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COURT OF APPEALS

STATE OF NEW YORK

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STRAUSS PAINTING, INC.,  
Appellant-Respondent,

-against-

MT. HAWLEY INSURANCE COMPANY,  
Respondent-Appellant.

No. 203

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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

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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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