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COURT OF APPEALS

STATE OF NEW YORK

STRAUSS PAINTING, INC.,
Appellant-Respondent,

-against-

No. 203

MT. HAWLEY INSURANCE COMPANY,
Respondent-Appellant.

20 Eagle Street
Albany, New York 12207
October 22, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Karen Schiffmiller
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 203, Strauss
2 Painting.

3 MR. JANOWITZ: Good afternoon, if it please
4 the court, I'd like three minutes rebuttal.

5 CHIEF JUDGE LIPPMAN: Three minutes?

6 MR. JANOWITZ: Three minutes.

7 CHIEF JUDGE LIPPMAN: You have it; go
8 ahead.

9 MR. JANOWITZ: My name is Richard Janowitz.
10 I'm representing Strauss and respectfully, we are
11 appealing to this court a very narrow issue.

12 CHIEF JUDGE LIPPMAN: What's the narrow
13 issue?

14 MR. JANOWITZ: Pardon?

15 CHIEF JUDGE LIPPMAN: What is the narrow
16 issue?

17 MR. JANOWITZ: That the delay to - - - of
18 notice to Mt. Hawley was excusable delay under the
19 facts and circumstances of what had happened and
20 should not have been decided as a matter of law by
21 the lower court.

22 And I just want to make sure that you - - -
23 we're not contesting that notice to the broker is
24 notice to the insurance company. It is not. We
25 understand that. But under the facts and

1 circumstances surrounding this particular matter, we
2 feel that the excuse of the - - - the delay was
3 excusable.

4 CHIEF JUDGE LIPPMAN: You think it's a
5 matter of fact and not a matter of law?

6 MR. JANOWITZ: Correct, Your Honor.

7 JUDGE SMITH: And you think this is
8 essentially like the Mighty Midgets case?

9 MR. JANOWITZ: Exactly, Your Honor, in fact
10 - - -

11 JUDGE SMITH: Wasn't - - -

12 MR. JANOWITZ: - - - I - - -

13 JUDGE SMITH: Well, why - - - why isn't the
14 - - - the relationship between the insurance company
15 and the broker was a lot closer in Mighty Midgets,
16 wasn't it?

17 MR. JANOWITZ: In Mighty Midgets, they were
18 actually the agent. But in Mighty Midgets they also
19 say irrespective of that relationship, you have to be
20 aware that people who are getting insurance rely on
21 insurance brokers as their own agents, not even as
22 the agent of the insurance company, and they said
23 that that should be taken into consideration.

24 JUDGE READ: Yeah, but these were pretty
25 sophisticated people, right?

1 MR. JANOWITZ: Pardon?

2 JUDGE READ: These are pretty sophisticated
3 entities involved here in the Mighty Midgets --

4 MR. JANOWITZ: Well, you know, in Mighty
5 Midgets, they took on the fact that he was a young -
6 - -

7 JUDGE READ: Right.

8 MR. JANOWITZ: - - - a twenty-one year old.
9 But in fact, that - - - it's the other way around.
10 As a sophis - - - Mr. Drewes, who was the - - - in
11 charge of the operations of Strauss, dealt with this
12 insurance company; he was twenty-five years in the
13 business. He has always, always, dealt with the
14 insurance companies by going through his broker and
15 it has always worked.

16 In fact, one of the things that he did - -
17 - if you look at page 658 and 659 of the record, Mt.
18 Hawley had sent, in their policy, notices of what the
19 policy was and what to do. And in actually that
20 policy, which is - - - is different than the other
21 ones, because Mt. Faw - - - Mt. Hawley is actually
22 telling them what to do - - - it says, "Notice to our
23 insureds: all losses must be reported in the usual
24 manner as well as to agent and brokers". They're
25 telling them - - -

1 JUDGE ABDUS-SALAAM: But - - -

2 MR. JANOWITZ: - - - report this to your
3 broker.

4 JUDGE ABDUS-SALAAM: Counsel, counsel - - -

5 MR. JANOWITZ: And the next - - -

6 JUDGE ABDUS-SALAAM: Counsel, isn't that in
7 addition to reporting it to Mt. Hawley?

8 MR. JANOWITZ: It's ambiguous.

9 JUDGE ABDUS-SALAAM: Isn't - - - isn't the
10 first thing that's directed is that you report it to
11 Mt. Hawley, they give you an address, a phone number,
12 and they say, in addition, you know, essentially, you
13 can report it to your broker - - -

14 MR. JANOWITZ: That - - -

15 JUDGE ABDUS-SALAAM: - - - or anybody else
16 you want to report it to, but you need to report it
17 to Mt. Hawley.

18 MR. JANOWITZ: That could be interpreted
19 that way, but Mt. Hawley has also sent a letter - - -
20 on the next page - - - you'll see on 659 - - -
21 there's a letter saying, okay, if there's an
22 accident, here's what you want to do, and there's a
23 list of about thirteen things that they want you to
24 do in the investigation.

25 And then it says, please report the

1 incident through normal channels. They don't say
2 then in that letter, by the way, report it directly
3 to us and - - - so there's a - - -

4 JUDGE ABDUS-SALAAM: Well, how would Mt.
5 Hawley know what the normal channels are for each
6 company they deal with - - -

7 MR. JANOWITZ: Well, they're telling - - -

8 JUDGE ABDUS-SALAAM: - - - if that's the
9 point, that you're - - - that Strauss' normal
10 channels - - -

11 MR. JANOWITZ: Well, they're telling their
12 - - -

13 JUDGE ABDUS-SALAAM: - - - would be
14 reporting - - - its practice is to report to its
15 broker. Why wouldn't it just say, instead of normal
16 channels, report to your broker?

17 MR. JANOWITZ: They didn't. Why would they
18 just report to the normal channels? They're leaving
19 it up to the insureds at that point to say normal
20 channels. That's ambiguous. They didn't tell them,
21 you know what? Here's a list of exactly what we want
22 you to do. Interview the - - - the injured party;
23 get the records; get - - - make photographs. They
24 were very specific in all of those items. So why
25 didn't they say, report all of this to us directly in

1 writing? No, they said normal channels.

2 JUDGE ABDUS-SALAAM: Because they said it
3 in the policy.

4 MR. JANOWITZ: Well, it --

5 JUDGE ABDUS-SALAAM: The normal channel is
6 report - - - report it to Mt. Hawley, and then you
7 can report it to anybody else you want to.

8 MR. JANOWITZ: But they said - - - in
9 different places, they gave you different
10 opportunities and different ways of doing it. And
11 this is what Mr. Drewes did. He did it in a normal
12 course. He's been there for twenty years. This is
13 the normal channels. He's always called up the
14 insurance broker.

15 Yes, they were sophisticated, but it always
16 worked, so that's why it's to that advantage. He - -
17 - he - - - I. Dachs, the broker, had been around for
18 a hundred years; they were sophisticated. He - - -
19 he was assured by them that afternoon or the next
20 morning when he spoke to them, he informed them about
21 the accident. And they assured him.

22 This is a big contracting company, Strauss,
23 so they had many different policies, and he was
24 assured by that broker that we are going to notify
25 all of the appropriate parties. And that's what he

1 did.

2 JUDGE GRAFFEO: When - - - when you - - -
3 when you never - - -

4 MR. JANOWITZ: The question here is that -
5 - -

6 JUDGE GRAFFEO: When you never heard back
7 from Mt. Hawley, did you have no obligation to try to
8 figure out what was going on, especially after a
9 hundred days?

10 MR. JANOWITZ: Well, that's a question that
11 should be decided by a trial. That's not - - - it's
12 something that, I feel, is - - - as a matter of law.
13 They did follow the procedures that they thought
14 under the different policies, what their normal
15 course was, what they usually did. They followed
16 that. But there's enough evidence there to say, is
17 this reasonable that after you did all of that, that
18 you - - - you know, that you gave notice?

19 JUDGE SMITH: There's an Appellate Division
20 case that says, we know it's very common for insureds
21 to rely on their brokers, but they do it at their
22 peril. Isn't that basically what the - - - the
23 generally understanding in New York, that you can - -
24 - yeah, sure, people notify their brokers and the
25 broker better have good errors and omissions

1 insurance if it's not going to pass the notice onto
2 the carrier.

3 MR. JANOWITZ: That's a different issue.
4 If it - - - are you saying, is there now a claim
5 against the broker? That's a different issue. The
6 issue here is, was the time or the delay excusable?
7 Was it reasonable?

8 JUDGE SMITH: Well, aren't we - - - aren't
9 we - - - but if we say that you're - - - it's - - -
10 it's excusable because you relied on your broker,
11 aren't we blowing a big hole - - -

12 MR. JANOWITZ: No.

13 JUDGE SMITH: - - - in the rule that says
14 notice to the broker is not notice to the carrier?

15 MR. JANOWITZ: There are several cases - -
16 - Universal, Cherry Hill - - - there are a lot of
17 cases that the broker gave improper information and
18 they still said it was an excusable excuse only after
19 a trial, not as a matter of law on a motion for
20 summary judgment.

21 So the - - - the issue on - - - on this
22 particular case - - - I don't know what the eventual
23 decision would be on the delay, but the law - - - or
24 Mighty Midgets said it should have been decided by a
25 trial. And actually in the Appellate Division - - -

1 I believe that's why we're here - - - is I brought
2 that up, and they - - - one of the justices didn't
3 want to follow Mighty Midgets and said - - -

4 CHIEF JUDGE LIPPMAN: Okay, counsel.

5 MR. JANOWITZ: Thank you.

6 CHIEF JUDGE LIPPMAN: Thank you.

7 Counselor?

8 MR. ELGARTEN: Here, Clifton Elgarten, and
9 I represent Mt. Hawley. I have to respond, and I
10 would like to do so for just a moment to Strauss'
11 argument on late notice, but we - - -

12 CHIEF JUDGE LIPPMAN: Go ahead.

13 MR. ELGARTEN: - - - have an appeal on the
14 Met, and I'd like to reserve two minutes to respond
15 on that.

16 CHIEF JUDGE LIPPMAN: You have it. Go
17 ahead.

18 MR. ELGARTEN: So just in response to
19 Strauss' argument, the cases have had - - -

20 CHIEF JUDGE LIPPMAN: Why isn't it an issue
21 of fact?

22 MR. ELGARTEN: It's not an issue of fact,
23 because - - -

24 CHIEF JUDGE LIPPMAN: Why not?

25 MR. ELGARTEN: - - - the decisive fact in

1 Mighty Midgets, of course, was that the broker in
2 that case was a specialized insurance agent - - -
3 specialized - - - that served as the agent for the
4 insurance company. So when that insurance company -
5 - -

6 JUDGE GRAFFEO: Exclusively?

7 MR. ELGARTEN: - - - misled his client - -
8 - misled the policy holder, that was attributable, of
9 course, to the insurance company, and that was
10 something you were allowed to take into effect - - -
11 into account. The cases cannot actually logically
12 allow your notice to your own agent, because your
13 agent is yourself, to satisfy the requirements of
14 notice.

15 CHIEF JUDGE LIPPMAN: Yeah, but whenever
16 you're going through multiple parties, there a
17 problem - - -

18 MR. ELGARTEN: There are no multiple
19 parties here for the relationship between the
20 policyholder and the broker. They have - - - he's
21 going to say he told his broker, and I always
22 expected my broker to give notice. The broker's
23 going to say, you didn't tell me the right thing.
24 And I didn't do anything wrong. That's their fight.
25 They fight about - - -

1 CHIEF JUDGE LIPPMAN: How almost built in -
2 - -

3 MR. ELGARTEN: - - - the brokers have to do
4 their job.

5 CHIEF JUDGE LIPPMAN: - - - but built-in to
6 these kind of situations is going from A to B to C.
7 Is - - - there are always problems that can arise,
8 right?

9 MR. ELGARTEN: Right, but the broker - - -
10 when the broker fails, that is the broker's fault,
11 because he is the policyholder. He is the agent at
12 law of the policyholder, except in the unusual case,
13 like Mighty Midgets, where the intermediary was
14 called the agent of the insurance company. So the
15 insurance company's liable for what it says and its
16 agent says. The policyholder is responsible for what
17 its agent does.

18 There is only one case I've heard of that
19 ever suggested any support - - - it's out of the
20 Second Circuit, and it's a total misreading of this
21 court's cases, which were cases in which - - - and -
22 - - and even the Appellate Division - - - where the
23 insurance company said something, it was passed on to
24 the policyholder, and that caused the problem.

25 The issue here as to anything special that

1 was said by the insurance company, that's at 489, the
2 first page of the insurance policy. I believe it was
3 referred to in the argument. It does not say in any
4 respect that notice to your broker is going to be
5 sufficient.

6 What it says - - - it clearly states and
7 gives you a little card to call up - - - if Strauss
8 wants to report something, you must report it to Mt.
9 Hawley. You must see to it that Mt. Hawley receives
10 it. And then it says all loss - - - losses must be
11 reported in the usual manner as well to your agent.
12 "To your agent". This is absolutely clear on 489.
13 That's what was being relied on. It is - - - it's -
14 - -

15 JUDGE SMITH: Is - - - is your case against
16 the Met equally clear?

17 MR. ELGARTEN: The case against the Met is
18 equally clear, yes, it is. The case against the Met
19 has two parts. The first part is there is no
20 provision in the construction contract that required
21 the Met to be named as an additional insured on the
22 Mt. Hawley policy.

23 JUDGE SMITH: Is it - - - is it clear that
24 you can't read that annex to the - - - to the
25 construction contract that way?

1 MR. ELGARTEN: Yes, it is clear that you
2 cannot. And the reason you cannot read it that way
3 is because it doesn't - - - those are not the words.
4 The annex is - - - and I - - - I appreciate - - -
5 it's on page 125 of the first volume of the appendix.
6 It's the Exhibit D. Remember the main policy
7 provisions have two parts. It says that the
8 contractor shall maintain, for its own benefit, a CGL
9 policy. It says the Met can have a CGL policy.

10 Then there are additional - - - each one
11 for their own benefit. Takes you out of the Karis
12 (ph.) case - - - that's your case - - - it's the one
13 case you dealt with before specifically on point
14 where it said you should maintain something for the
15 mutual benefit. This case said, for each, for their
16 own benefit by express terms. Then they wrote
17 Exhibit D.

18 The gentleman points to - - - from the Met
19 - - - points to paragraph F. He says, "all
20 insurance" - - - and I'm reading from it - - - "all
21 insurance policies must contain a clause that insures
22 the Metropolitan Opera Association." He puts a
23 period after those words. And that's his position.
24 He states it four times with a period there, and the
25 words go on.

1 "All insurance policies must contain a
2 clause that insures the Metropolitan Opera
3 Association a thirty-day written notification of
4 cancellation of any of these policies." That's the
5 usual provision that says you are required to buy any
6 number of policies - - -

7 JUDGE SMITH: Next time you're - - - next
8 time you're writing it, you should take out - - -
9 well, I guess you didn't write it, but the word
10 "insures" is a little confusing, but I see your
11 point.

12 MR. ELGARTEN: You know, insures and
13 ensures is the same. It actually means the same
14 thing; I looked it up. But I would say ensures as
15 opposed to insures, because that would make it even
16 more clear. But you certainly cannot put a period at
17 that provision.

18 JUDGE SMITH: What about - - - what about -
19 - -

20 MR. ELGARTEN: They also - - - well - - -

21 JUDGE SMITH: - - - Subsection C - - - or
22 I'm sorry, Subsection B?

23 MR. ELGARTEN: Well, so, A, B and C state
24 the three forms of liability insurance that must be
25 procured. The first is the workers' compensation

1 insurance, which is also called workers'
2 compensation-employee liability insurance. That's
3 the first. The second is the owner and contractors
4 protective liability insurance and that provides what
5 should be the elements of that. And then C provides
6 the comprehensive general liability.

7 The only mention of an additional insured
8 provision is under B, which is the owners and
9 contractors protective liability. The answer to that
10 question that was posed in his brief is, that's a
11 distinction without a difference. We don't see the
12 difference between an owner - - -

13 JUDGE SMITH: Well, the - - - the - - - as
14 I'm - - - I'm looking at the - - - the paragraph. It
15 has, I guess, two sentences. The first one says
16 "owners and contractors protective liability
17 insurance with a com - - - combined single limit of
18 five million dollars".

19 MR. ELGARTEN: Yes.

20 JUDGE SMITH: Then it says "liability
21 should add". His point is, I guess, that it - - -
22 that doesn't say this insurance policy should add.
23 It says liability should add - - -

24 MR. ELGARTEN: Well, that - - -

25 JUDGE SMITH: - - - so he says that means

1 any liability policy.

2 MR. ELGARTEN: Well, it certainly couldn't
3 mean the first liability policy, the workers'
4 compensation policy. The second policy it already
5 says that. It already has the provisos in the main
6 policy, so since this policy deals with owners and
7 contractors protective liability insurance, one would
8 think that the following clause, since they're
9 divided up 1, 2, 3, refers in exactly that way. It's
10 funny; I was looking at the record for the next case
11 - - -

12 JUDGE SMITH: Why isn't that an ambiguity?

13 MR. ELGARTEN: Because it - - - because
14 it's clear as day that there's nothing affirmatively
15 that would say liability applies to some - - - I
16 can't even - - - it says liability for that policy.
17 I cannot connect it to the next one - - -

18 JUDGE SMITH: It says - - - it says - - -
19 it says liability should add, which, if you're really
20 picky, that isn't English. Liability doesn't add
21 anything. Why isn't that ambiguous?

22 MR. ELGARTEN: Well, they wrote their
23 policy, and if they had an ambiguous - - - excuse me
24 - - - the Met wrote this. If the Met wrote it,
25 you're going to construe it against the Met. This is

1 their contract. And if they wanted to have - - - to
2 have that addition, they could have added it.

3 And as I was saying, I was looking at the
4 record of the next case before you. There is a
5 clause that says, general liability policy should
6 include as an additional insured. That's how you do
7 it. Normally, that's what you do. When you have an
8 OCP policy, you do it on purpose, because it is a
9 better kind of an insurance policy to meet these kind
10 of purposes.

11 And it is not a distinction without a
12 difference in this case for two reasons. One is
13 because if you look at clause E down here, clause E
14 actually says the owners and contractors liability
15 policy is a separate policy. That one must be
16 delivered - - - because it is written in the name of
17 the Met, it must be delivered to the Met. The other
18 ones you just - - - it distinguishes those from the
19 general liability policy for which you provide a
20 certificate.

21 And I would say one more thing which is, it
22 is frequently the case where someone would make an
23 argument that the certificate should somehow count as
24 the written requirement. You provide a certificate.
25 I'm tendering a contract. This contract has the

1 additional coverage. Maybe that would count as the
2 require - - - meeting the requirement that there be a
3 written contract. But that is not here, because this
4 was never provided as a certificated insurance to the
5 Met. They received the Nova policy from the Met.

6 I didn't get a chance to talk about the
7 disclaimer language. I'll do that on rebuttal.

8 CHIEF JUDGE LIPPMAN: You'll have it.

9 MR. ELGARTEN: Thank you.

10 CHIEF JUDGE LIPPMAN: Okay, counsel,
11 thanks.

12 JUDGE SMITH: Well, I'm going to ask you a
13 question, though, if I could.

14 MR. ELGARTEN: Yes?

15 CHIEF JUDGE LIPPMAN: Yes, Judge Smith, one
16 more question.

17 JUDGE SMITH: Yeah, you didn't get a ch - -
18 - but if you're right about the additional insured,
19 the disclaimer language falls out of the case,
20 correct?

21 MR. ELGARTEN: Yes, I believe that's
22 correct.

23 JUDGE SMITH: Because - - - because if they
24 weren't insured, you had no obligation to disclaim.

25 MR. ELGARTEN: Yes, that - - - that is the

1 type of coverage issue that cannot be - - - is not
2 subject to the disclaimer requirement. You are
3 correct.

4 CHIEF JUDGE LIPPMAN: Okay, counsel.
5 Thanks, counsel.

6 Okay, Mr. Mitchell?

7 MR. MITCHELL: Yes, sir.

8 CHIEF JUDGE LIPPMAN: You represent Met?

9 MR. MITCHELL: Yes.

10 CHIEF JUDGE LIPPMAN: Okay, go ahead.

11 MR. MITCHELL: With all due respect to my
12 adversary, the contract is quite clear as - - - as
13 far as Strauss was required to obtain insurance for
14 the benefit of the Met. Even if it's a poorly
15 drafted contract, Exhibit D, entitled "insurance
16 requirements", still gives you enough to glean the
17 content from it.

18 JUDGE ABDUS-SALAAM: Yeah, but if they were
19 supposed - - - according to the contract - - - to
20 provide OCP, owners and contractors protective
21 insurance, and you accepted their insurance
22 certificates without getting that. They didn't
23 provide OCP pol - - - an OCP policy before they
24 started this work, did they?

25 MR. MITCHELL: It - - - it appears that the

1 Met did not get all of the certificates of insurance.
2 They did get the subcontractor's certificate of
3 insurance which was provided by Ralph Drewes, who was
4 the sub - - - and the two companies were intertwined,
5 Creative and Strauss. So they took that one and they
6 said, okay, and they checked the box and we move on.

7 But my understanding is that doesn't affect
8 the Met's subsequent rights to pursue insurance
9 coverage from someone else who had the contractual
10 obligation to provide insurance coverage to the Met.

11 JUDGE ABDUS-SALAAM: But it wouldn't be Mt.
12 Hawley, would it?

13 MR. MITCHELL: I'm sorry?

14 JUDGE ABDUS-SALAAM: It wouldn't be Mt.
15 Hawley, would it?

16 MR. MITCHELL: Strauss had a direct
17 obligation in the contract to obtain insurance from
18 Mt. Hawley for the benefit of the Met.

19 JUDGE ABDUS-SALAAM: But if it didn't do it
20 - - -

21 MR. MITCHELL: Strauss actually did obtain
22 - - -

23 JUDGE ABDUS-SALAAM: - - - if they didn't
24 do it, then how can you go against Mt. Hawley now?

25 MR. MITCHELL: Well, Mt. Hawley - - - Mt.

1 Hawley's trying - - - what I called in the briefs, a
2 distinction without a difference, is the Mt. Hawley
3 general liability policy versus its reference to an
4 OCP liability policy. And my point was they are both
5 liability policies. Mt. Hawley's policy does not say
6 - - -

7 JUDGE SMITH: So you're - - - you're - - -
8 you're saying that the word "liability" in the second
9 of subparagraph B means both the liability policies
10 in B and C?

11 MR. MITCHELL: It's not clear, but it
12 certainly could be read that way. And don't forget
13 that paragraphs B and C are joined as one in the
14 original drafting of this. It's - - - as I said,
15 it's not as clear - - -

16 JUDGE SMITH: Yeah, it looks like there
17 should be white space, and there isn't, yeah.

18 MR. MITCHELL: It - - - yeah, it's not a
19 clear contract at all. But in any event, paragraph F
20 here says, all insurance policies must contain a
21 clause that insures the Met.

22 JUDGE SMITH: Wait a minute. That's - - -
23 that's the - - -

24 JUDGE READ: He - - - that's not the end of
25 it.

1 JUDGE SMITH: - - - that's the one he was
2 complaining about. You stop reading kind of soon.

3 MR. MITCHELL: I understand it.

4 JUDGE READ: Yeah.

5 MR. MITCHELL: I completely understand the
6 point. The thing is that had the word "and", A-N-D -
7 - - and I'm not trying to redraft the contract, but
8 insert - - - been inserted between those two phrases,
9 there'd be no problem here. It do - - - it says what
10 it says.

11 The second half of the clause doesn't
12 affect the first half of the clause. It's not 180
13 degree difference. It doesn't negate it. It doesn't
14 talk about the same thing. It says all of Strauss'
15 insurance policies must contain a clause that insures
16 the Met - - -

17 JUDGE ABDUS-SALAAM: No, it says it insures
18 the Met, a thirty-day written notification of
19 cancellation or nonrenewal of the policy.

20 MR. MITCHELL: Which is - - - is again,
21 it's a drafting issue - - -

22 JUDGE ABDUS-SALAAM: I agree that the
23 insure should have probably gone with an "e" instead
24 of an "i", but still, it's about a thirty-day written
25 notice of cancellation or nonrenewal, not just

1 general liability insurance or OCP insurance.

2 MR. MITCHELL: I'm sorry. Your reference
3 to an "e"?

4 JUDGE ABDUS-SALAAM: The word "insures".

5 MR. MITCHELL: Is with an "i" in my copy.

6 JUDGE ABDUS-SALAAM: Right, and maybe it
7 should have been with an "e" to say that they are
8 guaranteed to get a thirty-day cancellation instead
9 of - - -

10 MR. MITCHELL: Well, had it been an "e",
11 you could perhaps read it that way, but it was an "i"
12 as insurance - - -

13 JUDGE ABDUS-SALAAM: No, it just says
14 insures the Met a thirty-day written notification.
15 This is about a written notification of cancellation
16 or nonrenewal of the policy, not insuring with a
17 commercial general liability or OCP policy.

18 MR. MITCHELL: Okay, I would submit to you
19 that there are two - - - again, sloppily drafted - -
20 - but there are two references in this - - -

21 JUDGE ABDUS-SALAAM: Who drafted it?

22 MR. MITCHELL: I - - - I don't know.

23 JUDGE SMITH: But it was - - - but it's
24 your client?

25 MR. MITCHELL: Yes, it is. Yes, it is.

1 JUDGE GRAFFEO: So the Met doesn't ask for
2 certificates that list it as an additional insured to
3 be provided?

4 MR. MITCHELL: I imagine they do, but what
5 again - - -

6 JUDGE GRAFFEO: I mean, in a lot of
7 commercial construction situations, you ask for those
8 certificates, so that you have documentary proof that
9 you've been listed - - -

10 MR. MITCHELL: Sure.

11 JUDGE GRAFFEO: - - - as an additional
12 insured.

13 MR. MITCHELL: Sure.

14 JUDGE GRAFFEO: That's how you avoid this
15 problem.

16 MR. MITCHELL: You - - - you absolutely do,
17 and perhaps someone was checking the box - - - box,
18 I'm just speculating, but there's also case law that
19 says that failure to do that doesn't prejudice your
20 rights.

21 CHIEF JUDGE LIPPMAN: Okay, anything else,
22 counselor?

23 MR. MITCHELL: No.

24 CHIEF JUDGE LIPPMAN: Okay, thanks,
25 counselor.

1 Counselor, rebuttal?

2 MR. JANOWITZ: A quick rebuttal. In all
3 due deference to Mr. Mitchell, the Mighty Midgets,
4 the - - - the main factor, or the controlling
5 interest, wasn't the fact that the broker was the
6 agent of the insurance company. It specifically said
7 it was only a factor to - - - to be determined. It
8 really dealt with what was as soon as practical, the
9 language of these insurance policies, and it called
10 for a determination of what was reasonable under the
11 circumstances. And all the being an agent or not an
12 agent is only a factor that should have been de - - -
13 and right - - -

14 JUDGE SMITH: As a general rule, are you
15 saying that if I'm an insurance - - - an insured, I
16 have an insurance policy and it's my broker, that if
17 the broker makes a mistake, I can rely on that
18 mistake as a - - - as a reasonable ground for late
19 notice?

20 MR. JANOWITZ: We're talking about Mighty
21 Midgets says that that's a factor that should be
22 determined, not as a matter of law, that you have
23 take the facts - - -

24 JUDGE SMITH: So I can - - - basically your
25 answer is yes, or at least there's an issue of fact

1 as to whether that's grounds.

2 MR. JANOWITZ: Correct.

3 CHIEF JUDGE LIPPMAN: Okay, thanks,
4 counsel.

5 Counselor, rebuttal?

6 MR. ELGARTEN: Yes, I - - - instead of be
7 out of bounds to respond to Strauss at this point, so
8 let me just respond - - -

9 CHIEF JUDGE LIPPMAN: Yes, go ahead, to
10 Met, yeah.

11 MR. ELGARTEN: - - - respond on the
12 disclaimer. So on the disclaimer issue, the point
13 that comes up here is the certificates that were
14 provided did not name Mt. Hawley either, and when
15 they provided their notices, they did not provide - -
16 - the Met provided notices to its insurance - - - its
17 own insurance company, they did not notify Mt.
18 Hawley.

19 Mt. Hawley then takes it upon itself to
20 say, look, we're looking around; we heard about this
21 accident. We say these words and it's in the record.
22 We say exactly these words, and the question - - -
23 and the only question for you is that an adequate
24 disclaimer, in light of the fact that no claim had
25 even been made.

1 It said, we understand you received a
2 notice on the day of the occurrence. If that is
3 true, then just like Strauss, which we have
4 previously rejected as late, you will have no
5 coverage. We then say - - -

6 JUDGE RIVERA: What - - - what's the point
7 of saying, if that is true? Why not just say - - -

8 MR. ELGARTEN: We - - - be - - -

9 JUDGE RIVERA: - - - just say we're
10 disclaiming coverage?

11 MR. ELGARTEN: Because our investiga - - -
12 our investigation has shown this. We have - - -
13 still had no contact from them where anyone has
14 exerted - - -

15 JUDGE RIVERA: So does that then put in
16 question whether or not you've disclaimed?

17 MR. ELGARTEN: It - - - well, the court
18 below said, we did not disclaim. I say we did,
19 because under the circumstances, we apprised them of
20 a specific fact. If it is true that you had notice
21 on that date, there is no coverage. We then say
22 we'll take an affidavit, if it's not true. This is
23 ours. You still haven't even written us a letter or
24 asked for coverage.

25 JUDGE RIVERA: So if they provided you an

1 affidavit - - -

2 MR. ELGARTEN: No.

3 JUDGE RIVERA: - - - you're then going to
4 reconsider?

5 MR. ELGARTEN: Yes, they could have said,
6 no, we did not know on that day. That's right. But
7 they couldn't do that, because it wouldn't have been
8 true. So they let it sit for seventeen months. We
9 don't hear anything. There's a whole litigation that
10 goes on. They don't sue us. They don't make a
11 claim. And then they bring us in when everybody
12 else's insurance has failed, except their own
13 liability. They bring us in only at that point, so -
14 - -

15 CHIEF JUDGE LIPPMAN: Okay.

16 MR. ELGARTEN: - - - it's the failure to -
17 - - to ask.

18 CHIEF JUDGE LIPPMAN: Thanks, counselor.

19 (Court is adjourned)

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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Strauss Painting, Inc. v. Mt. Hawley Insurance Company, No. 203, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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