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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jean H. Toal, Circuit Court Judge

Opinion No. 28221 (S.C. Sup. Ct. Filed July 24, 2024)

COVIL CORPORATION, by and through its duly appointed Receiver, Peter D. Protopapas,

Respondent,

v.

PENNSYLVANIA NATIONAL MUTUAL CASUALTY INSURANCE COMPANY,

Petitioner.

PETITION FOR REHEARING

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INTRODUCTION

Pennsylvania National Mutual Casualty Insurance Company ("Penn National") respectfully moves and petitions the Court for a rehearing, pursuant to South Carolina Appellate Rule 221(a) and Rule 240, of the Court's opinion issued on July 24, 2024, *Covil Corp. v. Pennsylvania National Mutual Casualty Insurance Company*, Op. No. 28221 (S.C. Sup. Ct. filed July 24, 2024) (Howard Adv. Sh. No. 28 at 20). In its decision, this Court announced a new and unprecedented rule regarding the enforcement of the notice provisions contained in policies of insurance where no rights of innocent third-parties are at issue. Specifically, this Court crafted an "immaterial" breach exception to the notice provisions, holding that an insurer must establish that the insured's failure to comply with the notice provision of a policy constitutes a material breach before an insurer can decline coverage under the policy. In its application of this novel rule, the Court held that if the insured was defended in the underlying lawsuit, the insured's failure to provide notice to the insurer of the underlying lawsuit was not a material breach as a matter of law.

The practical effect of this rule is that insureds now have no motivation to comply with the notice provisions contained in an insurance policy. Under this Court's new rule, as long as the insured is defended – either by itself or another carrier – there can be no material breach of the notice provision, even if the insured does not provide notice to its insurer until the eve of trial, until after a judgment is entered against the insured, or until after a settlement is paid. For all feasible purposes, the Court's rule eviscerates the notice provisions in the policy and is clearly against well-established precedent.

Furthermore, in the Court's opinion, the Court disregarded the difference between an insurer's duty to defend and its duty to indemnify when it assessed the applicability of the

exclusions contained in the Penn National Policies. This case dealt solely with Penn National's indemnity obligation (due to Covil's late notice, Penn National did not have the opportunity to defend). When determining Penn National's duty to indemnify Covil for part of the settlement it paid in the underlying lawsuit, the issue should be whether, based on the facts developed in the underlying litigation, the exclusions preclude coverage for the amount paid by Covil to settle the claims asserted against it. The Court's reliance on allegations contained in the Complaint to determine the applicability of the Policies' exclusions was misplaced.

Accordingly, for these reasons, this Court should grant Penn National's Petition for Rehearing, reverse the Court of Appeals' decision, and find that either Covil's violation of the notice provisions in the Penn National Policies barred coverage for Covil's settlement in the underlying lawsuit, or that the case should be remanded to determine whether the exclusions apply to preclude coverage for the liability actually released by Covil in its settlement.

STATEMENT OF CASE

This is an insurance coverage action arising out of an underlying lawsuit filed against Covil Corporation ("Covil") asserting asbestos products liability claims. Specifically, Covil alleged that Penn National provided coverage under two policies of insurance for Covil's liability in an underlying lawsuit, *David D. Rollins v. Covil Corporation, et al.*," Civil Action No. 2019-CP-25-0118, filed in Hampton County, South Carolina ("Rollins Lawsuit"). Covil asserted that Penn National breached its policies when it refused to contribute toward the settlement that was reached during the mediation in the Rollins Lawsuit.

As one of its defenses to coverage, Penn National pled that Covil breached the notice provisions contained in the Penn National Policies. Specifically, Covil did not provide notice to Penn National of the Rollins Lawsuit until nine (9) months after Covil was served with the First

Amended Complaint. When Covil finally provided notice to Penn National, all pleadings in the Rollins Lawsuit were closed and all discovery (including both fact and expert discovery) was completed. When Penn National first learned of the Rollins Lawsuit, mediation was scheduled to be held in less than one month and trial was scheduled to begin in less than two months.

Covil was being defended in the Rollins Lawsuit by counsel hired and paid by another insurer. Penn National, however, did not retain the counsel who was defending Covil in the Rollins Lawsuit and had no control over the litigation, including what amount, if any, should be paid in settlement of the Rollins Lawsuit. To this date, Penn National has no information regarding the total amount paid by Covil to settle the Rollins Lawsuit and what liability and claims were released in the settlement.

Covil filed a motion for partial summary judgment in the present case, requesting that the trial court find that Penn National had coverage under the Penn National policies for the claims asserted in the Rollins Lawsuit and that it breached its policy when it failed to contribute $50,000 to the settlement in the Rollins Lawsuit. The trial court granted partial summary judgment in favor of Covil. The Court of Appeals affirmed. This Court granted Penn National's Petition for a Writ of Certiorari and issued its decision on July 24, 2024.

SUPREME COURT DECISION

In its decision, this Court addressed two main issues: (1) the insurance policy notice provision; and (2) policy exclusions, specifically the products hazard exclusion and the completed operations exclusion. Ultimately, this Court affirmed, as modified, the Court of Appeals' decision which entered partial summary judgment in favor of Covil, finding that there was coverage under the Penn National Policies for the settlement paid in the Rollins Lawsuit. From this decision, now-Chief Justice Kittredge dissented-in-part and concurred-in-part.

First, this Court analyzed the notice provisions contained in insurance policies and affirmed long-standing precedent recognizing the materiality, validity and enforceability of notice provisions. *Covil*, Op. No. 28221 at 24 (citing *Lee v. Metro. Life Ins. Co.*, 180 S.C. 475, 186 S.E.2d 376 (1936)). The Court then addressed South Carolina's "notice-prejudice rule" that requires proof of prejudice to the insurer before the insured's violation of the notice provisions bars coverage for claims of innocent third-parties. *Id*. at 24-25. With regard to claims that do not involve innocent third-parties, the Court held that the notice-prejudice rule does not apply, and a violation of the notice provisions by the insured bars coverage. *Id.* at 25.

> Thus, our courts will enforce the terms of all insurance policies, even if they appear to be unfair or to work injustice, unless the provision being challenged violates a specific statute or is found unenforceable under well-established provision of law.
>
> The "notice-prejudice rule" – a judicially-created fiction that operates to invalidate a notice provision in an insurance policy – is somewhat of an exception to this principle. We will not, therefore, expand the rule beyond its original purpose, which is to protect innocent third parties by preventing an insurer from enforcing a notice provision in its liability policy unless the insurer can prove it was prejudiced by the lack of notice.

Id. at 26-27.

Despite the Court's endorsement of long-established precedent clearly and predictably indicating the effect of an insured's breach of the notice provisions contained in the insurance policy, the Court then went on to judicially create a new "immaterial breach" exception to the notice provisions.

> Under well-established principles of contract law – "settled law" as we stated in *Evans* – to justify the forfeiture of Covil's contractual rights, Penn National must establish that Covil's failure to "immediately forward" notice constituted a "material breach."
>
> To guide our courts in "determining whether the breach of a [contract] is [] material," this Court adopted the "standards" set forth in section 241 of the Restatement (Second) of Contracts.

Id. at 27-28.

After analyzing the factors listed in the Restatement, the Court held that the most significant factor was "the extent to which [Penn National] will be deprived of the benefit which [it] reasonably expected." The Court found that the benefit reasonably expected by Penn National from the notice provisions contained in its Policies was its ability to adequately defend Covil in an underlying lawsuit. "Thus, the point that is important to analyzing the "benefit … reasonably expected" … is not whether Penn National's interests were protected but whether Covil's interests were." *Covil*, at 28-29. The Court then found that Covil's interests were protected because Covil was actually defended by counsel in the Rollins Lawsuit. Because Covil was defended by counsel, its failure to notify Penn National of the Rollins Lawsuit for nine (9) months (until after all discovery was completed and on the eve of trial) did not constitute a "material" breach of the notice provisions, and Covil was entitled to coverage under the Penn National Policies as a matter of law.

> Evaluating all the factors set forth in section 241, the most significant one on the facts of this case is subsection (a), which weighs heavily against finding a material breach because Covil's attorneys protected all of Covil's interests. Penn National was deprived of no benefit for which it could be compensated, and there remains no harm for Covil to cure. Thus, we hold Covil's breach was not material, and Penn National cannot escape liability due to untimely notice.

Id. at 29.

Justice Kittredge dissented from this portion of the Court's opinion, finding that the newly judicially-created "immaterial breach" exception to enforcement of the notice provisions in insurance policies was indistinguishable from the application of the notice-prejudice rule – which the majority of the Court expressly held did not apply in situations, as here, where rights of innocent third parties were not affected. *Id*. at 36.

This Court then proceeded to analyze whether the products hazard exclusion and the completed operations exclusion applied to preclude coverage to Covil under the Penn National Policies. Although the issue in this case was whether Penn National had a duty to indemnify Covil for a part of the settlement amount, this Court relied on allegations contained in the Complaint filed in the Rollins Lawsuit and applied a "duty to defend" standard to determine the applicability of the exclusions.

> Here, the complaint was not limited to allegations of products liability. In the same paragraph of the complaint that labels Covil as a "Product Defendant," Rollins alleged liability based on Covil's "installation and removal of asbestos-containing thermal insulation." By examining the specific actions described in Rollins's complaint rather than focusing solely on the labels he assigned, it is clear that Rollins alleged – at least in part – that his injuries resulted from Covil's activities related to the installation and removal of insulation, actions not excluded as a "products hazard."

Id. at 33. Therefore, this Court found that the products exclusion did not preclude coverage under the Penn National Policies for the settlement in the Rollins Lawsuit. *Id.* at 33-34. The Court also affirmed the Court of Appeals' decision that the completed operations exclusion did not apply to the settlement of the Rollins Lawsuit. *Id.* at 34-35.

ARGUMENT IN SUPPORT OF PETITION

I. The Judicially-Created "Immaterial Breach" Exception To The Late-Notice Rule Is Not Supported By This Court's Precedent.

This Court has long recognized that insurers have the right under their insurance policies to limit their liability and impose conditions on their obligations as long as the limitations and conditions do not violate statutory provisions or public policy. *B.L.G. Enter. v. First Fin. Ins. Co.*, 334 S.C. 529, 535-36, 514 S.E.2d 327, 330 (1999). One of the conditions to coverage universally included in insurance policies are notice provisions. Under such provisions, the insured has a duty to: (1) notify the insurer as soon as practicable of an "occurrence" which may

result in a claim against it; and (2) immediately send copies to the insurer of any summons or legal papers received in connection with any lawsuit. This Court has long held that the notice provisions contained in a policy are material terms of the insurance contract.

In this case, this Court reaffirmed the importance of notice provisions and the consequences of failing to comply with them. In so doing, it cited to its decision in *Lee v. Metropolitan Life Ins. Co.*, 180 S.C. 475, 186 S.E. 376 (1936). The *Lee* Court stated:

> No rule of law is more firmly established in this jurisdiction than one suing on a policy of insurance, where the notice required by the policy is not timely given, cannot recover. And the Court has gone so far as to hold that *the failure to give the required notice in the allotted time is* ***fatal to the right of recovery****, even if it be shown that* ***the insurance company has suffered no harm by the delay***.

Id. at 486-87, 186 S.E.at 381 (emphasis added). Under *Lee*, ***any*** failure to comply with the notice provisions in an insurance policy barred coverage under the policy – even where the insurer suffered no harm by the delay.

This holding – that any failure to comply with a notice provision barred coverage under the policy – provided the justification for the judicially-created notice-prejudice rule. As stated in *Factory Mutual Liability Insurance Company v. Kennedy*, 256 S.C. 376, 182 S.E.2d 727 (1971), another case relied on by this Court in its decision:

> [W]e think the sound rule to be that, in an action affecting the rights of innocent third parties under an automobile liability insurance policy, the noncompliance by the insured with policy provisions as to notice and forwarding suit papers will not bar recovery, unless the insurer shows that the failure to give such notice has resulted in substantial prejudice to its rights.

Id. at 381, 182 S.E.2d at 729-30. In its recent analysis of the notice-prejudice rule, this Court, in *Neumayer v. Philadelphia Indemnity Insurance Company*, 427 S.C. 261, 831 S.E.2d 406 (2019), rationalized the creation of the notice-prejudice rule on the grounds that the general rule allowed

an insurer to disclaim coverage where a technical breach of the notice provision occurred.

> [The notice-prejudice] rule prevented an insurer from relying on an immaterial breach by its own insured as a defense to paying an injured third party.

Id. at 267, 831 S.E.2d at 409. This Court then reaffirmed that the notice-prejudice rule does not apply when an insured is seeking coverage under its own policy and no rights of innocent third parties are implicated, citing to *Prior v. S.C. Med. Malpractice Liab. Ins. Joint Underwriting Ass'n*, 305 S.C. 247, 407 S.E.2d 655 (Ct. App. 1991). In *Prior*, the Court held that the insured's failure to provide timely notice, by itself, precluded coverage. *Id.* at 250, 407 S.E.2d at 657 ("Prior failed to notify JUA in a timely manner, thus violating the insurance policy. This failure justified JUA's refusal to defend and to deny coverage.").

In all of the cases addressing the consequences of an insured's failure to comply with the notice provisions when the insured is the one seeking coverage, the materiality or immateriality of the insured's breach of the notice provisions was not a factor in the ultimate decision. Instead, the appellate courts followed *Lee*'s directive, "the failure to give the required notice in the allotted time is fatal to the right of recovery, even if it be shown that the insurance company has suffered no harm by the delay." *Lee*, 180 S.C. at 487, 186 S.E. at 381.

Despite this Court's reliance upon the above cited cases, the Court deviated from this clear precedent when it adopted the "immaterial breach" exception to the late-notice rule. In so doing, this Court relied exclusively on its decision in *Evans v. American Home Assurance Co.*, 252 S.C. 417, 166 S.E.2d 811 (1969). However, the *Evans* decision cannot support the weight this Court ascribed to it.

In *Evans*, the insured was involved in an automobile accident in which he was at-fault. The accident was reported to the insurer and the insured provided a statement of the accident to

the insurer. When the lawsuit was filed, the insured was not personally served and therefore did not receive actual notice of the lawsuit. Ultimately, the insurer retained counsel and was able to find the insured. Upon request from the insurer, the insured met with defense counsel, "was friendly and cooperative," and answered all questions. Defense counsel notified the insured of the trial date and requested that he appear at trial. The insured then failed to appear at trial. *Id.* at 421-23, 166 S.E.2d at 813-14. Thereafter, the insurer denied coverage based on the insured's failure to cooperate. *Id.* at 419, 166 S.E.2d at 812.

The *Evans* Court first set forth the general rule regarding the effect of an insured's failure to cooperate with the insurer where the rights of an injured party were implicated.

> [I]t is settled law with us that a liability insurer may successfully defend upon the ground that the insured has violated the cooperation clause of the policy only when the breach has been material *and* has resulted in substantial prejudice to the insurer.

Id. at 420, 166 S.E.2d at 813 (emphasis added). After examining the facts, the Court held that the insured did not materially breach his duty to cooperate with the insurer.

> Mere failure to appear at the trial does not establish that Walton was deliberately non-cooperative, and the insurer affirms that he was cooperative in all other respects. Walton may have become ill, met with foul play or been arrested by military police and returned to the Naval Base in Charleston. *In this contest between the injured party and the tort feasor's insurer*, the burden was upon the insurer to establish that the tort feasor's failure to attend the trial was his deliberate act. On this record we can not conclude as a matter of law that this burden has been met by the insurer. This issue was for the trial court.

Id. at 423, 166 S.E.2d at 814 (emphasis added).

In *Evans*, the Court was not stating the law with regard to an insured's breach of the notice provisions regarding his own claim for coverage. Instead, the *Evans* Court was applying the notice-prejudice rule to determine if the insured breached his duty to *cooperate* in a way that prejudiced the insurer and precluded coverage for the resulting judgment. In order for the breach

of the duty to cooperate to bar coverage for an innocent third party under the policy, the *Evans* Court indicated that the insured's breach must be both material and result in substantial prejudice to the insurer. The *Evans* Court then found that the insured both cooperated pre-trial and then failed to cooperate when he did not attend the trial. In analyzing this pattern of conduct, the Court conflated the duo requirement of materiality and prejudice to the insurer by considering whether the insured "deliberately" violated the conditions of the policy. Because the insured's failure to cooperate was not clear, the Court found that coverage for the underlying judgment was not precluded as a matter of law. Significantly, *Evans* does not stand for the proposition that an insured's breach of the notice provisions in the policy must be material before such breach precludes coverage under the policy. And, no other court has cited *Evans* for this proposition.

The other two cases cited by this Court in support of its use of section 241 of the Restatement (Second) of Contracts to determine the materiality of Covil's breach of the notice provisions are inapposite because they do not arise in the insurance context, do not address the notice provisions in an insurance policy, and by their holdings are limited to the specific facts of those cases. See, *Kiriakides v. United Artists Commc'ns, Inc.*, 312 S.C. 271, 440 S.E.2d 364 (1994) (adopting the Restatement standards "for determining whether the breach of a *commercial lease* is trivial or immaterial under S.C. Code § 27-37-10); *Palmetto Mortuary Transp., Inc. v. Knight Sys., Inc.*, 424 S.C. 444, 818 S.E.2d 724 (2018) (approving the use of the Restatement standards when determining whether a breach of contract warranted *recission*). No other court in any jurisdiction has used the Restatement factors to determine whether an insured's breach of the notice provision precluded coverage under the policy.

In the present case, Covil requested coverage under the Penn National Policies for a portion of the settlement it paid to settle the Rollins Lawsuit. (Again, Penn National does not

know the total amount paid by Covil to settle the Rollins case.) Because the settlement was paid, no rights of innocent third parties were implicated. Therefore, Covil's failure to provide notice to Penn National of the Rollins Lawsuit for nine (9) months, after all discovery was completed and immediately prior to the mediation, should have precluded coverage under the Penn National Policies for the settlement paid by Rollins. The Court's adoption of the immaterial-breach exception to the late-notice rule was contrary to decades-old precedent and was otherwise not justified. Penn National respectfully requests a rehearing to review this issue.

II. This Court's Holding That Covil's Failure To Provide Timely Notice To Penn National Of The Rollins Lawsuit Constituted An Immaterial Breach Of The Notice Provisions Renders The Policy's Notice Provisions Meaningless.

After creating an immaterial-breach exception to the general rule that an insured's noncompliance with notice provisions precludes coverage for the insured's own claim for coverage under a policy, this Court determined that Covil's failure to provide notice to Penn National of the Rollins Lawsuit for nine (9) months was an immaterial breach of the Penn National Policies. This Court reasoned that the benefit to Penn National of the notice provisions in its Policies was so that it could defend Covil in any underlying lawsuit. Because Covil was defended in the Rollins Lawsuit and Covil's interests were protected, Penn National was not deprived of any benefit.

> [T]he benefit Penn National reasonably expected from the notice provision in its policy was to be notified so it could adequately defend Covil. While Penn National certainly intended that by protecting Covil's interests it would protect its own, its contractual responsibility was to protect Covil. Thus, the point that is important to analyzing the "benefit … reasonably expect" … is not whether Penn National's interests were protected but whether Covil's interests were. Penn National was not deprived of this benefit because Covil was represented by counsel hired by other insurers from the very beginning of this case. Those attorneys timely answered the complaint, conducted discovery, and handled other pretrial matters they deemed necessary to protect Covil. Thus, Covil's breach of the notice provision did not deprive Penn National from receiving the benefit it

> reasonably anticipated from requiring its insured to "immediately forward" the summons to it.

Covil, Op. No. 28221 at 28-29. *See also*, *Id.* at 29 (finding that this was the most significant factor in finding that Covil did not materially breach the insurance contract).

First, this Court has never before limited the purpose of an insurance policy's notice provisions to solely ensuring that the insured is defended. Indeed, this Court has regularly cited an insurer's ability to conduct a reasonable investigation as an equally significant reason for the notice provision. *See*, *Neumayer*, 427 S.C. at 266, 831 S.E.2d at 408 ("Common sense dictates that the insurer must have notice of a claim or lawsuit in order to properly investigate and defend against it, and these clauses ensure that the insurer receives notice by imposing this obligation on the insured."); *Vermont Mut. Ins. Co. v. Singleton*, 316 S.C. 5, 11, 446 S.E.2d 417, 421 (1994) ("The purpose of a notification requirement is to allow for the investigation of the facts and to assist the insurer in preparing a defense.); *Kennedy*, 256 S.C. at 381, 182 S.E.2d at 729 ("The obvious function of the policy provisions, requiring the insured to give notice of the accident and forward suit papers, is to prevent prejudice to the insurer's right to conduct a reasonable investigation of the accident and adequately defend any action brought against the insured."). Here, Penn National was not allowed to conduct a reasonable investigation into the Lawsuit.

Furthermore, the benefit to an insurer of prompt notice is so that the insurer can also control the defense of the insured – not simply that the insured generally be defended in the underlying case. When an insurer controls the defense, it can make decisions that protect both the insured's interests as well as its own, including whether and when to negotiate a settlement, what discovery should be pursued, and what must be done to ensure that the amount of any liability is fairly established. *See*, *Hatchett v. Nationwide Mut. Ins. Co.*, 244 S.C. 425, 434, 137 S.E.2d 608, 613 (1964). Here, Penn National was deprived of this interest when Covil failed to

provide timely notice of the Rollins Lawsuit.

This Court has held in this case that as long as an insured is defended in an underlying lawsuit (either through another carrier or through its own efforts), the insured's noncompliance with the notice provisions is completely absolved. The practical effect of the Court's ruling is that an insured will never have to provide timely notice to its carrier of a claim or lawsuit – or really any notice at all prior to the entry of judgment against it. This Court's decision essentially renders the notice provisions in the insurance policy meaningless especially in cases where more than one insurer's policies are triggered.

Under *Sloan Constr. Co. v. Central Nat'l Ins. Co.*, 269 S.C. 183, 186-87, 236 S.E.2d 818, 820 (1977), an insurer's duty to defend is personal and indivisible. Therefore, for any claim that triggers coverage under more than one policy (such as asbestos claims or construction defect claims) the insurer only has to provide notice to one of its insurers, ignoring all other potentially triggered policies. Once judgment is entered against the insured (and as long as the insured pays the judgment), the insured can then provide notice to all other triggered insurers and receive reimbursement, and under this Court's decision, the other insurers cannot disclaim coverage based on the insured's clear violation of the notice provisions – merely because the insured was actually defended in the underlying lawsuit.

In truth, conditions contained in an insurance policy must be upheld or they are rendered meaningless. The Court's decision to create an immaterial-breach exception to the notice provisions in effect re-writes the insurance policy, which this Court avowed should not be done.

> The judicial function of a Court of law is to enforce an insurance contract as made by the parties, and not to re-write or to distort, under the guise of judicial construct, contracts, the terms of which are plain and unambiguous. It is not the province of the Courts to construe contracts broader than the parties have elected to make them, or to award benefits where none was intended.

S.S. Newell & Co. v. American Mut. Liab. Ins. Co., 199 S.C. 325, 332, 19 S.E.2d 463, 466 (1942). Penn National respectfully petitions this Court to rehear this issue.[1]

III. This Court's Analysis Of The Exclusions Contained In The Penn National Policies Incorrectly Utilized The Duty To Defend Standard In Addressing Penn National's Duty To Indemnify.

As this Court has long recognized, an insurance policy obligates an insurer (1) to defend any suit alleging claims covered under the policy; and (2) to indemnify the insured for damages actually covered under the policy. *Sloan*, 269 S.C. at 186, 236 S.E.2d at 820. The insurer's defense obligation is measured by the allegations contained in the complaint against the insured. The insurer's indemnity obligation is based on the facts ultimately determined in the underlying litigation. An insurer's duty to defend is deemed broader than its duty to indemnify precisely because the insurer's defense obligation is based on allegations made in the complaint that may not, in fact, be true. *See*, *City of Hartsville v. S.C. Mun. Ins. & Risk Fund*, 382 S.C. 535, 543-44, 677 S.E.2d 574, 578 (2000).

Whether Penn National had a duty to defend Covil in the Rollins Lawsuit is not an issue in this case. The Rollins Lawsuit was settled by Covil less than one month after it gave notice to Penn National of the Rollins Lawsuit. The only issue in this case is whether the Penn National Policies provided coverage to Covil for a portion of the settlement. In determining Penn National's indemnity obligation, the allegations contained in the Complaint filed in the Rollins Lawsuit are largely immaterial. The deciding factor is whether the settlement was paid for claims actually covered under the Penn National Policies. *See*, *Builders Mut. Ins. Co. v. Island Pointe, LLC*, 431 S.C. 93, 847 S.E.2d 87 (2020) (allocation between covered and non-covered

[1] Even if the Court stands by its new immaterial-breach exception, Penn National requests that this Court remand the matter to the trial court for application of the facts to the newly created rule.

damages under a policy is appropriate in subsequent declaratory coverage action).

In its decision, this Court determined that the products hazard exclusion did not bar coverage for the settlement because the Complaint in the underlying Rollins Lawsuit alleged that Covil's liability was based, in part, on Covil's installation and removal of asbestos-containing insulation. *Covil*, Op. No. 28221 at 33. However, if in fact, Covil paid to settle claims of products liability only (as opposed to claims of negligent installation or removal), then the products hazard exclusion would indeed bar coverage for the settlement. *See, Continental Cas. Co. v. Employers Ins. Co. of Wausau,* 60 A.D.3d 128, 151 (N.Y. App. Div. 2008) (holding that claims arising out of the insured's asbestos insulating activities are included within the products hazard/completed operations hazard coverage). Penn National respectfully petitions this Court to rehear this issue and to remand the matter to the trial court for a factual determination of the basis for Covil's settlement payment and, thus, a determination as to whether Penn National must indemnify Covil for that payment.

CONCLUSION

Previously, this Court has never held that an insured's breach of the notice provisions in an insurance policy must be material before coverage can be precluded for the insured's own claim. By deciding that timely notice need not be given to an insurer so long as the insured is defended, this Court has created a host of unintended consequences that impact every long tail exposure (asbestos, environmental, construction defect, etc.) case that implicates multiple policy periods. Finally, by utilizing a duty to defend standard to decide Penn National's indemnity obligation, the Court has prematurely assessed the applicability of policy exclusions without the benefit of discovery and an established Record. For these reasons, Penn National respectfully requests that this Court grant its petition to rehear these issues.

This 8th day of August, 2023.

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