# NATIONAL PUBLISHING COMPANY, INC. *v.* HARTFORD FIRE INSURANCE COMPANY (SC 17647)

Norcott, Katz, Palmer, Zarella and Schaller, Js.

*Argued September 18, 2007—officially released July 8, 2008*

*James V. Somers*, with whom was *Regen O'Malley* and, on the brief, *John B. Farley*, *John C. Pitblado* and *Daniel P. Scapellati*, for the appellant (defendant).

*Steven D. Ecker*, with whom was *Peter M. Haberlandt*, for the appellee (plaintiff).

*Opinion*

SCHALLER, J. The sole issue in this certified appeal is whether the trial court properly refused to charge the jury on the defendant's special defense of late notice in this action for breach of an insurance contract. The defendant, Hartford Fire Insurance Company (Hartford), appeals, following our grant of certification,[1] from the judgment of the Appellate Court, which affirmed the judgment of the trial court rendered in accordance with a jury verdict in favor of the plaintiff, National Publishing Company, Inc. (National). See *National Publishing Co.* v. *Hartford Fire Ins. Co.*, 94 Conn. App. 234, 236–37, 892 A.2d 261 (2006). Hartford claims that the trial court's refusal to charge the jury on its special defense of late notice was harmful error because the timeliness and adequacy of National's notice, as well as the question of whether Hartford was prejudiced by any delay in notice, presented disputed issues of fact for the jury to resolve.[2] We reverse the judgment of the Appellate Court.

The jury reasonably could have found the following facts. At all times relevant to this litigation, Paul Cohen served as National's sole shareholder, chief executive officer and president. National was in the business of printing and distributing advertising inserts for newspapers throughout the country. In producing and distributing these inserts, National relied on a uniquely designed software package that included a sophisticated proprietary database containing the raw data needed to produce the advertising inserts. National's business operations ran smoothly until 1994, when relations began to sour between Cohen and Eric Richmond and Karen Clarke, two employees with whom Cohen had built National's business. On December 30, 1994, Richmond and Clarke, as well as a number of other employees of National, confronted Cohen and demanded that he relinquish control of the company. Without resolving the dispute, Cohen left National's premises and traveled to Florida. On January 1, 1995, Cohen received letters of resignation from Richmond and Clarke.

On January 3, 1995, upon his return from Florida, Cohen discovered that some of National's property was missing, including computers, customer files, business records, as well as backup discs that contained National's computer software and databases. Cohen did not realize the full extent of the loss until on or about January 20, 1995, when he attempted, with the assistance of two remaining employees, to fill a small order for inserts. While processing the order, Cohen discovered that the computer system did not function properly. He and his employees proceeded to fill the order manually, that is, without the aid of the computer system. Because the computer system did not function properly, Cohen and his remaining employees were unable to fill the large orders for inserts that were

necessary to keep the company solvent. National has not filled any orders for inserts since the January 20, 1995 order.

Because National's insurance policies were among the missing items and National's insurance coverage had not been within Cohen's purview, Cohen did not discover that National carried insurance with Hartford until January 25, 1995, when an invoice for a premium payment arrived from Hartford. This invoice referenced J. M. Layton and Company, Inc. (J. M. Layton), a third party insurance broker from whom National had procured the insurance policy. On January 30, 1995, Cohen called J. M. Layton and informed its chief executive officer, David Woodward, of the loss that National had suffered in early January, 1995, and the effect of the loss on National's ability to conduct business.

Woodward did not notify Hartford of National's claim until March 10, 1995, when he sent by facsimile to Hartford a form indicating that National was submitting a claim for employee dishonesty or employee theft. In this facsimile, Woodward also included a letter that he had received from Susan Guthrie, counsel retained by Cohen to represent National in its pursuit of its insurance claim. Guthrie's letter informed Woodward in writing of National's January, 1995 loss and its effect on National's business, and specifically stated that the business had been unable to operate since the losses had occurred.[3]

On the basis of the information that Woodward had transmitted, Gaspar Kuhn, an adjuster employed by Hartford, determined that the information supplied was insufficient to allow him to determine whether National was entitled to coverage under the policy. According to Kuhn, he thought that, at best, National might be entitled to coverage for its employee dishonesty claim. As for the employee dishonesty claim, Kuhn concluded that although a reported theft could have implicated the business interruption and extra expense coverage sections of the insurance policy, Woodward had not provided enough information to warrant coverage under either of those provisions. On March 13, 1995, Kuhn sent a letter to Guthrie in response, enclosing proof of loss forms and explaining that completion of the proof of loss forms was necessary to aid Hartford in its investigation of National's claim. On June 19, 1995, because he had not received any response to his March 13 letter, Kuhn sent a second letter, noting that Guthrie had not returned his telephone calls and asking her to contact him. On July 24, 1995, Kuhn sent Guthrie a third letter, again noting that he had not yet received a proof of loss form from her, and requesting that she return the enclosed proof of loss form to him, explaining that he was unable to proceed with the investigation until the form was returned.

Following Guthrie's failure to reply, National

responded to Kuhn's requests for information in August, 1995, when Eric Von Brauchitsch, a public adjuster hired by National to assist it in pursuing insurance coverage, telephoned Kuhn and informed him that National intended to assert claims for coverage under the business interruption and extra expense sections of the policy. Concluding that National's claim would be much larger and more complex than an employee dishonesty claim, Kuhn transferred National's claim to Thomas Effley, an adjuster employed by Hartford who had more experience handling larger claims.

The record reflects the following additional procedural history. At trial, National alleged that Hartford had breached the insurance contract by failing to pay National's claim. Based on a condition precedent set forth in § E.3.b of the policy, which specifies the insured's duties in the event of loss or damage, Hartford asserted as a special defense that National had failed to provide prompt notice to Hartford. Section E.3.b states in relevant part that the insured must "[g]ive [Hartford] prompt notice of the loss or damage. . . ." At the conclusion of evidence, the trial court declined to give the jury Hartford's requested instruction on its special defense of late notice, and the jury subsequently returned a verdict in favor of National. The trial court rendered judgment in accordance with the verdict awarding $1,100,314.37 in damages to National.[4]

Hartford then appealed from the judgment of the trial court to the Appellate Court, claiming, inter alia, that the trial court improperly had failed to instruct the jury on its special defense of late notice. *National Publishing Co.* v. *Hartford Fire Ins. Co.*, supra, 94 Conn. App. 237. The Appellate Court, assuming without deciding that the failure to give the requested instruction was improper, concluded that any such failure was harmless error. Id., 271. In arriving at this conclusion, the court first determined that National provided notice to Hartford on January 30, 1995, when National contacted J. M. Layton. Id., 274–75. Central to its determination that notice to J. M. Layton constituted notice to Hartford was the Appellate Court's determination that J. M. Layton was Hartford's agent. Id., 275. On the basis of that finding and testimony by Kuhn and Woodward that, in their opinion, Hartford was not prejudiced, the court concluded that National satisfied its burden to show that Hartford was not prejudiced by the timing of the notice. Id., 273–75. The Appellate Court then concluded that, because National had met its burden of demonstrating that Hartford was not prejudiced by the timing of the notice, pursuant to our holding in *Aetna Casualty & Surety Co.* v. *Murphy*, 206 Conn. 409, 419, 538 A.2d 219 (1988), Hartford could not meet its burden of showing that a charge on late notice likely would have affected the outcome because "[t]he only testimony offered on the issue of prejudice demonstrated a lack of prejudice to Hartford, thereby satisfying National's burden of

proof . . . .” *National Publishing Co.* v. *Hartford Fire Ins. Co.*, supra, 278. This certified appeal followed.

On appeal to this court, Hartford claims that the trial court's refusal to charge the jury on its special defense of late notice was improper because whether notice was timely and sufficient, and whether Hartford was prejudiced by any delay in notice presented disputed issues of fact for the jury to resolve. Hartford further argues that, because National failed to meet its burden to show that Hartford was not prejudiced by the timing of the notice, the result of the trial likely would have been different had the trial court instructed the jury on Hartford's special defense of late notice. National asserts that the record sufficiently demonstrates: (1) the timing of notice; (2) the sufficiency of notice; and (3) the form of notice required by the insurance policy. Finally, National argues that if this court should decide that notice was untimely, National has met its burden to demonstrate that Hartford suffered no material prejudice, and thus the instructional impropriety constituted harmless error. We agree with Hartford.

In determining whether the trial court improperly refused to give a requested charge, we review the evidence presented at trial in the light most favorable to supporting the proposed charge. *Matthiessen* v. *Vanech*, 266 Conn. 822, 828, 836 A.2d 394 (2003). “A request to charge which is relevant to the issues of [a] case and which is an accurate statement of the law must be given. . . . If, however, the evidence would not reasonably support a finding of the particular issue, the trial court has a duty not to submit it to the jury. . . . Thus, a trial court should instruct the jury in accordance with a party's request to charge [only] if the proposed instructions are reasonably supported by the evidence.” (Citations omitted; internal quotation marks omitted.) Id., 828–29.

Under this standard of review, we must decide whether the requested charge accurately reflects the law and reasonably is supported by the evidence. That charge would have instructed the jury that if it found that National had delayed in notifying Hartford, and that the delay was unexcused and unreasonable, such a delay would constitute a failure to comply with the policy's notice condition and would excuse Hartford from liability, unless the jury found that National had proven by a fair preponderance of the evidence that Hartford had suffered no material prejudice due to the late notice.[5] This instruction is an accurate statement of the applicable law. *Aetna Casualty & Surety Co.* v. *Murphy*, supra, 206 Conn. 417–18.

When Hartford pleaded late notice as a special defense, an uncommon system of burden allocation was set in motion. Although the general rule is that a defendant who pleads a special defense bears the burden on that issue, we have recognized an exception in

the context of a special defense based on a claim that an insured has failed to comply with the terms of the insurance policy. *Gaudet* v. *Safeco Ins. Co.*, 219 Conn. 391, 402–403 n.11, 593 A.2d 1362 (1991). When an insured brings an action against an insurer for breach of the insurance contract, the insured bears the burden of proving that it complied with the terms of the contract, including the conditions. *Northrop* v. *Allstate Ins. Co.*, 247 Conn. 242, 254, 720 A.2d 879 (1998). Ordinarily, however, unless a defendant insurer affirmatively places such compliance at issue, it is presumed. *Harty* v. *Eagle Indemnity Co.*, 108 Conn. 563, 565, 143 A. 847 (1928) ("it has become the established law of this [s]tate that one instituting an action upon an insurance policy is only obliged to allege in his complaint, in general terms, that the various conditions precedent stated in the policy have been fulfilled; that it is then incumbent upon the defendant, by way of special defense, to set up such failures to comply with such conditions as it proposes to claim; that the burden rests upon the plaintiff to prove compliance with the conditions so put in issue, but that, as to other conditions precedent, compliance is presumed, without offer of proof by the plaintiff"). When a defendant pleads failure to comply with the terms of an insurance policy as a special defense, the usual presumption of compliance is extinguished, and the insured carries the burden of proving compliance with the insurance contract, including the conditions precedent to coverage. In the present case, because Hartford pleaded late notice as a special defense, National, rather than Hartford, bore the burden to show that notice was timely and sufficient, and that Hartford was not materially prejudiced by any unreasonable delay in notice.

In *Aetna Casualty & Surety Co.* v. *Murphy*, supra, 206 Conn. 419, we first set forth the rule that an insured bears the burden to show that the insured's late notice did not prejudice a defendant insurer. Because of the unusual nature of that burden allocation, which places upon an insured the burden of proving a negative, a review of the reasoning underlying the rule is helpful. Prior to our decision in *Murphy*, our precedent already had established that "absent waiver, an unexcused, unreasonable delay in notification constitutes a failure of condition that entirely discharges an insurance carrier from any further liability on its insurance contract." Id., 412. That rule was based on the basic "principle that contracts should be enforced as written, and that contracting parties are bound by the contractual provisions to which they have given their assent." Id. The harshness of that bright line rule had been the subject of the dissent in *Plasticrete Corp.* v. *American Policyholders Ins. Co.*, 184 Conn. 231, 243, 439 A.2d 968 (1981) (*Bogdanski*, *J.*, dissenting) (commenting that "[t]here is no sound reason, in logic or equity, why the insurer should have the benefit of a conclusive presumption").

In *Murphy*, we recognized that rigid application of the general rule discharging an insurer's liability when an insured has failed to comply with the notice provisions of the policy, without any initial inquiry into whether the insurer was prejudiced by the timing of the notice, would likely yield a " 'disproportionate forfeiture.' " *Aetna Casualty & Surety Co.* v. *Murphy*, supra, 206 Conn. 413. Although we noted that most jurisdictions placed the burden upon an *insurer* to show prejudice before being discharged from liability due to an *insured's* late notice, we opted instead to place the burden on the *insured* to show that the *insurer* had not been prejudiced by the timing of the notice. Id., 418–19. In arriving at this rule, we balanced the competing principles of protecting an insured from disproportionate forfeiture and safeguarding an insurer's "legitimate interest in protection from stale claims." Id., 417. In this regard, we noted that "[t]he purpose of a policy provision requiring the insured to give the company prompt notice of an accident or claim is to give the insurer an opportunity to make a timely and adequate investigation of all the circumstances." (Internal quotation marks omitted.) Id. In explaining why the insured should bear the difficult burden of proving lack of prejudice to the insurer, we noted that an insured who bears this burden has not provided timely notice, and, therefore, is "seeking to be excused from the consequences of a contract provision with which he has concededly failed to comply." Id., 419–20. Under the system of burden allocation we adopted in *Murphy*, then, a fact finder must engage in a factual inquiry into whether an insured was prejudiced by any delay in notice; id., 417–18; and the "burden of establishing lack of prejudice must be borne by the insured." Id., 419.

In examining the question of whether the requested charge reasonably was supported by the evidence presented at trial, we are mindful of two principles. First, as we have noted, we examine that evidence in the light most favorable to supporting the proposed charge. Second, we note that this particular requested charge must be understood in light of the unusual circumstance that, although the charge concerned a special defense, with respect to which a defendant would ordinarily bear the burden of proof; *Verspyck* v. *Franco*, 274 Conn. 105, 112, 874 A.2d 249 (2005); with regard to this special defense, it was National, not Hartford, who bore the burden of proof, both to show that notice was timely, and, if National failed to sustain its burden to show timely notice, to show lack of prejudice to Hartford. *Gaudet* v. *Safeco Ins. Co.*, supra, 219 Conn. 402–403 n.11; *Aetna Casualty & Surety Co.* v. *Murphy*, supra, 206 Conn. 419.

Applying this standard, we review the evidence presented at trial to determine whether that evidence reasonably supported the requested charge. We turn first

to the evidence as to the timing of the notice. National presented evidence in support of its contentions that it provided timely notice on January 30, 1995, and, in the alternative, late notice on March 10, 1995. Hartford presented evidence that National did not provide *sufficient* notice until August, 1995. We summarize the evidence in the record as to each of these claimed dates of notice.

First, in support of National's claim that it provided Hartford with timely notice on January 30, 1995, National relies on evidence that Cohen contacted J. M. Layton on that date, and that J. M. Layton was the agent of Hartford. Specifically, both Cohen and Woodward testified that Cohen called J. M. Layton on January 30, 1995, to inform Woodward that National had sustained a theft of equipment and records and damage to its computer system. In support of its claim that J. M. Layton was Hartford's agent, National offered Woodward's testimony about the nature of the business relationship between J. M. Layton and Hartford, and Effley's testimony that J. M. Layton was Hartford's agent.[6]

"The existence of an agency relationship is a question of fact." (Internal quotation marks omitted.) *Wesley* v. *Schaller Subaru, Inc.*, 277 Conn. 526, 543, 893 A.2d 389 (2006). In *Beckenstein* v. *Potter & Carrier, Inc.*, 191 Conn. 120, 133, 464 A.2d 6 (1983), we set forth the elements required to show the existence of an agency relationship: "(1) a manifestation by the principal that the agent will act for him; (2) acceptance by the agent of the undertaking; and (3) an understanding between the parties that the principal will be in control of the undertaking." (Internal quotation marks omitted.) We also emphasized in *Beckenstein* that "[t]he existence of an agency relationship is a question of fact. . . . Some of the factors listed by the Second Restatement of Agency in assessing whether such a relationship exists include: whether the alleged principal has the right to direct and control the work of the agent; whether the agent is engaged in a distinct occupation; whether the principal or the agent supplies the instrumentalities, tools, and the place of work; and the method of paying the agent. See 1 Restatement (Second) Agency, §§ 14, 220 [1958] . . . . In addition, [a]n essential ingredient of agency is that the agent is doing something at the behest and for the benefit of the principal. . . . Finally, the labels used by the parties in referring to their relationship are not determinative; rather, a court must look to the operative terms of their agreement or understanding." (Citations omitted; internal quotation marks omitted.) *Beckenstein* v. *Potter & Carrier, Inc.*, supra, 133–34. Because of the fact-centered nature of the agency inquiry, we cannot make any determination regarding whether J. M. Layton was, or was not, Hartford's agent. See *State* v. *Lawrence*, 282 Conn. 141, 156, 920 A.2d 236 (2007) (appellate tribunal does not assess credibility or find facts; does not retry, but reviews

proceedings of trial court). Therefore, the question of whether National provided timely notice to Hartford on January 30, 1995, was a question of fact for the jury.

Second, in support of its alternate contention that it provided notice to Hartford on March 10, 1995, National points to the evidence presented at trial regarding the facsimile that Woodward sent on that day to Hartford. Specifically, National presented the testimony of Woodward and Kuhn that the facsimile informed Hartford of National's loss and of its intent to file a claim. National particularly relies on the statement in Guthrie's letter, included in the facsimile, stating that "since the time these losses occurred, [National] has been unable to operate and this inability to operate arises out of both the physical loss of several computers as well as the deletion and/or destruction of various computer programs essential to the operation of the business of [National]." See footnote 3 of this opinion.

Third, we review the evidence that would support Hartford's contention that National did not provide notice until August, 1995. Hartford contends that National's showing must be more than a showing that *some* notice was given. Instead, Hartford argues, National must establish when it gave sufficient notice of a business interruption claim. Hartford relies on the language of the policy's notice provision, which requires that the insured "[g]ive [Hartford] prompt notice of the loss or damage. Include a description of the property involved." The policy also requires that the insured must "[a]s soon as possible [give Hartford] a description of how, when and where the loss or damage occurred." Those policy requirements, Hartford argues, require the conclusion that National did not provide sufficient notice until August, 1995. In support of this argument, Hartford points to Kuhn's testimony that the March 10, 1995 facsimile from Woodward did not provide him with enough information to determine whether the policy's business interruption coverage was triggered. The three letters that Kuhn sent to National via Guthrie, on March 13, 1995, June 19, 1995, and July 24, 1995, support Kuhn's assertion at trial that he did not have sufficient information to determine the exact nature of National's claim. All three of the letters requested that National fill out and return the proof of loss form, and the July 24, 1995 letter specifically informed National that Kuhn was unable to proceed with the investigation until National returned the forms.

In addition, Hartford relies on Woodward's testimony that, when he sent the March 10, 1995 facsimile to Hartford, he was unaware that National was making a business interruption claim, and that he had not interpreted Guthrie's letter as asserting a business interruption claim. Hartford cites as support the property loss notice that Woodward sent via facsimile to Hartford on March 10, 1995. That form indicated that National's

claim was for "employee dishonesty" and "vandalism," and also indicated that employees had stolen computer equipment. The form made no mention of a loss based on business interruption. Hartford also relies on Effley's testimony that, when the claim first came to Hartford, those working on the claim did not know the exact nature of the loss. Finally, Hartford points to evidence that National did not submit the proof of loss forms until August, 1995.[7] Kuhn testified that he received proof of loss forms—with regard to the business interruption and extra expense claims—in August, 1995, after he received notice, on August 2, 1995, that Von Brauchitsch would be representing National in his capacity as a public adjuster. Kuhn also testified that, after receiving these proof of loss forms from Von Brauchitsch, he turned National's claim over to Effley, who had more experience handling larger claims.

We next review the evidence presented by National to show that Hartford was not prejudiced by the timing of the notice. Because National contended that if notice was determined to have been given on January 30, 1995, it was timely, National presented no evidence regarding lack of prejudice to Hartford in connection with that date. As to March 10, 1995, National presented the testimony of Effley and Kuhn that Hartford did not send anyone to inspect National's premises until September, 1995, six months after Woodward sent to Hartford the facsimile that included Guthrie's letter.[8] Specifically, in September, 1995, Gregory Ashayeri, an independent computer expert retained by Effley, went to National's premises to investigate the claim. National points to no evidence of lack of prejudice in connection with the August, 1995 notice date, but asserts that the record does not support a finding that notice was given any later than March 10, 1995.

All of this evidence, taken together, establishes that the record reasonably supported the requested charge. The two principal questions remained unresolved, namely, the timing of the notice and any prejudice that the timing of notice may have caused Hartford. Additionally, many underlying questions of fact remained unresolved, such as the questions of agency and what would have been sufficient notice under the policy language. Therefore, these factual questions should have been submitted to the jury for resolution, and not resolved on appeal. See *State* v. *Lawrence*, supra, 282 Conn. 156 (role of appellate tribunal is to review, not retry trial proceedings). The trial court improperly refused to give the requested charge, because it was an accurate statement of the law and was reasonably supported by the evidence.

We turn now to the question of whether the instructional impropriety was harmful, an issue on which Hartford bears the burden to show that the impropriety likely affected the verdict. *Schoonmaker* v. *Lawrence*

*Brunoli, Inc.*, 265 Conn. 210, 243, 828 A.2d 64 (2003). If the trial court had given the requested instruction and the jury had determined that National failed to sustain its burden, Hartford would have been discharged from all liability. *Aetna Casualty & Surety Co.* v. *Murphy*, supra, 206 Conn. 411–12. The question, then, is whether Hartford can show that it was harmed by the trial court's failure to instruct the jury that Hartford was discharged from all liability unless National sustained its burden to show either that it provided timely notice, or, failing that, to show that Hartford was not prejudiced by late notice. In order to answer that question, we must examine the record more closely to determine whether National likely would have met its burden to make one of the two alternate showings. We engage in this inquiry mindful of the fact that the trial court's failure to give the requested instruction prevented the jury from making key factual findings, including: the timing of notice, specifically of the business interruption claim; whether J. M. Layton was Hartford's agent; when Hartford's investigation began; and, ultimately, whether Hartford was prejudiced by the timing of the notice.

We further note that the business income and extra expense coverage of the insurance policy, as set forth in the Special Property Coverage Form, was limited to "loss of [b]usiness [i]ncome that occurs within [twelve] consecutive months after the date of direct physical loss or damage," and, even more significantly, provided that Hartford agreed to "pay for the actual loss of [b]usiness [i]ncome [that National sustains] due to the necessary suspension of [National's] 'operations' during the 'period of restoration.' " The policy defines " '[p]eriod of [r]estoration' " as "the period of time that . . . (a) [b]egins with the date of direct physical loss or damage caused by or resulting from any covered [c]ause of [l]oss at the described premises, and (b) [e]nds on the date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality." The timing of the notice would be relevant to determining whether the period of restoration was affected by any delay in notice. Because National bore the burden to show that Hartford was not prejudiced by any delay in notice, National, in meeting that burden, would have to show that the period of restoration was not affected by any delay in notice in any way that would have prejudiced Hartford. The proof of this was in National's control. In order to assess whether National had met that burden, the jury would have had to make findings as to each delay following the date of damage, beginning with the original date of the damage, sometime on or before January 3, 1995; then to January 30, 1995, when National notified J. M. Layton; then to March 10, 1995, when Guthrie sent the fax to Hartford; and in August of 1995, when Von Brauchitsch informed Kuhn that National intended to assert

claims for coverage under the business interruption and extra expense sections of the policy. For each period of delay, the jury would have had to consider the effect that the late notice had on the period of restoration and determine whether the late notice prejudiced Hartford. National would also have to show that the amount that it was requesting as damages did not include any damages accrued during a period of delay in notice. These are all findings of fact, and should have been made by the jury, but were never made because the trial court did not give the requested instruction.

The court then, in interpreting the policy on the basis of the jury's factual finding, would have had to decide in each instance whether National was entitled to recover under the business income and extra expense coverage portion of the policy. "[C]onstruction of a contract of insurance presents a question of law for the court which this court reviews de novo." (Internal quotation marks omitted.) *Galgano* v. *Metropolitan Property & Casualty Ins. Co.*, 267 Conn. 512, 519, 838 A.2d 993 (2004).

We turn first to the question of whether National sustained its burden to show that it gave timely notice to Hartford. The only notice date that National contends would be deemed timely notice is January 30, 1995.[9] In order to show that it provided Hartford notice on that date, however, National would need to establish that J. M. Layton was Hartford's agent. That inquiry, as we already have noted, is a fact specific question for the jury. National would need to present evidence to show that: (1) Hartford made some manifestation that J. M. Layton would act on its behalf; (2) J. M. Layton accepted the undertaking; and (3) J. M. Layton and Hartford had an understanding that Hartford would control the undertaking. *Beckenstein* v. *Potter & Carrier, Inc.*, supra, 191 Conn. 132–34. National's evidence, which was limited to a few statements by Woodward and Effley to the effect that J. M. Layton was Hartford's "agent," is not sufficient to persuade us that, on the present record, National would have sustained its burden to show that J. M. Layton was Hartford's agent. See id., 133, 137 (labels used by parties in referring to their relationship are not determinative).

As to the question of whether a fact finder likely would have concluded, given the proper instruction, that National met its burden to show lack of prejudice, although we acknowledge that this presents a close question, our answer ultimately is guided by the difficult showing that National would have had to make under *Aetna Casualty & Surety Co.* v. *Murphy*, supra, 206 Conn. 419. Because National offered no evidence to show lack of prejudice to Hartford with respect to the August, 1995 notice date relied on by Hartford, we examine the evidence offered by National to show that Hartford was not prejudiced by notice given on March 10, 1995. That evidence consists of testimony establish-

ing that Ashayeri, the computer consultant retained by Hartford, did not inspect National's premises until September, 1995. National contends that the fact that Hartford did not send anyone to inspect the premises until six months later establishes that Hartford was not prejudiced by notice given on March 10, 1995. We disagree.

National's argument rests on the premise that Hartford waited until September, 1995, to make any efforts to investigate National's claim. The record reveals, however, that although Hartford did not inspect National's premises until September, it made repeated efforts prior to that time to ascertain the nature of National's claim.[10] Three days after receiving the March 10, 1995 facsimile, Kuhn sent National's attorney, Guthrie, a letter requesting that National fill out and return enclosed proof of loss forms. Kuhn stated specifically in the letter that the request was in response to the report that Hartford had received from J. M. Layton on March 10, 1995. As we already have noted in this opinion, Hartford received no response to its request, so Kuhn sent two additional letters to Guthrie, seeking the same information, on June 19, 1995 and July 24, 1995. In the letter of June 19, 1995, Kuhn stated that he had attempted to contact Guthrie by telephone several times and left messages for her. National failed to respond until August, when Von Brauchitsch submitted proofs of loss on behalf of National, including one that constituted the first notice of a claim for business interruption coverage. At that point, Effley took over the investigation of National's claim.[11]

Although the question of whether a jury would have concluded that National met its burden to show either the timeliness of the notice or lack of prejudice to Hartford due to late notice is a close one, we are persuaded—both because of the fact bound nature of the inquiry under *Murphy*, and because of the difficult showing National would have to make to establish lack of prejudice to Hartford—that Hartford has met its burden to show that it was harmed by the failure to give the requested instruction. Specifically, as to the timing of the notice, National would have had to make a much more detailed showing to satisfy its burden to establish that J. M. Layton was Hartford's agent, a showing that would have been essential to a jury finding of a notice date of January 30, 1995. As to the remaining two notice dates, National would have retained the burden to persuade the jury that March 10, rather than August, was the notice date, once again a fact bound inquiry. National's burden to show lack of prejudice would have been difficult to meet, even if one assumed that the jury would have concluded that March 10, 1995, was the notice date. We emphasize that National's entire lack of prejudice argument relies on Hartford's alleged delay in responding to notice. Although Hartford did not inspect National's premises until September, 1995, we cannot say that a jury necessarily would have found

that Hartford conducted no investigation prior to that time. The question of when Hartford's investigation began, and, indeed, what actions of Hartford constituted an investigation of National's claim, are questions of fact. A jury reasonably could have found that Hartford began, at the very least, a preliminary investigation immediately upon receiving notice of the claim, and intensified its investigation in August, 1995, when it received the proof of loss forms that it had been requesting for three months. Viewing the investigation in the broader context, a jury could have determined that the investigation began on March 13, 1995, when Kuhn sent his first inquiry to Guthrie, three days after Woodward sent the facsimile to Hartford on March 10, 1995. It is difficult to see how a delay of three days could demonstrate a lack of prejudice due to the late notice. Accordingly, because National likely would have failed to meet its burden to show either that notice was timely or that Hartford was not prejudiced by the timing of notice, we conclude that Hartford has established that the failure to give the requested instruction was harmful error.

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to reverse the judgment of the trial court and to remand the case to the trial court for a new trial.

In this opinion NORCOTT and ZARELLA, Js., concurred.

[1] We granted Hartford's petition for certification limited to the following question: "Did the Appellate Court properly affirm the trial court's refusal to charge the jury on [Hartford's] late notice of special defense?" *National Publishing Co.* v. *Hartford Fire Ins. Co.*, 278 Conn. 903, 896 A.2d 105 (2006). Because the certified question contains a typographical error, we rephrase it, and consider whether the Appellate Court properly affirmed the trial court's refusal to charge the jury on Hartford's special defense of late notice.

[2] National claims that the record is not adequately preserved. This claim is without merit. It is well established that a party may preserve for appeal a claim that an instruction was defective either by: (1) submitting a written request to charge the covering matter; or (2) taking an exception to the charge as given. *Lin* v. *National Railroad Passenger Corp.*, 277 Conn. 1, 13, 889 A.2d 798 (2006); see also Practice Book § 16-20. Hartford properly objected to the jury charge and specifically asked the trial court to instruct the jury on late notice. The claim was preserved for appeal.

[3] Guthrie sent Woodward a letter that stated in relevant part: "Please be advised that this office has been retained to represent the interest of [National] with respect to losses it sustained as a result of theft, sabotage and other damage caused by former employees of [National] in late December of 1994. I understand that you have already spoken with . . . Paul Cohen president of [National] regarding these losses. As you are aware, *since the time these losses occurred*, [*National*] *has been unable to operate* and this inability to operate arises out of both the physical loss of several computers as well as the deletion and/or destruction of various computer programs essential to the operation of the business of [National]. Therefore, under the above-referenced policy [National] is herein making a claim against various portions of the coverage afforded with respect to these losses. Please forward the appropriate claim forms to my office for completion by [National]. . . ." (Emphasis added.)

[4] The award reflected a remittitur in the amount of $238,533.79 upon the court's finding that the jury's award was excessive.

[5] The specific language of Hartford's requested instruction is as follows: "Hartford has asserted that coverage is forfeited because of the Duties in the Event of Loss or Damage provision in the policy. The policy provides in relevant part:

"3. Duties in The Event Of Loss Or Damages

"You must see that the following are done in the event of loss of or damage to [c]overed property.

"b. Give us prompt notice of the loss or damage. Include a description of the property involved.

"c. As soon as possible give us [a] description of how, when and where the loss or damage occurred.

"e. At our request, give us complete inventories of the damaged and undamaged property. Include quantities, costs, values and amount of loss claims.

"f. Permit us to inspect the property and records proving the loss or damage.

"h. Send us a signed, sworn statement of loss containing the information we request to investigate the claim. You must do this within [sixty] days after our request. We will supply you with the necessary forms.

"i. Cooperate with us in the investigation or settlement of the claim.

"j. Resume part or all of your operations as quickly as possible.

"Under Connecticut law, an unexcused, unreasonable delay in notification constitutes a failure to comply with the policy's notice condition which entirely discharges an insurance company from any further liability on its insurance contract, unless, however, the insured proves by a fair preponderance of the evidence that the insurance company suffered no material prejudice from the late notice.

"The term as soon as practicable, used in [National's] policy, requires that notice be given within a reasonable time, under the circumstances. Neither negligence nor any mistakes on the part of the insured, if not caused by any act of the insurer, will excuse noncompliance with this contractual requirement.

"The insured bears the burden of establishing compliance with notice provisions in an insurance policy, and proving the reasonableness of any time period elapsing between the trigger event and the giving of notice.

"If you determine that late notice was provided by [National] to . . . Hartford, then you must find that [National] breached the notice condition of [its] policy, and further, you must find that there is no coverage, unless you conclude that [National] has proven that there was no material prejudice to . . . Hartford as a result of the late notice. However, the burden of establishing lack of prejudice must be borne by the insured, who, in this case, is [National].

"*Aetna Casualty & Surety Co.* v. *Murphy*, [supra, 206 Conn. 417–18]; *United Technologies Corp.* v. *American Home Assurance Co.*, 989 F. [Sup.] 128, 137–140 ([D. Conn.] 1997); [3 G. Couch, Insurance (3d Ed. 1999) § 190:11 pp. 190-25 through 190-26]; *McMahon* v. *New London County Mutual Ins. Co.*, [Superior Court, judicial district of New Haven, Docket No. CV-98-0408032 (August 23, 1999)] citing to, *Aetna Casualty & Surety Co.* v. *Murphy*, [supra, 418–20]." (Internal quotation marks omitted.)

[6] Effley's prior deposition testimony was admitted into evidence at trial under the prior testimony exception because Effley had died prior to trial.

The Appellate Court concluded that J. M. Layton was Hartford's agent on the ground that Hartford, through Effley, made an uncontested judicial admission as to the agency relationship between J. M. Layton and Hartford. In evaluating the evidence, the Appellate Court stated: "Effley, an adjuster with Hartford for twenty-eight years, testified that he exclusively handled large property losses for Hartford and that National's claim was given to him in August, 1995, by his supervisor, Gaspar Kuhn. He further testified that J. M. Layton was Hartford's agent and that Kuhn had received the first report of National's loss from this agent. . . .

"Reviewing the record, we can find no evidence that contradicts this testimony and conclude that Effley's statement was an uncontested admission that J. M. Layton was its agent. Although Hartford argues that J. M. Layton was not its agent, the only evidence offered at trial supports a contrary conclusion. Accordingly, we find no merit in Hartford's argument . . . ." *National Publishing Co.* v. *Hartford Fire Ins. Co.*, supra, 94 Conn. App. 274–75. National, in its brief, and at oral argument, argues that the Appellate Court properly concluded that J. M. Layton was Hartford's agent.

The question of whether Effley had the authority to bind Hartford to such an admission turns on principles of agency law. "Corporations generally have the power to appoint agents with full authority to do acts or enter into contracts within the powers of the corporation. . . .

"The appointment of an agent for a corporate principal, as for an individual principal, need not be in writing, and may be presumed or inferred from

circumstances. Accordingly, a written authority, vote, or resolution of the corporation need not be shown to establish an agency from a corporation or to extend the scope of an agency in a known and recognized agent to do certain acts on behalf of the corporation; a corporate agent may, as a general rule, be appointed by parol." 18B Am. Jur. 2d 222, Corporations § 1183 (2004). As we discuss in this opinion, the determination of an agency relationship is a question of fact, which we cannot, as an appellate tribunal, appropriately resolve. *First National Bank of Litchfield* v. *Miller*, 285 Conn. 294, 302, 939 A.2d 572 (2008).

[7] National asserts that, in claiming that it did not receive adequate notice until it received the proofs of loss in August, 1995, Hartford conflates notice of loss with both proof of loss and notice of claim for specific coverage. National argues that the language of the contract indicates that National was not obligated to make such a specific showing to satisfy the prompt notice requirement. National asserts that the contract required " 'prompt notice of the loss or damage,' including 'a description of the property involved,' " and under the applicable law, this initial duty to give notice of the loss is satisfied so long as National made a good faith effort to provide Hartford with the facts available to National at the time of notice. National further asserts that once it provided notice of loss, it was Hartford's responsibility, not National's, to determine what coverage applied under the terms of the policy, and to provide National with the appropriate proof of loss forms for business interruption coverage—something Hartford never did.

Hartford responds that, until August, 1995, National did not provide sufficient information to allow Hartford to determine that National was asserting a claim for business interruption coverage. Hartford additionally points to the fact that Woodward, the only other professional involved in processing National's claim, also testified that, based on the information sent by facsimile to Hartford on March 10, 1995, Woodward did not interpret those materials to assert a claim for business interruption coverage.

[8] National also relies on Kuhn's testimony at trial that Hartford suffered no prejudice due to the timing of notice. Our examination of the trial transcript, however, reveals that Kuhn's testimony was much more limited in scope than National suggests, and more open to interpretation. The following colloquy occurred:

"Q. The question was even though you had sent a fidelity bond form under the employee dishonesty section to . . . Guthrie on behalf of National . . . you didn't receive that back from her, correct?

"A. That's correct.

"Q. But you did receive it from . . . Von Brauchitsch?

"A. Yes, sir.

"Q. As part of the package that was sent to you in regards to the overall proofs of loss in August of 1995, correct?

"A. Yes, sir.

"Q. Does your file reflect anywhere that . . . Hartford was prejudiced in any way by the fidelity bond form not being sent back to you until August of 1995?

"A. I would have no basis to say what is prejudiced. I never had enough information to base an opinion.

"Q. Okay. So the answer is no, there is nothing in the file that reflects that your company was prejudiced in any way by the bond form not being sent back until August of 1995, correct?

"A. That's correct, sir."

This conclusory statement equally could be interpreted to mean that Kuhn had no opinion as to whether Hartford was prejudiced, or that his records did not show evidence of prejudice, as to one specific factor only—the receipt of the fidelity bond form in August of 1995. Under either interpretation, and assuming that the jury would have found Kuhn's opinion on the issue probative, at best the testimony would suffice to show that Hartford's records failed to establish that Hartford had been prejudiced, which, if Hartford bore the burden to prove that it had been prejudiced, would be relevant. The testimony does little, however, to satisfy National's burden to show lack of prejudice.

[9] Because National does not contend that notice given on March 10, 1995, or August, 1995, would be timely, and, therefore, makes no attempt to show that it sustained any burden to show the timeliness of those notice dates, it is unnecessary for us to consider whether National presented sufficient evidence to show that either of these dates would constitute timely notice to Hartford.

[10] National argues that the jury's answers to interrogatories preclude a

finding that Hartford was prejudiced by the timing of notice. We note first that National misstates the burden, which it bears, to show lack of prejudice to Hartford. Second, the interrogatories did not ask the jury to consider the issue of the timing of notice, or any prejudice to Hartford from late notice.

Specifically, in response to interrogatories, the jury found that National had proved, by a preponderance of the evidence, that its claims qualified for insurance proceeds under the sections providing coverage for business loss, extra expense and employee dishonesty. The jury further found that Hartford had not sustained its burden on its special defense alleging that National had violated the conditions of the insurance policy by intentionally concealing or misrepresenting material facts regarding the claim. The jury also found that National had proved that it complied with the conditions of the insurance policy requiring cooperation in the investigation, provision of statements of loss containing requested information, and provision of inventories of damaged property and amount of loss claim.

These interrogatories make clear that the jury did not resolve: (1) whether National provided Hartford with timely notice—including the actual timing of the notice; (2) the type of notice required under the terms of the policy; (3) whether the notice provided was sufficient; (4) whether the delay in notification was reasonable; and (5) whether Hartford suffered any prejudice as a result of late notice.

[11] It is unclear from the record precisely when in August Effley began working on National's claim, or the extent of the work that he performed on the claim during that month.