get to the policy reason about-- you know, we have Hernandez as well. So ...

MR. FIELDER: Okay. For the public policy reason, and that's what the Court is asking me, I would back up to Cutaia. This Court differ to the legislature or the State Board of Insurance to create forms in the policies or to create law in the insurance code which will require prejudice to be shown.

JUSTICE O'NEILL: Well, in the policies that they have promulgated have to deleted that the conditions precedent language ...

MR. FIELDER: The policy is they have promulgated, have retained the condition precedent language but engrafted under the Bodily Injury And Property Damage Coverage of Requirement of prejudiced that has never been done.

JUSTICE O'NEILL: My understanding is that the Cutaia policy, it said, "as a condition precedent."

MR. FIELDER It said that as a condition precedent, right?

JUSTICE O'NEILL: And that has been deleted now in this form.

MR. FIELDER: That is not in the form in that exact language. That's true.

JUSTICE O'NEILL: And you would read now intent into deleting as a condition precedent.

MR. FIELDER: No, I wouldn't. And, and I would point out-- well, I don't have a Texas case on that point. The Nevada Supreme Court didn't either and I was going to talk about that case. It maybe this is the time to do it.

JUSTICE: Well, you says that she said something to the fact just because it doesn't say, it isn't, doesn't mean it isn't when ref-- in response to Justice O'NEILL's question about the laundry list of things that we're pointed out on Mr. Banowsky. And you say this is a condition precedent. That reminds me of-- you know-- some comment offense what the definition of, "Is this." "How was suppose to figure it out if the policy isn't clear?"

MR. FIELDER: I think that the definition of condition precedent is clearly made. I think this is a classic condition precedent. It is something that occurs after the making of the contract.

JUSTICE: So is everyone one of those laundry list of things in the other section?

MR. FIELDER: No.

JUSTICE: Then how you do distinguish it? Just by your interpretation of it? There's an ambiguous or ...

MR. FIELDER: I don't think it's ambiguous at all. And, and I would point out to the Court-- the District Court doesn't think this language is, is a condition precedent. Then that is essentially overruled. It get out 60 years of Texas case law and very far out of the mainstream of the remainder for American through Springs. I can't find cases anywhere in this country where Courts have said that decision a condition precedent except one federal court ...

JUSTICE: But you're talking about two different, two different

types of policy languages. Policies aren't were exactly the same. The language has changed.

MR. FIELDER: There, there are changes in the language over the years. There's no doubt about that.

JUSTICE O'NEILL: But you, you, you don't seem to give them any import, the changes in the languages. When they removed policies language like unless, if, and as a condition precedent, is that some indication legislature or, or that the, the Judge Commissioner did exactly what they needed to do to remove that this is a condition precedent?

MR. FIELDER: I don't think so. Because a lot of the languages still the same in the brief of petitioner ...

JUSTICE O'NEILL: Is there unless or if or condition precedent in you?

MR. FIELDER: There is not an unless, or an if. There is language when construed as a whole which says that, "You have to give us notice and if you don't comply with that notice, you can sue us on the policy." That's the no-action cause to the policy. And, and I think that taken as a whole is the condition precedent. I mean, this is-- to me-- clearly a condition precedent. It is something that happens that has to occur after the making of the policy for liability to attach. If notice isn't given-- if notice is improperly given, the liability the insurer doesn't attach. In that, there's a condition precedent under the Court's definition in Hollenburg which defines what a condition precedent is.

JUSTICE: I just want to be clear. The endorsement that says, "You must prejudice with respect to Bodily." That is in the po-- is in this policy.

MR. FIELDER: It's in the policy from Bodily Injury and Property Damage. And, and our argument is that if the State Court of insurance or the legislature had wanted to cost that type of endorsement or that type of law to be present for prejudice. They have had a number of years to do that and they'll failed to do so. But ...

JUSTICE O'NEILL: Can you think of a policy reason why they would require prejudice or that type of coverage but not for "advertising injury" -

MR. FIELDER: Very easily.

JUSTICE O'NEILL: - injury. Fine.

MR. FIELDER: The Cutaia opinion and any opinion dealing with an honorable bill policy deals with unsophisticated consumers, and what is now a mandatory honorable bill policy. My expectation is those consumers probably have read their policy and might not understand it even if they did. A Commercial General Liability Policy deals with sophisticated businesses who negotiate an insurance policy at arms link. They go through an agent. They can have manuscript endorsements to the policy. They have risked managers. They have lawyers. Some of them probably on staff who can assist them and they could pay a premium for whatever kind of manuscript endorsement they want. That's not just my idea. A case that I've frankly should have cited that the Court but didn't is new era of network's ink which is a Federal District Court here in Texas by Federal Judge Gilmore of the Lexis side on it is 2003 US District Lexis 14259. And Judge Gilmore does a far better job than I do in my brief in discussing the very position or advocating here starting at page 4. And one of the things she discusses is the public policy argument that the Court has just asked me, and she points out that these businesses are, are not in the same bargaining position as consumers had read. So there is no strong public policy requirement

that there be a prejudice requirement in a CGL policy on Advertising Injury. There would be a stronger argument frankly, when Cutaia has decided. But this Court shows not to do that and instead, to differ to the State Board of the Insurance or to the legislature. And that is still good law, and should be good law.

JUSTICE: So you think that the parties would negotiate the term that if they missed a notice provision like this, like that, that was that bargain that they came in into? They would negotiate that?

MR. FIELDER: I think what the parties would negotiate would be an endorsement if requires prejudice. I think that a, a party could go to ...

JUSTICE: This so because they have lawyers and law if there's sophisticated that it would be okay to, to see forfeit the policy because of this ...

MR. FIELDER: Sure. I think that -

JUSTICE: Not prejudice shall ...

MR. FIELDER: - I think they could do that for premium. I'm sure that there's a natural worry. You could sit down and figure out what that endorsement would cost. And I'm sure that a business could sit down and have that manuscript endorsement put on the box. There a General Liability Policies have many, many, many manuscript endorsements. I think this Court is heading construe on several cases. Some of them that have come up involving an issue insuring endorsements. There's no reason that can't be done on this content. This is not the typical, unsophisticated consumers situation.

JUSTICE: This is the stipulation of a-- that there is layer, is that-- that just adequate to a non-material breach?

MR. FIELDER: No. The stipulation of prejudice is for the Summary Judgment only. First of nine of them tested and I clear the Court. But this is just for the Summary Judgment and all of that's, is, is that we weren't prejudiced by that because we contend that the only issue is whether or not timely noticed it was given. And, and I was stipulated on my head that it wasn't. So they have stipulated that they didn't give notice as soon as practical for the first to the Summary Judgment. We stipulated, we we're prejudiced by-- there by bringing the question to the Court that you ...

JUSTICE: What's, what's the answer to that question now, assuming there was no prejudice, where that amount to the non-material breach?

MR. FIELDER: Assuming there was no prejudice with that amount to a non-material breach.

JUSTICE O'NEILL: Understanding in your position has been as a non-material breach -

MR. FIELDER: Well, ...

JUSTICE O'NEILL: - if it does a condition precedent ...

MR. FIELDER: Right, in that matter. And that's exactly what I was going to say. It's, it's a non-material breach because that's not in the equation for the question of whether or not it's a condition precedent. If it's a condition precedent, then the fairer the comply with it negates the policy. If it is a covenant which would be a unique determination and, and to totally contrary whatever the Courts said, then it would be a question whether it's a material breach or not, and having said it wasn't. That would matter. And our position, is it done matter. Prejudiced don't matter. And, and I would like to return to the case that I had, had briefly talked to the Court about, and that's the case out of-- the case is out of the bottom. And, and this Court is in a remarkably similar position which in the bottom of the Supreme Court was in in a case called Las Vegas Star Taxi versus St. Paul Fire and

Marine which is at 714 Pacific 2nd 562, 1986. What happened is in 1950, the Nevada Court in the Casa Nelly case and I proudly mispronounced that, 216 Pacific 2nd 606 held that the fare of an insured to perform the policies expressed condition precedent affording the State form within a reasonable time to suit papers in an action against him precluded Casa Nelly from recovering on the policy and render the issue of prejudice immaterial. Thirty-six years later or thirty-four years later I'd say it's closed, the insurer came back, another insurer with another bided the apple. The argument was exactly the argument you're hearing here today. The language had changed. It was not a condition precedent. The term "condition precedent" have been taken out of the language. And therefore, the Court should hold that because the change had occurred, because it was no longer a condition precedent, the insurer will be entitled to recover in the Las Vegas Star Taxi opinion. The Nevada Supreme Court held that the fact that the words "condition precedent" didn't appear in there anymore, didn't matter. The Court looked at the purpose of the notice provision and held as Court's have held many, many times that it was in fact, the condition precedent. The Court declined to change its position on the prejudiced situation. In fact, they didn't even really addressed ...

JUSTICE O'NEILL: Can, can you give me that cite again.

MR. FIELDER: Sure. I'm sorry.

JUSTICE O'NEILL: 714-- You said it's 2nd ...

MR. FIELDER: It's 714 Pacific 2nd 562, and I would sit-- oh, a great discussion of this appears ...

JUSTICE O'NEILL: Well, but let me ask you this. Is it your position that all notice provisions no matter how they're written are conditions precedent?

MR. FIELDER: I would seeing, well, it didn't. So yes. I, I can't imagine how it wouldn't be a condition precedent. And, and, and we step back from whatever you want to call it in the policy whether it comes on the condition section which I don't know matters that much is we look it what things are, not what they're called. And it is a condition precedent by the nature of what a condition precedent is. Something that occurs after the formation of the policy but must occur before liability attaches. That's a condition precedent. And this is classic condition precedent. In this Court has said that six or seven times in the last 60 or 70 years, no Court in Texas has ever held in the contract ...

JUSTICE O'NEILL: But, but how about be-- the language here, 2(a), it sounds to me more like a covenant. You must do this, you must notify us, you must-- it doesn't say, "Unless, you notify us, there's no coverage." It just says, "You must do this. You must see to it. And that is not a strong as unless you notify us, there would be no coverage under this policy."

MR. FIELDER: The words must and shall appear for the last 60 years ...

JUSTICE O'NEILL: Well, that we have a long, lot of juries prejudiced that says, "The words must and shall," unless it says what will happen if they don't-- if you don't, are conditions precedent.

MR. FIELDER: This Court has repeatedly construed language that says, "must and shall," and repeatedly said, "it's condition precedent in the insurance context of the-- of" fortunately-- I think before the opinions, that is Supreme Court opinions that are in our brief, those were in words appear and this Court held anyway, that it was a condition precedent liability. There's never been a determination in the contrary in the State. And, and, and the Nevada opinion-- well, I

realized it's not by and impressed of the normal as Court. Nonetheless, the Nevada Court may quick work of the argument. And, and there's a ...

JUSTICE: Did you say, you just say that their headings and the terminology in these policies don't mean anything?

MR. FIELDER: No. And if I did, I-- that was correlate stating-- What I'm trying to say is I think the well-established rule of law that it's not so important what you call something ...

JUSTICE O'NEILL: But I mean I understand you're saying and it's words we didn't felt to mean certain things. But that, that-- at least to that cases that I have written down that we have addressed it, have very different language. I mean I used the word "must" but it's some-- no action show against the company unless, as a condition precedent the insurer shall have fully complied. And so as the company by other language that's much more definite and the language is clear. You have a duty to say to it as suppose to-- unless you do. But that, that, that import just seems to be much different to me.

MR. FIELDER: I would respectfully suggest that, that the distinction without a difference, the things where conditions precedent that, that under the language that's the way it should be construed and that there are covenant. I think there are condition precedent because they fit the definition of condition precedent. And at least, I have spoken fully and I apologize. I'm not meaning to say that headings don't matter. But, but for instance in motions, we all know when there's someone calls something at certain type of motion, we don't look at what they're calling, and then what really is. And that's what I'm trying to say here.

JUSTICE: Would the same applied to list of proceeding to Section 2(b) if a claim is made or as soon as brought, you must immediately record the specifics of the claim or suit in the date received -

MR. FIELDER: Well, ...

JUSTICE: - and if they don't need that, then my ability doesn't attach.

MR. FIELDER: That would appear and be a condition precedent to liability I've never seen anyone did not a liability on that part.

JUSTICE: Only but if, but if-- certainly could?

MR. FIELDER: Could be. And, and, and I will-- now, make an argument that I expect that the petitioner might make because there is a line of cases and is cited in the briefs that says, "To the effect, that we're, we're not going to have conditions result in an absolute forfeiture when it's not reasonable to do so." And, and it occurs to me that arguably that might be the case under that particular ...

JUSTICE: Or under C, you and any other insurer must immediately send us copies of any demands and under that some of the legal papers.

MR. FIELDER: Now, I think that would definitely be a condition precedent.

JUSTICE: What if you, you just don't send-- I mean, there's a-- the letter from the lawyer which is of legal paper that has nothing to do with merits to the suit or in the account of the case. It's a change of address.

MR. FIELDER: I would expect that what that means if I were trying to interpret legally who's would be a demand letter or suit.

JUSTICE: Or any, any demands, notices, summons, or legal papers to received in connections, it's not just the manager or someone. Any legal paper received and in connection with the claim.

MR. FIELDER: I, I think legal papers would logically be construed by this or any other court to mean a suit or, or demand letter and not of change of address.

JUSTICE: Well, ...
JUSTICE O'NEILL: The deposition of -
JUSTICE: - a deposition of it's ...
MR. FIELDER: Well, that would involve the cooperation closed to the insurance ...
JUSTICE: I'm just saying that under, under than your in-- we can read through this paper-- I mean, through the policy and we see we must-- you're done, if you don't do it. It's condition precedent.
MR. FIELDER: So the Court is asking if someone doesn't send a legal paper?
JUSTICE: If the Court doesn't and I mean that insurer doesn't and the record the specifics of the claim, that's condition precedent. That it doesn't and see some deposition of this kind of condition precedent, and there's no liability in the policy. And then we can breadth them, and there are other points, it's in our brief.
MR. FIELDER: Well, I think we would probably fall back on the rule that the, that the petitioner is cited to the Court rule or we're not going to have a forfeiture over something as de minimis. And, and I frankly think nuts and there's somebody had change of headers or something might will be demeaned. But I don't think not telling them you've been sued or would be de minimis. I think that would be pretty boring.
JUSTICE O'NEILL: So if you tell them you concede if you didn't send them concede papers.
MR. FIELDER: I don't think any insurance company would do very well and throughout the Court argue that would think of.
JUSTICE O'NEILL: But under your argument, it would.
MR. FIELDER: No. Under my argument, I don't think it would. Because I think that would be a total de minimis-- kind of fair, the comply with condition precedent which as the petitioner has recited in his brief, recited several cases. The Courts don't allow that. That's, that's something that the Courts don't look at, well, unkindly. And I think could cover the cases cited for instances somebody made a tendering in the Court and a condition precedent and then was so to be a condition precedent required that the tender be made to the Court. All courts said, "Yes, a condition precedent. But we're not going to enforce that condition precedent to allow an extreme forfeiture or penalty under those Counsel's service cases." But not telling the insurance company about the suit. I'm not telling the insurance company that the claims been made is not de minimis. But they need to get in there, and be able to investigate, and defend the matter. That's not, not de minimis at all.
JUSTICE O'NEILL: But if there's, if there's no prejudice, how, how can it be more than the de minimis? I mean, if not improve energy for coming in, and beginner or perk up insurance position, then why wasn't the failure reported de minimis?
MR. FIELDER: Wasn't failure to reported de minimis? Because for all we know, the insurance company could have done something. And if, if we just stipulated there was no prejudiced for the purpose of this case, for the purpose of the Summary Judgment. It might-- well, have been partly exaltment you will skip de minimis lose hope.
JUSTICE: Do you agree that the modern trend among the-- at least in the common law of, of the contrary is to require prejudice?
MR. FIELDER: I would say that the modern trend isn't by virtue the fact that the Illinois Supreme Court this five months ago, went to the contrary. Then I, I will say that the-- it's hard.
JUSTICE: One decision. I'm ask-- asking about the trend?

MR. FIELDER: I can say that the majority is not a part. And I don't, what I would call a threat. Like I said the most recent of highest appeal of the wording I read who's pay for our position of the majority rule appears to be the contrary. So I don't ...

JUSTICE: Any further questions.

JUSTICE: Mr. Baxter, I'm not interest in vain outside that the mainstream or counting a hundred years of first you didn't zone as a head, so how did you prevailed here when it was argued just now that languages changed but the result hasn't in this type of policy.

REBUTTAL ARGUMENT OF BAXTER W. BANOWSKY ON BEHALF OF PETITIONER

MR. BANOWSKY: Well, I would say that Nevada case has a no less than cited in your brief. I have had a chance to review the case and what the specific languages are, was in that policy. But if this Court meant what it said in Hernandez, and that is that an insurance policy is a contract. And then it gets free of like any other contract. Then what that means is a forgiven in terminal of the effect of the languages or what the effects of the terms or we have actually read the contract. And the difference between insurance policies and, and just a business contracts-- I guess, they exempted it and it deals with, with the evolution of the law is that insurance policies tend to have a lot of the same language. And so if this work just a commercial contract case, we would be point all over the language of this contract, and we would-- if we we're lying on any other case-- as will be point over the language to those contracts to make sure that the whole link in some other case, applied to this contract because the language as I was saying. I don't think-- I'm sorry.

JUSTICE: What about the response that it's not what you call something, it's what it is. And, and response to this catch off ...

MR. BANOWSKY: I think that, I think that's exactly the point here. Exactly the point. One of the things that Counsel, one of the points the Counsel made is these parties were free to negotiate whatever type of amendments or rights to this policy they wanted to. Now, in order for an insurer under the General Liability Policy to negotiate for a prejudice requirement with respect to notice, it's first got to appreciate that the policy is going to involve a forfeiture if there is a lack of timely notice and no prejudice.

JUSTICE: But don't you, don't you sort of guess that when you knew when the policy says, "You must give notice. But if you don't, that's probably injury claim that must have been showing prejudice." But if it's an advertising claim it suit.

MR. BANOWSKY: Well, I guess the point is that we have to really jockey around a lot in the policies, to come to that conclusion. And I think the better question is if you read the notice provision, there's the notice provision put the insurer unnoticed that this provision is a condition precedent. The failure of which will result to a forfeiture of the benefit the policy. And I think that the clear answer is, "No." In fact, we know that in order to complete the argument that this Section 2 constitutes a, a condition which at least to the forfeiture, we had to go to some other part of the policy to read language which is materially different in Cutaia which does not include this expressed condition precedent language to they'd infer the defense. That could-- provision provides that if you don't comply with other provisions, then

are lack of complaints here is a, is a condition precedent. The argument that it is what it is under Hollenburg is circular. Hollenburgs says generally what a condition precedent is, and we agree what a condition precedent is. That's something that happens but they're after formation that-- and tell it happens, there's no requirement. But that doesn't tell us how to recognize it. The Courts are in accord that in Hollenburg and find a condition precedent. The Courts or the Court to say how we recognize it as we look and we see if the language includes language which puts us unnoticed that if you don't do this, there's no benefit.

JUSTICE: What about the language under the subsection entitled Legal Actions Against Us, no person has a right under this coverage to sue unless coat-- unless all of it's terms have been fully complied with.

MR. BANOWSKY: Well, I guess, that's really where-- what and, and what I said earlier, well, what that means is that the only covenant that a policyholder makes is the covenant to pay the premium and everything else, that's a burden on the policyholder must be a condition because that then applies to everything not just this notice action. Some of the prior cases that find ...

JUSTICE: See your answer is that language doesn't mean what it says?

MR. BANOWSKY: No. My answer is that, that, that language include-- includes the basic premise that if you got an obligation, and you don't do it, then I have with defense, and it's called the material breach. The same language in Cutaia said, "If you don't do this and as a condition precedent." Now that language-- that term which I would submit is a pretty important two words in the policy better exist favor in this policy. And so in order to rely on Hollenburg to say this is a, a condition precedent, we have to first just assume that it's a condition precedent. The argument is circular. Because there's nothing in Section 2 here the notice provision that tells us that failure to do anyone of these things, whether it's record the specifics of a claim give notice of the suit same in deposition orders, what are these? There's nothing in here that tells us that unless you do these things, there's nothing be coverage. And so in order to say, "Well, it is a condition because it has that effect. We have to just assume, that's a condition."

JUSTICE: And the -

MR. BANOWSKY: Well, -

JUSTICE: - what about the language, unless, all of it's terms that have been fully complied with?

MR. BANOWSKY: - well, I guess my point is that ...

JUSTICE: It's, it's not in Section 2. Is that the answer?

MR. BANOWSKY: Excuse me?

JUSTICE: That language is not in Section 2, is that the answer?

MR. BANOWSKY: No. The answer is that that, that that recognizes the general proposition that if you got an obligation in this contract and don't you perform then that's constitute the breach of the contract, and it release me a performance. But I think that that comes in of the general notion that it's got to be a material breach. Counsel conceded that if I don't record the specifics of the claim in suit, while that would be a material breach. Importantly draw the line, Counsel conceded that even if it's a condition precedent, their in line has to be drawn. There's something that is too de minimis, and so if we go Section 2(b) (1), let's too de minimis. And Counsel, for the insurance company acknowledged that that's not a condition precedent or

remand if it is, will be excuse that. And so the question is what's the difference, we lack and notice of the suit in situation where that, that those policies were prejudiced. And this is a case that came, the stipulation is uncrossed motions for Summary Judgment. And so it's this policy of, of the issue of coverage, at least with respect to the notice issue. So it's not like that we going to go-- we'd litigate the noticed issue because if, if the-- if their motions shouldn't be granted, then the petitioner must have shifted. And I see that I'm out of time.

JUSTICE: Any further questions? Thank you, Counsel. Case has submitted. And that concludes the argument for this morning. The marshal now return the Court.

COURT MARSHALL: All right, please, please, please the Honorable Court will now return.

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