IN THE SUPREME COURT OF TEXAS

NO. 06-0598

PRODIGY COMMUNICATIONS CORP., PETITIONER,

v.

AGRICULTURAL EXCESS & SURPLUS INSURANCE COMPANY, N/K/A GREAT AMERICAN E & S INSURANCE COMPANY AND GREAT AMERICAN INSURANCE COMPANY, RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS

Argued April 1, 2008

CHIEF JUSTICE JEFFERSON delivered the opinion of the Court, joined by JUSTICE O'NEILL, JUSTICE WAINWRIGHT, JUSTICE BRISTER, JUSTICE MEDINA, and JUSTICE GREEN.

JUSTICE WAINWRIGHT delivered a concurring opinion.

JUSTICE JOHNSON delivered a dissenting opinion, joined by JUSTICE HECHT and JUSTICE WILLETT.

In *PAJ, Inc. v. The Hanover Insurance Co.*, 243 S.W.3d 630, 636-37 (Tex. 2008), we held that "an insured's failure to timely notify its insurer of a claim or suit does not defeat coverage if the insurer was not prejudiced by the delay." *PAJ* involved an occurrence-based commercial general liability ("CGL") policy with a prompt-notice provision that required the insured to notify the insurer of **"**an occurrence or an offense that may result in a claim 'as soon as practicable**.'"** *Id*. at 631-32. Noting that "the timely notice provision was not an essential part of the bargained-for exchange

under PAJ's occurrence-based policy," we held that PAJ's untimely notice did not defeat coverage in the absence of prejudice to the insurer. *Id*. at 636-37.

Today, we decide whether *PAJ*'s notice-prejudice rule applies to a claims-made policy when the notice provision requires that the insured, "as a condition precedent" to its rights under the policy, give notice of a claim to its insurer "as soon as practicable . . ., but in no event later than ninety (90) days after the expiration of the Policy Period or Discovery Period." The parties dispute whether notice of the claim was given "as soon as practicable" but agree that the insured gave notice within the ninety-day cutoff period. The insurer also admits that it was not prejudiced by the delayed notice.

For the reasons explained below, we conclude that "notice as soon as practicable" was not an essential part of the bargained-for exchange under the claims-made policy at issue here. Following *PAJ*, we hold that, in the absence of prejudice to the insurer, the insured's alleged failure to comply with the provision does not defeat coverage. *See id*. Because the court of appeals held otherwise, 195 S.W.3d 764, 768, we reverse its judgment, render judgment that the insurer may not deny coverage based on the fact that notice was not given "as soon as practicable," and remand the remaining issues to the trial court.

I
Factual Background

Prodigy Communications merged with FlashNet Communications in May 2000. At the time of the merger, FlashNet was insured under a claims-made "Directors' and Officers' Liability Insurance Policy Including Company Reimbursement" issued by Agricultural Excess & Surplus

Insurance Company (AESIC).[1] In exchange for a $19,519 premium, the policy covered losses resulting from certain "claims first made" against Flashnet[2] and its directors and officers during the policy period of March 16, 2000 to May 31, 2000. In anticipation of its merger with Prodigy, FlashNet purchased a 3-year "Discovery Period" which, in exchange for a $93,750 premium, extended coverage under the policy to any "claims first made" against the Insureds between May 31, 2000 and May 31, 2003.[3]

The policy contained the following amended[4] "notice of claim" provision:

> The [Insureds] shall, as a condition precedent to their rights under this Policy, give the Insurer notice, in writing, as soon as practicable of any Claim first made against the [Insureds] during the Policy Period, or Discovery Period (if applicable), but in no event later than ninety (90) days after the expiration of the Policy Period, or Discovery Period, and shall give the Insurer such information and cooperation as it may reasonably require.[5]

On November 28, 2001, Flashnet was named as a defendant in a class-action securities lawsuit (commonly referred to as the "IPO litigation"). The underlying FlashNet lawsuit constituted

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[1] Respondent Great American Insurance Company's Executive Liability Division was responsible for underwriting and claims administration of D&O policies issued by AESIC, including the one issued in this case.

[2] With respect to claims against FlashNet itself, coverage was provided solely by operation of Endorsement 16, which added the following insuring agreement: "if, during the Policy Period or the Discovery Period, any Securities Claim is first made against the Company for a Wrongful Act the Insurer will pay on behalf of the Company all Loss which the Company is legally obligated to pay."

[3] As prominently stated on the declarations page, the policy "D[ID] NOT PROVIDE FOR ANY DUTY BY THE INSURER TO DEFEND THOSE INSURED UNDER THE POLICY." This is standard for D&O policies. *See* 3 ROWLAND H. LONG, THE LAW OF LIABILITY INSURANCE § 12A.05[1] (2006).

[4] The original "notice of claim" provision, found in section VII of the policy, required that the Insureds "as a condition precedent to their rights . . . give the Insurer notice . . . as soon as practicable . . . but in no event later than ninety (90) days *after such Claim is made . . . .*"

[5] As noted above, the Discovery Period expired on May 31, 2003. Thus, the notice provision required that notice of a claim be given "as soon as practicable . . ., but in no event later than" August 29, 2003.

a "Securities Claim first made against [FlashNet]" "during the . . . Discovery Period" of the policy, as described in the insuring agreement added by Policy Endorsement 16. Prodigy was served with a copy of the complaint on June 20, 2002 and first notified AESIC of the FlashNet lawsuit in a letter dated June 6, 2003. Apparently assuming that AESIC was already aware of the underlying lawsuit, the June 6 letter requested AESIC's consent to a proposed settlement agreement of the claims brought against Flashnet, rather than purporting to provide the initial notice of the claim.

By letter dated June 18, 2003, AESIC denied coverage on the ground that the June 6 letter did not comply with the policy's notice requirements.[6] In response, Prodigy provided AESIC with formal written notice of the claim on June 26, 2003. Along with this notice, Prodigy attached a letter asserting that notice was timely because it had been sent within ninety days of the expiration of the Discovery Period. Despite Prodigy's efforts, AESIC never retreated from its no coverage stance.

II
Procedural Background

Prodigy sued AESIC, seeking a declaration that Prodigy was contractually entitled to coverage. Prodigy also asserted several extra-contractual claims alleging, among other things, that AESIC violated certain Insurance Code provisions as an unauthorized surplus lines insurer and was

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[6] AESIC's letter stated in part:

> As I advised you in telephone conversations on June 9, 2003 and June 11, 2003, AESIC is not participating in the [IPO litigation] and has not signed the relevant agreements. I also advised you that AESIC had not received any written notice of any lawsuit involving Flashnet Communications, Inc. In fact, your June 6, 2003 letter appears to be the first notice of this matter to AESIC. However, such notice was not in compliance with the [Policy's requirements] (including Section VII) ["The Notice of Claim" provision], which are a condition precedent to any rights under the Policy. Furthermore, both the Policy Period and Discovery Period expired prior to your June 6, 2003 letter. Under the circumstances there is no coverage for this matter under the Policy.

thus liable to Prodigy for the full amount of coverage. AESIC moved for summary judgment arguing that Prodigy did not satisfy the policy's condition precedent that notice of a claim be given "as soon as practicable." Prodigy filed a cross-motion for summary judgment. The trial court denied Prodigy's motion and granted AESIC's motion in part, ruling that Prodigy failed to comply with the condition precedent of timely notice and that this failure "avoids coverage, with or without prejudice to AESIC." AESIC and Great American Insurance Company then moved for summary judgment on the remaining Insurance Code issues, and the trial court granted a final summary judgment in their favor.

The court of appeals affirmed, holding that: (1) Prodigy was required to give notice "as soon as practicable," even though the policy allowed notice within ninety days after the expiration of the discovery period; (2) notice given almost one year after the filing of the lawsuit against the insured was not "as soon as practicable" as a matter of law; (3) AESIC was not required to prove that it was prejudiced by Prodigy's late notice; and (4) Insurance Code provisions did not prevent AESIC from enforcing the policy's notice provision. 195 S.W.3d 764, 766-69. Prodigy petitioned this court for review on the issues of late notice and Insurance Code violations. We granted the petition. 51 Tex. Sup. Ct. J. 292 (Jan. 14, 2008).

III
Discussion

We must decide whether, under a claims-made policy, an insurer can deny coverage based on its insured's alleged failure to comply with a policy provision requiring that notice of a claim be

given "as soon as practicable," when (1) notice of the claim was provided before the reporting deadline specified in the policy; and (2) the insurer was not prejudiced by the delay.

As noted earlier, we recently held in *PAJ,* that an "insured's failure to timely notify its insurer of a claim or suit does not defeat coverage if the insurer was not prejudiced by the delay." 243 S.W.3d at 636-37. In reaching that conclusion, we followed our holding in *Hernandez* that "an immaterial breach does not deprive the insurer of the benefit of the bargain and thus cannot relieve the insurer of the contractual coverage obligation." *PAJ*, 243 S.W.3d at 631 (citing *Hernandez v. Gulf Group Lloyds*, 875 S.W.2d 691, 692 (Tex. 1994)). Prodigy argues that, even assuming it breached the policy's requirement that notice of a claim must be given "as soon as practicable," under our holding in *PAJ*, that breach was immaterial and cannot defeat coverage given AESIC's admitted lack of prejudice. *See id*. AESIC responds that our holding in *PAJ* does not control the outcome of this case for several reasons.

First, unlike the *PAJ* policy, this one states unambiguously that the insured's duty to give "notice, in writing, as soon as practicable" is a "condition precedent" to coverage. Importantly however, our holding in *PAJ* did not rest on the distinction between conditions and covenants. *See id*. at 633 (noting that in *Hernandez* "[w]ithout distinguishing between covenants and conditions or classifying the exclusion as one or the other, we concluded that the insured's breach of the settlement-without-consent provision was immaterial and thus the insurer could not avoid liability") (citing *Hernandez*, 875 S.W.2d at 693); *see also id*. at 633 n.2 (noting that "the courts in many of the cases we cited made no attempt to classify the policy provisions as either covenants or conditions, nor did they even employ those terms"). Instead, we followed our reasoning in

Hernandez, where we applied "'fundamental principle[s] of contract law,'" to hold "that when one party to a contract commits a material breach, the other party's performance is excused." *Id*. at 633 (quoting *Hernandez,* 875 S.W.2d at 692). We noted that one consideration in determining the materiality of a breach is "'the extent to which the nonbreaching party will be deprived of the benefit that it could have reasonably anticipated from full performance.'" *Id*. (quoting *Hernandez,* 875 S.W.2d at 693 (citing RESTATEMENT (SECOND) OF CONTRACTS § 241(a) (1981))). Thus, while the Prodigy policy describes the notice provision as a "condition precedent," we must go further to determine whether prejudice is, or is not, required.

This brings us to AESIC's second reason for distinguishing this case from *PAJ*. Unlike the occurrence-based policy in *PAJ*, the policy at issue here is a "claims-made" policy. According to AESIC, timely notice is always inherent to, and an essential part of, the bargained-for exchange in a claims-made policy. In *PAJ*, we recognized a "critical distinction" between the role of notice in claims-made policies and the role of notice in occurrence policies and concluded that timely notice was not an essential part of the bargained-for exchange in PAJ's occurrence-based policy. 243 S.W.3d at 636. In reaching this conclusion, we were persuaded by the Fifth Circuit's explanation that "'[i]n the case of an "occurrence" policy, any notice requirement is subsidiary to the event that triggers coverage.'" *Id*. (quoting *Matador Petroleum Corp. v. St. Paul Surplus Lines Ins. Co.*, 174 F.3d 653, 658 (5th Cir. 1999)).

To determine whether "notice as soon as practicable" is an essential part of the bargained-for exchange in the claims-made policy at issue here, it is helpful to review the basic distinctions

between occurrence and claims-made policies and the different types of notice requirements associated with each.

As one treatise explains:

> D&O insurance policies today are invariably written on a "claims-made" basis, which means that the policy only covers those claims first asserted against the insured during the policy period. This limitation appears in the insuring clauses. This coverage differs from "occurrence" type coverage, written for most casualty insurance, which covers only claims arising out of occurrences happening within the policy period, regardless of when the claim is made.

3 ROWLAND H. LONG, THE LAW OF LIABILITY INSURANCE § 12A.05[3] (2006). Thus, the main difference between these two types of policies is that a "claims-made" policy provides unlimited retroactive coverage and no prospective coverage, while an "occurrence" policy provides unlimited prospective coverage and no retroactive coverage. 20 ERIC MILLS HOLMES, HOLMES' APPLEMAN ON INSURANCE § 130.1(A)(1) (2d ed. 2002) ("HOLMES' APPLEMAN ON INSURANCE 2D"); *see also* 1 LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE § 1.5 (3d ed. 2008) ("COUCH ON INSURANCE 3D").

For the insurance company, the primary advantage of a claims-made policy "is the limitation of liability to claims asserted during the policy period." 20 HOLMES' APPLEMAN ON INSURANCE 2D § 130.1(A)(1). This allows insurers "to calculate risks and premiums with greater precision." *Id*. Furthermore, "the elimination of exposure to claims filed after the policy expiration date enables liability insurance companies to issue the claims made policies at reduced premiums." *Id*.

Both occurrence policies and claims-made policies tend to have a requirement that notice of a claim be given to the insurer promptly, or "as soon as practicable." *See* 13 COUCH ON INSURANCE

3D § 186:13; *see also Chas. T. Main*, *Inc. v. Fireman's Fund Ins. Co.*, 551 N.E.2d 28, 29 (Mass. 1990). Unlike occurrence policies, however, some claims-made policies (often called "claims-made-and-reported policies) have an additional requirement that the claim be reported to the insurer within the policy period or within a specific number of days thereafter.[7] *See, e.g.*, *Burns v. Int'l Ins. Co.*, 929 F.2d 1422, 1423 (9th Cir. 1991) (claims to be reported within sixty days following policy termination); *Zuckerman v. Nat'l Union Fire Ins. Co.*, 495 A.2d 395, 396-97 (N.J. 1985)(claims to be made against insured and reported to insurer during policy period).

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[7] It should be noted that "[m]any courts fail to distinguish between claims-made and claims-made-and-reported policies, and simply speak in broad terms of 'claims-made' policies." *Textron, Inc. v. Liberty Mut. Ins. Co.,* 639 A.2d 1358, 1362 n.2 (R.I. 1994). As one court has explained:

> [T]he only true mark of a "claims made" [policy] is that it provides coverage for any claim first asserted against the insured during the policy period, regardless of when the incident giving rise to the claim occurred. Whether reporting to the insurer [i]s also a condition of coverage depends on the terms of the specific policy.
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> In this regard, there is a distinction between a "claims made" policy and a "claims made and reported" policy: "Whereas the former requires only that a claim be made within the policy period, the latter also requires that the claim be reported to the insurance company within the policy period."

Jones v. Lexington Manor Nursing Ctr., *L.L.C.*, 480 F. Supp. 2d 865, 868 (S.D. Miss. 2006)(quoting *Chicago Ins. Co. v. Western World Ins.* Co., No. Civ.A. 3-96-CV-3179R., 1998 WL 51363, at *3 (N.D. Tex. Jan. 23, 1998) (mem.)); *see also Pension Trust Fund for Operating Eng'rs v. Federal Ins. Co.*, 307 F.3d 944, 955-56 & n.6 (9th Cir. 2002)(holding that claims-made policy that required insured to provide notice of claims "'as soon as practicable'" but "did not require that the claims be reported within the policy period, or even within a specific number of days thereafter" could "[not] be treated as a claims-made-and-reported policy"); *Textron*, 639 A.2d at 1361 n.2 (noting that "[a]bsent a provision requiring notice within a set period after policy expiration, standard claims-made policies 'implicitly allow * * * reporting of the claim to the insurer after the policy period, as long as it is within a reasonable time'") (quoting 2 ROWLAND LONG, THE LAW OF LIABILITY INSURANCE, § 12A.05[3A] at 40 (Supp. 1991)).

Although Prodigy's policy is labeled a "claims-made policy," its requirement that notice of a claim be given "as soon as practicable during the Policy Period,. . . but in no event later than ninety (90) days after the expiration of the Policy Period, or Discovery Period" is characteristic of a "claims-made-and-reported policy". *See* 3 ROWLAND H. LONG, THE LAW OF LIABILITY INSURANCE § 12A.05[3A] (2006) ("The distinction between 'claims made' and 'claims made and reported' policies is not necessarily apparent on the face of the policies, since disclosure regulations generally require only that the legend 'claims made' be placed on the policy. The distinction is typically evident in the notice of claims provision of the policy.").

As courts and commentators have recognized, the different kinds of notice requirements when found in a claims-made policy serve very different purposes.[8] *See, e.g.,* 13 COUCH ON INSURANCE 3D § 186:13 ("As a general statement, the prompt notice of claim requirement and the 'claims made' within the policy period requirement serve such different purposes, and are of such different basic character, that the principles applied to one should have little or nothing to do with the principles applied to the other."); *Chas. T. Main,* 551 N.E.2d at 29 (noting that "[t]he purposes of the two types of reporting requirements differ sharply").

In a claims-made policy, the requirement that notice be given to the insurer "as soon as practicable" serves to "maximiz[e] the insurer's opportunity to investigate, set reserves, and control or participate in negotiations with the third party asserting the claim against the insured." 13 COUCH ON INSURANCE 3D § 186:13, *see also Chas. T. Main,* 551 N.E.2d at 29. By contrast, the requirement that the claim be made during the policy period "is directed to the temporal boundaries of the policy's basic coverage terms . . . . [This type of notice] is not simply part of the insured's duty to cooperate, but defines the limits of the insurer's obligation, and if there is no timely notice, there is no coverage." 13 COUCH ON INSURANCE 3D § 186:13. Similarly, a notice provision requiring that a claim be reported to the insurer during the policy period or within a specific number of days

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[8] As one treatise notes:

> Courts too often speak broadly of the [claims-made] policy's "notice requirement," without specifying which requirement is at issue, and make broad pronouncements about the effect of noncompliance with the unspecified "notice requirement." Alternatively, courts may speak in terms of the insured's "untimely notice," and proceed to determine the effect of the untimeliness, without specifying which of the notice requirements is at issue.

13 COUCH ON INSURANCE 3D § 186:13.

thereafter "define[s] the scope of coverage by providing a certain date after which an insurer knows it is no longer liable under the policy." *Resolution Trust Corp. v. Ayo,* 31 F.3d 285, 289 (5th Cir. 1994); *see also Chas. T. Main,* 551 N.E.2d at 29-30 (noting that "fairness in rate setting is the purpose of a requirement that notice of a claim be given within the policy period or shortly thereafter" and therefore this type of notice requirement "is of the essence in determining whether coverage exists" in a claims-made policy).[9]

> The role of notice in claims-made policies has been described as follows:
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> > Claims made or discovery policies are essentially reporting policies. *If the claim is reported to the insurer during the policy period, then the carrier is legally obligated to pay*; if the claim is not reported during the policy period, no liability attaches. Claims made policies require notification to the insurer to be within a reasonable time. *Critically, however, claims made policies require that that notice be given during the policy period itself.*

20 HOLMES' APPLEMAN ON INSURANCE 2D § 130.1(A)1 (emphasis added). Because the requirement that a claim be reported to the insurer during the policy period or within a specific number of days thereafter is considered essential to coverage under a claims-made-and-reported policy, most courts

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[9] *See also Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Willis,* 296 F.3d 336, 343 (5th Cir. 2002) ("The purpose of claims-made policies, unlike occurrence policies, is to provide *exact notice periods that limit liability to a fixed period of time* 'after which an insurer knows it is no longer liable under the policy, and for this reason such reporting requirements are strictly construed.*'"*)(emphasis added)(quoting *Resolution Trust Corp. v. Ayo,* 31 F.3d 285, 289 (5th Cir.1994)*; F.D.I.C. v. Mijalis*, 15 F.3d 1314, 1330 (5th Cir. 1994) (noting that "[t]he notice requirements in claims made policies allow the insurer to 'close its books' on a policy at its expiration and thus to 'attain a level of predictability unattainable under standard occurrence policies'") (quoting *Burns v. Int'l Ins. Co.*, 709 F. Supp. 187, 191 (N.D. Cal. 1989), *aff'd*, 929 F.2d 1422 (9th Cir.1991)).

have found that an insurer need not demonstrate prejudice to deny coverage when an insured does not give notice of a claim within the policy's specified time frame.[10]

In *Main*, the Supreme Judicial Court of Massachusetts noted the distinction between the "as soon as practicable" and "within the policy year" notice requirements and concluded that, in a claims-made policy, noncompliance with the latter would defeat coverage regardless of prejudice to the insured. 551 N.E.2d at 30. The court explained:

> The purpose of a claims-made policy is to minimize the time between the insured event and the payment. For that reason, the insured event is the claim being made against the insured during the policy period and the claim being reported to the insurer within that same period or a slightly extended, and specified, period. If a claim is made against an insured, but the insurer does not know about it until years later, the primary purpose of insuring claims rather than occurrences is frustrated. Accordingly, the requirement that notice of the claim be given in the policy period or shortly thereafter in the claims-made policy is of the essence in determining whether coverage exists. Prejudice for an untimely report in this instance is not an appropriate inquiry.

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[10] *See*, *e.g.*, *Chas. T. Main,* 551 N.E.2d at 30; *Matador Petroleum Corp.*, 174 F.3d at 656, 658; *Lexington Ins. Co. v. St. Louis Univ.,* 88 F.3d 632, 634-35 (8th Cir. 1996)(where claims-made policy provided that the insured "'shall give' [insurer] notice of each claim 'as soon as practicable,' and in any event, *'during the period of this Policy*,'" insurer "need not prove prejudice to deny coverage if the [insured] failed to report the [claim] *within the policy term*")(emphasis added); *DiLuglio v. New England Ins. Co.*, 959 F.2d 355, 356, 359 (1st Cir. 1992) (where policy provided that insurance company would pay "'any claim or claims ... first made against the Insured and reported to the Company during the policy period'" "prejudice may be presumed *where notice is not provided within the policy period*")(emphasis added); *Nat'l Union Fire Ins. Co. v. Talcott*, 931 F.2d 166, 168 (1st Cir. 1991) (same); *Burns v. Int'l Ins. Co.*, 929 F.2d 1422, 1423-25 (9th Cir. 1991) (notice-prejudice rule did not apply to claims-made policy that covered "claims made against the insureds during the policy period . . . notice of which claim is received by the company within sixty days following the termination of the policy period"); *Esmailzadeh v. Johnson and Speakman*, 869 F.2d 422, 424 (8th Cir. 1989); *Zuckerman v. Nat'l Union Fire Ins. Co.*, 495 A.2d 395, 396-97, 405-06 (N.J. 1985) (where policy covered "claims first made against the insured and reported to the [Insurer] during the policy period" insurer was not required to demonstrate prejudice to deny coverage based on notice given ten months after policy expired).

Id. The court then concluded that a statutory notice-prejudice requirement "applies only to the 'as soon as practicable' type of notice and not to the 'within the policy year' type of reporting requirement which is contained in the policy under review in this case and was not met." *Id*.

Similarly, in *T.H.E. Insurance Company v. P.T.P. Inc.*, 628 A.2d 223, 228 (Md. 1993), the Maryland Court of Appeals held that a statutory notice-prejudice requirement did not apply to the insurer's denial of coverage under a claims-made policy for a claim made and reported after the policy had expired. The court emphasized that the insurer was not attempting to "deny coverage because of an alleged material failure to perform a covenant to give notice, or to satisfy a policy provision that might be phrased as a condition that must be satisfied to prevent the loss of coverage that otherwise would apply." *T.H.E. Ins. Co.*, 628 A.2d at 227. Rather, the court explained, the extended reporting period under the policy had expired before P.T.P. reported the claim, and therefore the notice-prejudice requirement "could no more revive the original policy to cover [the claim] than [it] could reopen an occurrence policy to embrace a claim based on an accident that happened after the end of the policy period." *Id*. The court observed that the insurer would be required to demonstrate prejudice, however, to deny coverage based on the policy's provision requiring the insured to give notice of a claim "'as soon as practicable,'" assuming that the claim had been made and reported within the extended reporting period. *Id.* at 227 n.7.

We agree with this analysis. In a claims-made policy, when an insured gives notice of a claim within the policy period or other specified reporting period, the insurer must show that the insured's noncompliance with the policy's "as soon as practicable" notice provision prejudiced the insurer before it may deny coverage. Here, it is undisputed that Prodigy gave notice of the FlashNet

lawsuit before the ninety-day cutoff. Even assuming that Prodigy did not give notice "as soon as practicable," AESIC was not denied the benefit of the claims-made nature of its policy as it could not "close its books" on the policy until ninety days after the discovery period expired. *See F.D.I.C. v. Mijalis*, 15 F.3d 1314, 1330 (5th Cir. 1994) (noting that "the notice requirements in claims made policies allow the insurer to 'close its books' on a policy at its expiration and thus to 'attain a level of predictability unattainable under standard occurrence policies'")(quoting *Burns v. Int'l Ins. Co.*, 709 F. Supp. 187, 191 (N.D. Cal. 1989), *aff'd*, 929 F.2d 1422 (9th Cir.1991)); *see also* 20 HOLMES' APPLEMAN ON INSURANCE 2D § 130.1(A)1 ("The *essence* . . . of a claims made policy is notice to the insurance carrier *within the insurance policy period*.") (emphasis added).

Accordingly, we conclude that Prodigy's obligation to provide AESIC with notice of a claim "as soon as practicable" was not a material part of the bargained-for exchange under this claims-made policy. *See Hernandez,* 875 S.W.2d at 693 ("In determining the materiality of a breach, courts will consider, among other things, the extent to which the nonbreaching party will be deprived of the benefit that it could have reasonably anticipated from full performance.") (citing RESTATEMENT (SECOND) OF CONTRACTS § 241(a) (1981)). As AESIC has admitted that it was not prejudiced by the delay in receiving notice, it could not deny coverage based on Prodigy's alleged failure to provide notice "as soon as practicable." *See PAJ*, 243 S.W.3d at 636-37.

IV
Conclusion

In a claims-made policy, when an insured notifies its insurer of a claim within the policy term or other reporting period that the policy specifies, the insured's failure to provide notice "as soon as

practicable" will not defeat coverage in the absence of prejudice to the insurer.[11] Accordingly, we reverse the court of appeals' judgment, render judgment that AESIC cannot deny coverage because of Prodigy's alleged failure to give notice "as soon as practicable," and remand the remaining issues to the trial court. TEX. R. APP. P. 60.2(d).

Wallace B. Jefferson
Chief Justice

OPINION DELIVERED: March 27, 2009

[11] Because we hold that AESIC cannot deny Prodigy coverage for the Flashnet claim, we do we do not consider Prodigy's contention that AESIC was precluded from enforcing the notice provision because the policy was sold in violation of the surplus lines statute.