

This is an unofficial transcript derived from video/audio recordings

Supreme Court of Texas.  
National Plan Administrators, Inc. and CRS Marketing Agency, Inc.,  
Petitioners,  
v.  
National Health Insurance Company, Respondent.  
No. 05-0006.

February 16, 2006.

Appearances:  
Douglas W. Alexander, Alexander Dubose Jones & Townsend LLP,  
Austin, Texas, for petitioner.  
William L. Kirkman, Bourland & Kirkman, Austin, Texas, for  
respondent.

Before:

Chief Justice Wallace B. Jefferson; Don R. Willett, Harriet  
O'Neill, Dale Wainwright, Paul W. Green, Phil Johnson, Nathan L. Hecht,  
Scott A. Brister, and David M. Medina, Justices.

#### CONTENTS

ORAL ARGUMENT OF DOUGLAS W. ALEXANDER ON BEHALF OF THE PETITIONER  
ORAL ARGUMENT OF WILLIAM L. KIRKMAN ON BEHALF OF THE RESPONDENT  
REBUTTAL ARGUMENT OF DOUGLAS W. ALEXANDER ON BEHALF OF PETITIONER

JUSTICE: Going to hear argument in 05-0006 National Plan  
Administrators, Inc. and CRS Marketing Agency versus National Health  
Insurance Company.

ORAL ARGUMENT OF DOUGLAS W. ALEXANDER ON BEHALF OF THE PETITIONER

COURT ATTENDANT: May it please the Court. Douglas Alexander will  
present for the petitioner and reserve five minutes for rebuttal.

MR. ALEXANDER: May it please the Court. This Court should reverse  
and rendered judgment that NHIC take nothing for a single press hold  
briefing. Under a correct application of the restatement, NPA oath no  
fiduciary duty to NHIC that precluded NPA from offering the school  
district's could served a choice of carriers when NHIC announced its  
decision to exit cancer and dread disease while on business. NPA oath  
NHIC no such duty because the parties agreement interpreted in light of  
the circumstances under which it was made may expressly clear that  
unlike the typical relationship between agent and principal, NPA was  
not obligated to exclusively serve the interest of NHIC. The legal  
argument is relatively straight forward and I have prepared to report a  
handout that I'd like to turn to you now specifically, tab 1. Number  
tab 1 start with restatement second of agency section 376, this core

has never expressly considered this, this section but it is our contention that it should be expressly adopted by this Court. The restatement tells us that we should look at two things in a case like this. One, we look at the agreement of the parties. Two, we look at the circumstances under which that agreement was made and with the permission of the Court, I'd like to first look at the circumstances because they ultimately inform the agreement. If you go down to D, down to the very bod, this is an important circumstance that must be considered here. The typical agency relationship is exemplify by this Court's decision in Johnson versus Werinfrenchet. That's the case between associate point work for a law firm. Let's take the example of a, of a law student fresh out of law school whose work for full bright and paper butts intencenell instead all fruitocize to go to work for Vencinel case. Once they do so they put aside whatever loyalties and religions that they had the full bright of paper butts and concentrate on their religions as defense now. Our situations are other way different. The circumstances here was when this agreement was entered into, NPA had a pre-existing settle relationships with 160 school districts with thousands of employees and you could see this sub-section D, this is the example of the AISD agreement that those relationships on those relationships, NPA have already pledge to serve the best interest of those employees. It was not going to do anything that would compromise those interest. And this is the point that ...

JUSTICE: That's not, that's not an agreement. Is it that, that, that part.

MR. ALEXANDER: That, that part-- those part of the agreement that-- I'm sorry-- that what part of the agreement that NPA had with the Oston independent school history.

JUSTICE: I mean the party agreement, that you seem to focus on states that NPA will provide services to third parties.

MR. ALEXANDER: Okay, I'm sorry, I was-- promissory only to D. Yes, all right. Right?

JUSTICE: But the fact that you'd-- it seems to me that since NPA is providing administrative services. It might not occur to you that they were actually fund of taking business for a while, that they, that they might provide administrative services to a lots of the people and continue providing those on the best way to their schools to clients but they weren't going to road business to, to someone else.

MR. ALEXANDER: Well, I think that the important thing if you don't mind, this is a good point. On the one there, there's two sets-- there's, there's actually three sets of a particular issue that would part lack NPA's interest. Sub, sub party initials in the pre-existing interest of the school district's subpart C shows the interest that NPA has that is due to the relationship that NPA has with the school districts. It has a nice business opportunity which is also to provide third party administrator services for insurance carriers that reselling their policy to the school districts. And so it says in C at the very outset on negotiations, we are not going to-- we want to be in charge of our own fate in distant. We are not going to do anything that's can compromise our business interest. We are not going to do anything just to compromise well the interest of our school district and. And so you can have the situation back to your question. There, there are many number of situations in which a carrier in this choose of NHIC might have another carrier substituted on, I give you example. Let say that, that NHIC or carrier acts who's these do that. Carrier acts has an A plus rate would goes into as business relationship with NPA but due to circumstances you drops to demands, okay that's bad for

the employees but it's also bad for NPA because now that payroll slot is a target for other insurance carriers coming and say, "We are better carrier we're not low rated", and so NPA in that situation to say " I'm get you out and I'm getting somebody else in ". Another example, let say that NPA has a contract with carrier acts and carrier acts has low pay, that is to say that NPA is properly administrate business just in claim to we know that but the insurance carrier-- for some reason-- is, is slow pay in getting pay their clients. In that's situation, that's the add for the carriers and it's the add for NPA required because what's going to happen is, is that other carrier is going to coming in because the school districts are just run off and the next circumstance NPA says, "I Would I want to have a latitude gets of, then out to somebody else in".

JUSTICE: So I was trying to think whether would be like this situation. A lawyer has an accountant.

MR. ALEXANDER: An account?

JUSTICE #1: An accountant -

MR. ALEXANDER: Okay.

JUSTICE: - And the accountant decides that it's also representing with the lawyer's clients, he's going to full of, full of clients and he decides that the lawyer is not doing this a good job for that client. As another one of his lawyer clients -

MR. ALEXANDER: Right.

JUSTICE: - and so I says to his clients, you know, unless your client but it really would be better if you here pick this lawyer. It seem like it wouldn't really expect you the client to be rolling your business if he would, if you would, if you were to another lawyer.

MR. ALEXANDER: Except that, that, that that they might. I mean and that's why you have to consider all the circumstances, in other words, if the accountant has a relationship-- of fiduciary relationship with the client and, and, and, and in that relationship says, "Well, let's work with, let's work with-- you know-- lawyer X but then lawyer X isn't doing the job." What should he attempt do in that situation.

JUSTICE: Of course, of-- and both the lawyers are implied to take.

MR. ALEXANDER: Right. And, and so I mean, there are competing interest and this is one of the reasons that you know fiduciary duty is so tricky and why it is that you have to look at all the circumstances. But, but it can't be in the situation where the accountant goes, "Okay I know that lawyer X over here is really doing a bad job for, for the client but I'll just sit back, keep that quiet. I won't say anything to the client. Ultimately, of course, in that situation is the client that makes the choice and that's what we have here. We, we have a situation and I think it's important to understand that, is when we talk about rolling business it's not as if NPA was in the position to come in and say, "You now get part of it." They had two hurdles that they had to clear, they had independent agents but they had to persuade that this was a better group for the client and ultimately school districts 'cause each of these school districts is in the situation in which there looking out for the interest of their employees and, and they're surveying the landscape and they can ultimate decision as to whether to make a switch. In our case what happen was in this "rolling" as they call it. Not everybody made a switch because they had a choice. Some of them said, " Well, work a district with NHIC ", but, but ultimately and I think that that is the key. If wasn't in the situation, an NPA may extremely clear from the very outset of negotiations. They were not obligated to just sit up and say, "Okay, so and so you can or NHIC." You can come along at some point and say,

"Well, I'm just going to sell out to people has rated carriers." And if you don't like that, you're going to loose all the administrations to your businesse's interest or prejudice and you're going to stick all these thousands of employees with the Bkk rate in chart. NPA looks at that situation 'cause I don't think so; who will going to give him the choice. And the choice is we got an A plus rated carrier who give them the same coverage with the same benefits for the same prize they use at. Most decided to make the moves. Some did't, but there is no way that they're liable for breach of fiduciary duty as a result of doing that and that is the key. If you look at the two brief side by side what they want to do effectively here is to have a common law step in, and create the agreement that they did not negotiate, they would like to ask that be captivated. They want the NPA to be in the position but captivation and they say that the common law allows that to happen. Well, it doesn't allow that to happen because restatement suddenly 376 tons you look at the parties agreement. In this case, the parties agreement was not to go with the exclusive relation all out to captivate the relationship but rather to go to a none exclusive one. And under that none exclusive one, NPA had absolutely a lot to do, a lot to do what a fifth year on page two with a clear threat not only to its own business interest but also to the interest of the thousands of employees that it was pledged to serve and that is why we can't look the breach of fiduciary duty that is have.

JUSTICE: Do you have this relationship by virtue of the agreement with the NHIC right?

MR. ALEXANDER: Two unlimited extent.

JUSTICE: Okay, so and that imply solve fiduciary relationship?

MR. ALEXANDER: Yes.

JUSTICE: What would those be?

MR. ALEXANDER: Okay, I give you an example. One of the things that we were obligated to the NPA was obligated to do was to collect, collect moneys from the insured and pass them on to the Insurance Company briefs. That had everything to do with fiduciary duty all over it. If we had taken out money and invested it, let say not giving it to the Insurance Company, that would have constituted not only a breach of contract if would have constituted a breach of the fiduciary duty make this liable not only for actual damage but also for port damages. So our point is this, I think that we don't want to stand up here and say that there was a typical principle agent relationship at all strictly told, "Everybody in this room is in some sort of transible agent relationship." I, I may devote a principle in an agent with respect to my partner when he jumps, all the men of this Court are agents of the State of Texas but our duties are informed by other circumstances. In our case, we have laws related to lawyers. In your case, you have, you have norms related to the justices to call on and so it's not just enough to go aha there's a principle agency relationship therefore, there is only convincing judiciary duty so we don't look in anything else. That is why the restatement says the states and then say, "You have to look at the parties agreement and lay that the circumstances under which was it made."

JUSTICE: Did NPA manage funds in a just a-- that's the way the Court of Appeals rank that.

MR. ALEXANDER: Well, manage that, yes, from the standpoint of we collected premiums, and then pass them on to the query, so to the extent they were managing funds.

JUSTICE: Yes, did the NPA have confidential information or trade secrets?

MR. ALEXANDER: They had, they, they have important, I mean, they have records. But they-- but these are records that they fully off and one of the things if you look at the agreement, they, they-- in the typical principle agent relationship ...

JUSTICE: Can I see this straight forward question did NPA have countered the information or trade secrets of NHIC?

MR. ALEXANDER: Yes.

JUSTICE: Those two factors tend to suggest heightened responsibilities, don't they?--

MR. ALEXANDER: Yes.

JUSTICE: - I mean that's not the totality of the circumstances.

MR. ALEXANDER: No.

JUSTICE: Don't they at least raise some issue?

MR. ALEXANDER: They do and they, and they do to this extent and let me, and this let me get back to the limited scope of it. We had with respect to those about the money first and trade secret settle. It's a-- it's an interesting point. With respect to the money, we had a fiduciary duty. We had to fully account for that money and if there's any breach, that was both a breach of contract and a breach of fiduciary duty. When I'm-- The reason I was hedging on trade secrets, I stranded [inaudible] which are really trade secrets. I would say-- an I've call this-- I the 7F'confidential information". You have policies about people who have cancer, and that's confidential. You're not suppose to get that to third parties and in fact, in this case it's a very interesting point and you'll see it when you review the record. There was that one point where NPA slip up on that. There were certain policies that had confidential information that were mistakenly provided to Hartford, okay? And you will see the point of the juries answers is, is that, that we have breach this confidentiality provision. Are we in a breach trade secrets but there was no damages. Everybody agreed that, okay, this is a slip up, it should not happen but thank God nobody was harmed as a result. So back to that, that's something that shouldn't have happen. Fortunate, there was no damages associated with it but again it, it meant that we had certain duties that were limited, do not mismanage the money, do not provide confidential information to other people but that did not traces plurry canambra which is what the Court of Appeals did in saying, "You therefore, have of duties that extends to everything the world particularly when we you have an agreements that makes clear that, that is not the case.

JUSTICE: Any further questions. Thank you counsel. The Court is ready to hear argument from the respondent.

ORAL ARGUMENT OF WILLIAM L. KIRKMAN ON BEHALF OF THE RESPONDENT

COURT ATTENDANT: May it please the Court. Mr. William Kirkman who'll arguing the file.

MR. KIRKMAN: May it please the Court. The answer to your question justices, yes, it was a confidential information. Yes, they had an extensive trade secret information. The fact of the matter is that NPA was an essential extension of NHIC and step into NHIC's shoes by virtue of the special unique relationship.

JUSTICE: This confidential information, it wasn't just a confidential, confidential medical information that patients was it the

type of Trade Secret Information or confidential information that it is misprotects worth to competitive to manage, that's the time I'm asking about.

MR. KIRKMAN: In certain instances it was, and I don't want did that happened policy coordinates which is critical to NHIC but they had premium information that they had every conceivable piece of information about that book was placed in the hands of NPA. Let's understand what this fiduciary duty issue really is in this case. Let's understand factually, what happened here because like in any other lawsuit, any other case before this, this case involved a set of facts that you have to apply the lawsuit that NPA was described as a third party as mentioned it. What did it give, is it took every conceivable piece of information about Cancer Book of Business that National Health Insurance Company undergo, if then in, in the public settlement shot that coverage for public employees to payroll deduction. Now, by virtue on this unique relationship, justices, NPA have every conceivable piece of information that NHIC, the carrier had. The only function that National Health had in this instance was warrant, received premiums, decide well in the pay claims. Every other to function associated with the Insurance relationship rested with the NPA in this unique relationship. Now, let's understand what the factual with all due respect to this granted saying, "What he sub- stated to you was not the facts in the case and was not what this jury determined because here is what this record is replete with." After the relationship between NPA and NHIC developed, the business went forward. NPA client decently without telling any jealousy, without any indication met secretly with Hartford in an attempt to roll that business.

JUSTICE: Some, some indication that happens all the time?

MR. KIRKMAN: It doesn't.

JUSTICE: If [inaudible] is really known in the-- in this case.

MR. KIRKMAN: It really doesn't. Well, it happens it by request or proposals. In a normal cases NPA or the third party administrate goes to the Houston school district and says, "I have these companies, I have this range, I have these policies what would you like to do?". That denying the key. There were plain dissents specific negotiation between Parker and NPA with they said, "What we're going to do is we're going to cherry pick this business, we're going to take only those that are cloned actively at work, meaning those who are not sick."

JUSTICE: Would it, would it made a difference if NPA had told the NHIC, "You know, no, thank you we're just-- we're conceive it to find another carrier."

MR. KIRKMAN: Well, it-- not in this instance because the facts of the case where that at the point in time that this happen Judge, NHIC had another carrier ready to take over this business and the unfortunate thing for NPA was it wasn't going to get to administer and make significant administrative list and commissions of that book. So what NPA did to further its all mess in violation of its duties-- of its fiduciary duties-- as the agent. They'd said, "I'm going to go, got another data for Hartford, I'm going to keep this business, I'm going to make money but I'm going to miss with NHIC, I'm going to leave them with 500 sick people and take the rest to those 5500 to 6500 and put on the parker." Can you imagine what he deal was, was Parker? They had forfeit of the underlying, they didn't have in sick people, they cheery pick the business and all if they extends to NHIC. That's what the jury found when they found they breach that fiduciary duty. Now legally, the question is: in these circumstances, does the fiduciary duty exists base on the fact that they were third party administrator puts each a

very unique agent under the insurance code and base on new grading, and base on all of the circumstances that existed, did it fiduciary duty exist between the NPA and NHIC. Am I suggesting you that the Court of appeals analysis of this is exactly glad on the point. They went to the insurance code, they went to the provisions within the insurance code after the third party administrator pointed out that this was a very unique relationship. This is not the principle on agent, this is not the agent that goes into the field to sell a normal policy this is a significant unique relationship with the agent get all the information, they get all the plain information, they get the policy over the information, they get everything available to them to provoke that loyalty and take it somewhere else and what they did is just that NPA did just.

JUSTICE: Would it have been okay if NPA had gone to Hartford with the whole book of business.

MR. KIRKMAN: In certain circumstances that exists I say no but un- - but fortunately Judge, that was not the case.

JUSTICE: I understand that but I'm trying to understand we'd got some of the pickup briefs that seem to indicate that an administrator like this has some duty in the district for which he administers as well, and therefore this harmed in a situation about to the cheery picking to get bond that A plus credit company that will cover everyone. I mean we did into sense from the record that I did this all the time and I have some duty to the school districts to make sure that these policies are placed with the big company.

MR. KIRKMAN: I don't doubt that but, but the truth that I was just, that was not the facts in, if you had a fact situation with my client NHIC was headed down to two's.

JUSTICE: I was saying what -

MR. KIRKMAN: That -

JUSTICE: - What I'm trying to get out here is, is the, is the, the issue or the turn over of what are you trying to get out here the bad acting in fact that they market it at all or the way they market it?

MR. KIRKMAN: - the way they market it, the manner and means by which they breach that fiduciary duty that would be it up to those. ...

JUSTICE: So there would be in a breach if they had gone to Hartford before the policies?

MR. KIRKMAN: Well, it depends on these particular facts. There were some facts that led NHIC that try to federal rule let say, "Well, we want this because we want to make a commission that might led to a breach of fiduciary duty." I mean it depends on what the exact facts on Judge and that, that the evidence in this case there was no harm or adverse to that to vacation to the school district. This was a dread hearing that's the NPA through it and at the trial to try that it, it excuse their performance. The jury rejected that, now in the proper case if that existed Judge there wouldn't be a breach of fiduciary duty.

JUSTICE: Okay. So let me ask to this the course of the one we're say it they breach their fiduciary duty that's where-- we're trying to decide if there a fiduciary review -

MR. KIRKMAN: Correct.

JUSTICE: - It rises out of relationship on the contractual relationship general.

MR. KIRKMAN: Well, in this case that rises out of the insurance code the circumstances that existed between the parties and the contract.

JUSTICE: Okay. And how did they breach their fiduciary duty? What

did they do and what did-- the jury found that there was no conspiracy in part, which is I recall. And we found that there was some trade secrets but-- that they breach, that they key to breach for misuse trade secrets but there was no damage from that. So what is it, what is it that I did by going to Hartford, that rate where did the duty come from that was entitled trade secrets was? What was that they did that was improper given the jury findings as we have here.

MR. KIRKMAN: Well, the way they breach the their fiduciary duty was they took all the information financial and otherwise ... ..

JUSTICE: Okay, now those trade secrets. Should that, was that trade secret may issue about was? ...

MR. KIRKMAN: Some, some of it was ... ..

JUSTICE: Okay, some of a while, while he's taken the information breach that was, is a ready contract that is-- they have the records and contracts is or joint writ -

MR. KIRKMAN: Well, -

JUSTICE: - and the jury found trade secret breach no, no damages from that so I'm struggling with the jury.

MR. KIRKMAN: - Well, one of the things that jury found this breach of contract but no damages. The thing that they found was they breach their fiduciary duty by going behind NHIC fact when they did have the authority and cut this field and put all the sick people in NHIC and keep it with well people with the Hartford at NHIC's expense. They-- the jury found that, that action breach their fiduciary duty, that fiduciary duty to the unfairly with their principle, this was their principle. This was an agent principle relationship that have been duty not in the serve of purport opportunity like they did to be loyal, not to throw them and cast them away like they did because that's what happened. We did not have the situation where was in a best interest of the school district to move this business. This was done for one reason and that was better than his of the NPA. That is what the evidence was, that's what the jury found.

JUSTICE: And that's okay, as long as this going to pick expense of NHIC issue. That's what I'm telling you. It's okay if everyone is doing this as long as want to continue to administer to client. I get on the briefing everybody is after doing that, the problem is I did not expense of their transfer

MR. KIRKMAN: Well, I take issue the fact that everybody is after doing that in the way it was done but it is not appropriate to do that at the expense of your principle with when you have that relationship that duty and loyalty and that is exactly what happened here. Now, there is another issue that is before the Court with regards the Single Business Enterprise. I didn't want to address that. As I understand the law as it exists in this Court in the adverse case, the Court respectfully declined to address whether the Single Business Enterprise was a liable theory in this case of giving from one corporation to another and stops it doing in several liability. Now, as I understand the briefing that is been provided by CRS in this matter, they take the position that 2.21 of the Texas Business Corporation Act is the only matter that means by which you can establish liability from one affiliate corporation to another. We respectfully suggest that is not the law, we respectfully suggest that article 2.21 of the Business Corporation Act is limited to written of the patients and does not involved joint in several liability under Single Business Enterprise 34 B tort as was found in this case now. ...

JUSTICE: How is, how is it differ from all to legal questions?

MR. KIRKMAN: In theory it is really not because the Single



Business Enterprise something says, "If two affiliates had a common single purpose and that it is unfair in dealing with somebody to have one liable and not the another and then they given number of factors then if the jury find those factors that issue the ability to transfer liability of duty in the counsel." So theory is really not but I suggest to this Court that when one reads the factor associated to this, to this body of law. I am absolutely convince that, that is nefarious application of the way in affiliate corporation ought to be liable for another. When you read those factors they all talk about from purpose, from directors, from offices, from employee, from salaries, from the book keeping all that in my judgment if a jury finds that was the case opt to be able to get through this, this dealing of one affiliate from another and if evidence is foot forward like was in this case if the jury is instructed like that the judge instructed the jury and a finding opt to establish Single Business opt, opt to establish on the Single Business Enterprise theory liability for that other affiliate corporation. I think that is an appropriate body of law that the Court of appeals in this case have held that legal law, read of another states their act that is withheld that is a viable workable theory of establishing liability against another affiliate corporation and I suggest to this Court that base on these findings that on an act. ...

JUSTICE: What if, what if be back if any would that have on corporations-- we're that, we are saying-- only of those areas other parts of the country?

MR. KIRKMAN: Absolutely none, as long as those corporations separately conduct their business like they should they where be absolutely no adverse effect. And again justice, when one reach the fact there's their associated in Single Business Enterprise I'm convinced your conclude. If the jury finds those facts existed between two of the legal corporations, they all will be a single business enterprise because in fact they are not operating separately. There shouldn't be a liability in one corporation to shift its money over another corporation if they operate separately. That all be in the law. I don't think it will have any in fact, whatsoever any provision worldwide or otherwise that will prolong. I did want to bring form of Single Business Enterprise that is critical to this place. The only objection the CRS made the discharge when that submitted on this issue was that the Single Business Enterprise was not a viable deed of theory in Texas. If they believed that 2.21 was the matter and means by which all the legal settlements established they were obligated under the law of the state to make that specific objection and tender that limiting instruction to the Court in connection with making that instruction to the jury. So I suggest that they have weighed any right to present that argument to you today. Thank you very much.

JUSTICE: Well, let's go back to the first issue with just a minute. Why did the jury find breach of contract from this progression trade secrets in a worth \$0 in damages then a worth of three quarters of million dollar per breach of fiduciary duty?

MR. KIRKMAN: My first opinion is because what NPA implied somewhere than it did was not covered by the contract

JUSTICE: But they now breach of that contract.

MR. KIRKMAN: They did, they found the breach but they found that those did not cause in NHIC damages what they felt cause damages was what they did behind their back as taken with district business that was not specifically covered in the contract. I believed that the jury-- through that instruction-- believed that they breach their fiduciary

duties different in what existed in the company.

JUSTICE: The brief on the merit's petition for you-- says referring to this third party administrator function, how it works. Today, apparently no state in the country has chosen to regulate this practice out of the statute or by regulation or we aware of any other Court that is prescribed and practice either to the application of general agency principles because I think the Court of Appeals did hear or otherwise.

JUSTICE: What's your response to that?

MR. KIRKMAN: Well, of course just a sector as specific said of statutes in our code that government third party administrator I mean that couldn't be able to determine from the truth or not and there was specific laws enacted by our legislature to cover the third party administrators and how they recognize what a unique agency and a unique function that they saw. So I, I've completely disagree with that, I also break that filing to fiduciary duties existent with this Court's tort a body of law that a unique special relationship is the tackle relationship that opt to live defining fiduciary.

JUSTICE: Yes, of course before, before the we-- NPA went with your client they were-- there was inquire underwrite or carrier involved. Is that correct?

MR. KIRKMAN: That is correct.

JUSTICE: Now if there's a fiduciary duty between the NPA and the underwriter why would that fiduciary duty only apply if you cherry pick as suppose to with that prior carrier. NPA come into your client and you might, you might in your brief the, the statement that your president or representative said, "We are not going to roll over which is going to make it or if request for proposal and present our apologize." That's our call - ...

MR. KIRKMAN: Yes.

JUSTICE: - but if we have fiduciary duty doesn't NPA still have the duty to that prior carrier not to become involved whatsoever with your client because that would somehow compromise their fiduciary duty to their pre-existing relationship?

MR. KIRKMAN: No, because that first relationship was which covered by a settled agreement. In fact, that ...

JUSTICE: Well, let me ask some questions set it aside. If that in fact where the situation, where the first carrier still going to make request for proposals in things that mention your client and NPA talked about it and it's derived of front deal, they don't give you any information but yet they come and say, "Look we oath role of administrate, we'll take care of it if you want to make a bit on it because other violation on the fiduciary duty to the existing underwriter."

MR. KIRKMAN: It may or may not be but based on the limited fact you've explain I don't think so.

JUSTICE: But there would be fiduciary duty they would bind them to their prior

MR. KIRKMAN: Absolutely Judge, there's no difference between the fiduciary relationship that would be just in a bad instance as existed between NPA and NHIC.

JUSTICE: So if we find the fiduciary duty between the NPA and the underwriter. Do we not effectively restrict NPA from taking any action other than to to try to keep that underwriter in the contracts with the school district whoever their administrator.

MR. KIRKMAN: No, absolutely not. Again, each situation is more about of a fact. What if NHIC went into receiver shift for vacant shift

or begin to fail miserably. There can't be a breach of fiduciary duty with that company to do ...

JUSTICE: But why not because our NPA trying to loose the business or they going to impact the improper use you stay and entrust this to come after if we find that duty that I can't do anything other than look to the best interest at most highest interest of their pre-existing client. We going to violate that anything than trying to keep on the other side?

MR. KIRKMAN: I don't think so because each case is going to be judge daunts facts. I mean ...

JUSTICE: Well, the deep no more work we're talking about the deed not where they validate. But well, if the duty exists now violation is a separated part.

MR. KIRKMAN: Correct, but I believe that fiduciary duty does in fact exist in that situation

JUSTICE: And this exist in NPA's bound that prior underwriter is always at prior to write or rather want to stay in the contract.

MR. KIRKMAN: No, it's only bound not to breach the fiduciary duty by taking access that benefit in itself to the document of-- by, by not being loyal to that public like NPA did NHIC in this case in your limited scenario, I can't conceive those facts would reflect that now. Who knows what facts may developed in that situation? But I do believe that there really exists, the question is, "Do they breach it by the way they act?" And I don't think in your limited statutes here, there's a a not evidence even get to the jury on the question breach judiciaryBD

JUSTICE: On work?

MR. KIRKMAN: Yes.

JUSTICE: The Court of Appeals said that both National health in NPA recognize that NPA would work as independent contract. Do you agree with that?

MR. KIRKMAN: Yes.

JUSTICE: And then continuous under the agreement someone continue to provide services to other parties. So NPA was servicing a number of parties?

MR. KIRKMAN: Absolutely, no question about it?

JUSTICE: And your position is in NPA had the fiduciary duty to each of those. If that circumstances is similar to duty, to what relationship between the National Health and NPA

MR. KIRKMAN: Might be, Judge. I don't know exactly what third party they referring to but their other NHIC carriers then the answer is yes, absolutely. Simply because there's lot of school activity arrangement. It doesn't mean they don't have fiduciary duty as a lawyer I still have to negotiate to the client you're expected the way of specific exclusive relationship. In fact, that it's a non-exclusive agreement. I's absolutely irrelevant to any issue before the Court.

JUSTICE: But say it's not impossible that you're saying NPA infinite contractor to several entities that perhaps that's a non-exclusive arrangement with each entity and the fiduciary duty to its entity but that individual, each individual entities interest above their own and above the interest of everybody else in the world.

MR. KIRKMAN: If those third party relationship Judge was similarly to the one that I had the answers absolutely yes, they were agent. We were principal. They all does the duty of loyalty not as rules and they did that in this case. There's no question that would be understood

JUSTICE: Thank you.

MR. KIRKMAN: Thank you.

REBUTTAL ARGUMENT OF DOUGLAS W. ALEXANDER ON BEHALF OF PETITIONER

MR. ALEXANDER: May it please the Court. Have five minutes in the five point starting with the question justices in real raise. That was the question what if a, what if Hartford had taken everybody? I think it's very important to recognize two points and I will give you two sides in the record. NPA did not hats this idea of which just take some and not others I want to give you this side right here. It's the reporter's record point seven page 25, NPA tried to get Hartford to purchase all of these policies. Number one, purchase on outline. Number two, this on the record going five at pages 100 to 115 lying 7815.

JUSTICE: But then you're arguing-- you're argument have an entry. Point it out.

MR. ALEXANDER: An, I argue in evidence point is response question do you ask and that is the ...

JUSTICE: But I was trying to get on this is the duty. Did I have a duty not to market at all or just not to market them?

MR. ALEXANDER: Okay, then I think that we got it to the duty that it can be the questions now they did not have the duty to precluded I mean the situation with their place. I mean let's take at hypothetical, under their theory if they have announced we're going to sell out to this carrier X who is the worst carrier in the business. Their position is that we have to stand I can find silent and allow that to occur. "Even though that it completely got the interest of the school districts and this is the answer," the Ameter says

JUSTICE: And it's your position that you all those districts of fiduciary duty or not.

MR. ALEXANDER: I wouldn't care to rise necessarily as the fiduciary duty but we did it all from the duty as for our agreement to serve their best interest. So we had a competing interest and in that situation we are privilege to protect those interest as we we're privilege in this case to protect our own business interest in light of the agreement that we had struck which is a non-exclusive relationship which I think it's critical to understand.

JUSTICE: But I see I, It's hard to understand that I answer the questions. But this is, that is non-exclusive as to administration doesn't really speak to the duties in times of marketing.

MR. ALEXANDER: Well, I think it does. In this situation the-- which you have to understand the-- when you look at the agreement here that was struck in the deals that they have with all of their captive agents, they make and their in those agreement are very clear that in marketing their policies, that the marketing policy you can only ...

JUSTICE: What is it a marketing?

MR. ALEXANDER: I'm looking at theirs, at agent risk not have any other contract of point was with any other plans instructs companies or agencies market products were similar. In other words, that's the agreements that they had with other fiery's that they didn't enter it into here.

JUSTICE: But there could not administer those than other companies market. I mean, I-- it's hard for me to say that by agreeing that you're not going to, that you're going to market your administration services to other parties speaks it all to marketing the policies themselves.

MR. ALEXANDER: Well, it does when you says specifically your agreement you are not exclusively servicing their interest now that you have the opportunity to serve the interest of others which in this case can be other carriers and can be the interests of the school districts and other is that we have preserved full out to going in to control our own fate in dusting. They do that very clear did not be one of the compromise situation where they could be effectively completely got our business. You got it? By saying that we going to give it to somebody else it can self-administer you're going to lose that and for they going to prejudice the answers over here of their school districts.

JUSTICE: I think of the structure of a very difficult administrator -

MR. ALEXANDER: This structure-- Yes.

JUSTICE: - administrator in ...

MR. ALEXANDER: Yes, and that's why it's I mean I think that it should be interesting this Court standard in industry that we don't have any case law any statute to prescribe what it for review. The only way you get her list such as Justice Johnson's point when you look at that, I think this is very important. The jury was instructed here what the fiduciary duty. You ask the question why did they find the breach of the fiduciary duty but not breach the contract just a when underwrite. The reason is, is that ...

JUSTICE: Now they come both congesting the word damages

MR. ALEXANDER: Right, and the reason for that is is that if you look at the contract there wasn't any constructive provision that precluded in the visit country the damages all referred as result of the so called "roll". Okay? Okay. There wasn't anything in the contract that precluded that. That explains why the jury did not find any damages for that. The only way that you can get to damages of the title word worded under tab three is by virtue of this canambra of breach of fiduciary duty. If you look under tab two back to just whose Jhonson\$7Ds point. The jury was instructed that the jury-- the, the fiduciary duty exist and then if you look at sub D it says, "NPA have a burden to show it didn't play NHIC before John." Well, clearly it was place in it's interest before its own at a time that they you knew unilaterally, took steps that prejudice not only our interest but the interest of the school districts and we are privilege to do that. We were privilege to do that by virtue of the agreement that we had.

JUSTICE: Are there, are there any further questions? Thank you, Counsel. The case is submitted and I conclude the arguments for this morning and the Marshall will adjourn the Court.

COURT MARSHALL: All rise. Oyez! oyez! oyez! The Honorable Supreme Court of Texas now stand adjourn.

2006 WL 5918093 (Tex.)