No. 122556

In the

Supreme Court of Illinois

AMERICAN MUTUAL INSURANCE COMPANY,

Plaintiff/Counter Defendant,

v.

WALTER KROP, individually and as father and next friend of T.K. a minor; LISA KROP and MARY ANDRELOAS, as next best friend of A.A., a minor,

Defendants/Counter-Plaintiffs.

WALTER KROP, LISA KROP and TOMMY KROP,

Third-Party Plaintiffs-Appellees,

v.

ANDY VARGA,

Third-Party Defendant-Appellant.

On Appeal from the Appellate Court of Illinois, First Judicial District, No. 1-16-1071.
There Heard on Appeal from the Circuit Court of Cook County, Illinois,
County Department, Chancery Division, No. 2014 CH 17305.
The Honorable **Neil Cohen**, Judge Presiding.

AMICUS CURIAE BRIEF OF THE INDEPENDENT INSURANCE AGENTS OF ILLINOIS IN SUPPORT OF THIRD-PARTY DEFENDANT-APPELLANT ANDY VARGA

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POINTS AND AUTHORITIES

II. Passage of the Insurance Placement Liability Act Eliminates Fiduciary Relationship.

IDENTITY AND INTEREST OF AMICUS CURIAE

The Independent Insurance Agents ("IIA") of Illinois is a trade association of independent insurance agents throughout this state. Its membership consists of more than 1,100 insurance agencies, representing roughly 10,000 individuals who are engaged in all facets of obtaining policies of property, casualty, life and health insurance for their customers from a variety of different insurers. The IIA of Illinois also works to improve the legal environment in our state for its members (and their customers) by, among other things, bringing issues of state-wide importance to the attention of the Legislature. These efforts contributed in part to the enactment of the statutes at issue in this case, namely, the Insurance Placement Liability Act, 735 ILCS 5/2201 (West 2016) and the statute of limitations governing professional liability claims against insurance producers, 735 ILCS 5/13-214.4 (West 2016).

The question presented by this case is of great importance to the IIA of Illinois, its members, and their customers who seek to purchase insurance policies in the state of Illinois from a choice of insurers. In particular, these important state-wide considerations have been undermined by the reasoning of the Appellate Court, which misconstrued the Insurance Placement Liability Act by finding the existence of a fiduciary relationship between an insurance producer and its customer—in direct contravention of the plain language of the statute itself. Such expansion of Illinois insurance producers' potential fiduciary liability

risks imposing a duty on insurance producers to procure broader coverage than what the customer has requested or can even afford; otherwise, the insurance producer faces potential liability where an insurer subsequently decides that a claim is not covered by its policy.

STATUTES INVOLVED

Section 5/2-2201(b) of the Code of Civil Procedure, 735 ILCS 5/2-2201(b) (West 2016), provides in pertinent part:

> No cause of action brought by any person or entity against any insurance producer. . . concerning the sale, placement, procurement, renewal, binding, cancellation of, or failure to procure any policy of insurance shall subject the insurance producer. . . to civil liability under standards governing the conduct of a fiduciary or a fiduciary relationship except when the conduct upon which the cause of action is based involves the wrongful retention or misappropriation by the insurance producer. . . of any money that was received as premiums, as a premium deposit, or as payment of a claim…

Section 5/13-214.4 of the Code of Civil Procedure, 735 ILCS 5/13-214.4 (West 2016), provides in pertinent part:

> All causes of action brought by any person or entity under any statute or any legal or equitable theory against an insurance producer, registered firm, or limited insurance representative concerning the sale, placement, procurement, renewal, cancellation of, or failure to procure any policy of insurance shall be brought within 2 years of the date the cause of action accrues.

ARGUMENT

The Appellate Court erred in its decision below where it relied upon its decisions in *Perelman v. Fisher*, 298 Ill.App.3d 1007 (1st Dist, 1998) and *Broadnax v. Morrow*, 326 Ill.App.3d 1074 (4th Dist. 2002), to hold

that, "when an insurance agent owes a fiduciary duty to an insured, a cause of action for breach of that duty accrues at the time of the breach, but the statute of limitations is subject to tolling by application of the discovery rule." The Court's opinion did not note that the fiduciary duties which formed the basis for the holdings in *Perelman* and *Broadnax* no longer exist as they were expressly eliminated by the passage of the Insurance Placement Liability Act, once it became effective on January 1, 1997. 735 ILCS 5/2-2201(b). Because insurance producers no longer owe such fiduciary duties to their insureds under Illinois law, the Appellate Court misapplied *Perelman*, *Broadnax*, the Insurance Placement Liability Act and the statute of limitations against insurance producers in this instance.

In light of the foregoing, and as set forth more fully below, this Court should reverse the Appellate Court's decision in this case and eliminate the confusion the decision created about what Section 2-2201(b) of the Code of Civil Procedure has set forth for more than twenty years. Specifically, this Court should clearly announce that insurance producers do not owe fiduciary duties to customers beyond the specific circumstances the Insurance Placement Liability Act identified.

I. Long-Standing Duty of an Insured to Read and Understand Policy Eroded By Findings of Fiduciary Relationship.

Traditionally under Illinois law, an insured had a duty to read and understand the contents of the insurance policies that he received. *State*

Farm Fire & Casualty Co. v. Mann, 172 Ill. App. 3d 86, 94 (1st Dist. 1988); *Foster v. Crum & Forster Insurance Cos.*, 36 Ill. App. 3d 595, 598 (5th Dist. 1976), citing *Spence v. Washington National Insurance Co.*, 320 Ill. App. 149 (4th Dist. 1943) and *Richer v. Catholic Order of Foresters*, 344 Ill. App. 200 (2nd Dist. 1951); *Connelly v. Riordan*, 246 Ill. App. 3d 898, 901 (1st Dist. 1993).

Accordingly, where a policy had been in effect for multiple years and renewed by the customer several times, the customer was charged with knowledge of its contents and could not subsequently raise a claim against its insurance producer alleging wrongful denial of coverage by the insurer or wrongful procurement of the policy. *Foster*, 36 Ill. App.3d at 598 ("Plaintiffs had ample opportunity over the 2 1/2 years prior to the accident to learn the limits of their coverage and seek to extend it with defendant or some other company if they felt it inadequate. They cannot now be heard to complain"); *Connelly*, 246 Ill.App.3d at 901 (where insurance agent provided plaintiff a copy of the policy, and where plaintiff reviewed the terms of that policy, did not object to the policy, paid the premium, and renewed the policy for several years, a directed verdict was properly entered in favor of agent on negligent procurement claim).

Thereafter, certain court decisions began to deviate from the general rule stated above and held that an insured's failure to read and understand the contents of his insurance policy was not a requirement

in a suit against the insurance broker as a matter of law. *Black v. Illinois Fair Plan Assn*, 87 Ill. App. 3d 1106, 1110 (5th Dist. 1980); *Economy Fire & Casualty Co. v. Bassett*, 170 Ill. App. 3d 765, 772 (5th Dist. 1988). The appellate court in these cases reasoned that, because an insurance broker was acting as an agent of the insured customer as opposed to being an agent of the insurer, a fiduciary relationship existed between the broker and the customer. *Black*, id., citing *Browder v. Hanley Dawson Cadillac Co.*, 62 Ill. App. 3d 623, 630-31 (1st Dist. 1978); *Bassett*, 170 Ill. App. 3d at 772. Accordingly, these decisions found that the customer's failure to read the policy was not contributory negligence as a matter of law, and that the customer could maintain a claim against its broker for negligently procuring the at-issue policy. *Black*, *id.*; *Basset*, *id.* Other courts followed the lead of these decisions and held that relationship between an insurance broker and its customer was a fiduciary relationship as a matter of law. *Kanter v. Deitelbaum*, 271 Ill. App. 3d 750, 753-54 (1st Dist. 1995).

II. Passage of the Insurance Placement Liability Act Eliminates Fiduciary Relationship.

As the preeminent trade association of independent insurance agents throughout this state, the members of the IIA of Illinois and indeed all of the independently employed insurance brokers across the State were subjected to an untenable burden by being deemed to be "fiduciaries" of their customers, despite the arms-length nature of their

transactions with their customers. The IIA of Illinois assisted in bringing this issue to the attention of the Legislature which subsequently passed the Insurance Placement Liability Act codified at Section 2-2201 of the Code of Civil Procedure. See, e.g., 89th Ill. Gen. Assem., Senate Proceedings, Mar. 27, 1996, at 62 (statements of Senator Madigan on Senate Bill 1279)("this is an initiative of the independent—agents association[sic]"). As insurance professionals in Illinois, the IIA had a unique understanding of the manner in which insurance producers procure insurance policies for consumers, and how that relationship differs drastically from those other legal relationships where fiduciary duties exist.

The essence of a fiduciary relationship is that one party is dominated by the other. *Landau v. Landau*, 20 Ill.2d 381, 386 (1960); *Benson v. Stafford*, 407 Ill. App. 3d 902, 913 (1st Dist. 2010). Illinois courts recognize that this element of dominance is manifested in the very nature of certain relationships, which they deem fiduciary as a matter of law. See, e.g., *Winston & Strawn v. Nosal*, 279 Ill. App. 3d 231, 239, (1st Dist. 1996) (partners); *Newton v. Aitken*, 260 Ill. App. 3d 717, 722 (2d Dist. 1994) (joint venturers); *Lossman v. Lossman*, 274 Ill. App. 3d 1, 7 (2d Dist. 1995) (attorney and client); *Matter of Estate of Dyniewicz*, 271 Ill. App. 3d 616, 622 (1st Dist. 1995) (guardian and ward); *Smith v. First Nat. Bank of Danville*, 254 Ill. App. 3d 251, 261 (4th Dist. 1993) (trustee and beneficiary); *Kurtz v. Solomon*, 275 Ill. App. 3d 643, 651 (1st Dist.

1995) (agent and principal). It remains settled law that in the absence of dominance and influence, there is no fiduciary relationship regardless of the level of trust between the parties, and a "slightly dominant business position *** [does] not operate to turn a formal, contractual relationship into a confidential or fiduciary relationship." *Lagen v. Balcor Co.*, 274 Ill. App. 3d 11, 21 (2nd Dist. 1995).

The essential element of dominance simply does not exist in the relationship between an insurance broker and the proposed insured. For example, a customer may choose to engage any independent insurance broker to secure a desired policy. Often, the customer may simultaneously work with *multiple brokers*, who will then compete against one another to try to procure a policy of insurance for the customer. Moreover, customers have full freedom of choice and have no obligation to follow an insurance producer's recommendations as to the types or amount of coverage to obtain. If insurance brokers truly enjoyed the dominance that is the touchstone of a fiduciary relationship, brokers would consistently procure for and bind the customer to the Cadillac of policies covering every conceivable risk at Cadillac prices. Such a practice would limit the customer's risk of inadequate coverage, while also resulting in higher premium payments and therefore likely higher commissions for the broker. However, in Illinois it is the customer that enjoys the final say as to her coverage needs and the premium she can afford. *Nielsen v. United Services Automobile Ass'n*, 244 Ill.App.3d 658,

667 (2nd Dist. 1993). Further, an insured customer is free to reject any policy that is offered by an insurance broker.

Insurance producers have never been in a position to legally bind a customer to obtain a given policy; instead, the customer retains the right to reject any policy that is offered or refuse to pay the premium on a policy that is placed. Given the lack of a true fiduciary relationship between insurance producers and customers, along with the complete absence of dominance by insurance producers over their customers, the General Assembly enacted Section 2-2201 of the Code of Civil Procedure. This statute eliminated fiduciary liability on the part of insurance producers concerning the placement of insurance, while maintaining a cause of action for negligence under an ordinary care standard. 735 ILCS 5/2-2201(a), (b). Specifically, Section 2-2201 explicitly states that no cause of action brought by any person shall subject insurance producers to civil liability under standards governing a fiduciary relationship, except in limited circumstances pertaining to the wrongful retention or misappropriation of premiums or claim payments. 735 ILCS 5/2-2201(b).

The primary rule of statutory construction should be to give effect to the intent of the Legislature, and courts "should seek the legislative intent primarily in the language of the statute." *Henrich v. Libertyville High School*, 186 Ill.2d 381, 387 (1999). Indeed, the *Henrich* court went on to hold that "where the language of the statute is unambiguous, the only legitimate function of the courts is to enforce the law as enacted by

the legislature." *Id.* at 391.

When the Legislature enacted Section 2-2201, it determined that an insurance producer does not owe a fiduciary duty to a customer in connection with the procurement of a policy of insurance. Stating that an Illinois insurance producer has a duty of ordinary care and cannot be held liable as a fiduciary is tantamount to stating that the relationship is *not* a fiduciary relationship. The Appellate Court's opinion effectively negates the Legislature's well-considered determination about the limited circumstances in which an insurance broker may be subject to liability as a fiduciary of its customer. It simply makes no sense to state that an insurance producer has a duty of ordinary care, cannot be held liable as a fiduciary, but that the duty owed is still that of a fiduciary. "In interpreting a statute, no part should be rendered meaningless or superfluous." *Skaperdas v. Country Casualty Ins. Co.*, 2015 IL 117021,¶15, citing *Hartney Fuel Oil Co.*, 2013 IL 115130, ¶25. Section 2201 became effective on January 1, 1997. Though it did not apply retroactively, it did immunize insurance producers from civil liability based upon the fictional fiduciary relationship on claims accruing after its effective date. *AYH Holdings v. Avreco, Inc.*, 357 Ill.App.3d 17, 43-44 (1st Dist. 2005).

Under current Illinois law, an insurance producer operates in a fiduciary capacity only "when the conduct upon which the cause of action is based involves the wrongful retention or misappropriation by

the insurance producer…of any money that was received as premiums, as a premium deposit, or as payment of a claim." 735 ILCS 5/2-2201(b); see also 215 ILCS 5/500-115(a) (West 2016)("Any money that an insurance producer…receives for soliciting, negotiating, effecting, procuring, renewing, continuing, or binding policies of insurance shall be held in a fiduciary capacity and shall not be misappropriated, converted, or improperly withheld"). In any instance where a fiduciary relationship exists, that fiduciary relationship does not extend to all affairs and transactions between the parties, but rather is limited to those transactions which are within the scope of that relationship. *Stoke v. Wheeler*, 391 Ill. 429, 434 (1945)(fiduciary relationship between administrator of estate and beneficiary did not extend to matters outside the administration of the estate); *Stone v. Stone*, 407 Ill. 66, 77 (1950)(same). Accordingly, unless a plaintiff's claim relates to the wrongful conversion of funds, Section 2201(b) eliminates any fiduciary relationship between an insurance producer and its clients.

Similar to our General Assembly in passing Section 2-2201, courts in other states have looked at the relationship between an insurance broker and a proposed insured and rejected calls to construe it with the expansive duties that a fiduciary relationship entails. See, e.g., *Murphy v. Kuhn*, 90 N.Y.2d 266, 273 (1997), citing *Farmers Insurance Co. v. McCarthy*, 871 S.W.2d 82, 85-86 (Mo. Ct. App. 1994). In *Murphy*, the New York Court of Appeals rejected any duty on the part of a broker to

advise as to other available coverages, stating that

> Insurance agents or brokers are not personal financial counselors and risk managers, approaching guarantor status. Insureds are in a better position to know their personal assets and abilities to protect themselves more so than general insurance agents or brokers, unless the latter are informed and asked to advise and act. Furthermore, permitting insureds to add such parties to the liability chain might well open flood gates to even more complicated and undesirable litigation. Notably, in a different context, but with resonant relevance, it has been observed that "[u]nlike a recipient of the services of a doctor, attorney or architect … the recipient of the services of an insurance broker is not at a substantial disadvantage to question the actions of the provider of services."

Murphy, *id.* (citations omitted).

Similarly, in *Farmers Insurance Co.*, the Missouri Court of Appeals looked to the practical effects of such expansive duties on the parts of agents or brokers, noting the "moral hazard" of a regime where opportunists could seek additional coverage after a loss by suggesting that they would have purchased different coverage had it been offered prior to the loss. 871 S.W.2d at 86. Specifically, the court found this approach would "turn the entire theory of insurance on its ear" by encouraging individuals to circumvent the risk of loss by waiting until after an occurrence to seek coverage at the expense of the broker or agent. *Id.* So too does the appellate court's decision in this case, by encouraging policy holders like the Krops to refrain from reading their insurance policies so as to cultivate ignorance regarding the extent to which the policies provide coverage in order to preserve a potential claim

against their broker in the event that (entirely preventable) gaps in coverage should later reveal themselves. Such a perverse incentive does not inure to the public policy of this state.

III. Post-1997 Court Decisions Considering Fiduciary Duties of Insurance Producers Fail to Address Section 2201(b).

Although Section 2-2201(b) became effective in January 1997, some courts in Illinois have issued decisions that continue to recognize a fiduciary relationship between an insurance producer and an insured, in direct contravention of the plain language of Section 2-2201(b) which eliminates civil liability arising from a fiduciary relationship. See, e.g., *Skaperdas v. Country Casualty Ins. Co.*, 2015 IL 117021, ¶22; *Babiarz v. Stearns*, 2106 IL App (1st) 150988, ¶¶45-46; *Garrick v. Mesirow Fin. Holdings, Inc.*, 2013 IL App (1st) 122228, ¶31. All of these cases rely upon common law opinions that never considered the change of the law effected by Section 2201(b). *Skaperdas*, at ¶22 (citing *Zannini v. Reliance Insurance Co. of Illinois, Inc.*, 147 Ill. 2d 437, 451 (1992)); *Babiarz*, at ¶¶45-46 (citing *Perelman v. Fisher*, 298 Ill.App.3d 1007 (1st Dist. 1998)). Many of them also fail even to acknowledge the plain language of Section 2201(b). *Babiarz, id.*; *Mesirow Fin. Holdings, Inc.*, at ¶31.

In *Perelman v. Fisher*, the plaintiff insured brought an action against its insurance broker for failure to procure the appropriate coverage. 298 Ill.App.3d 1007, 1008 (1st Dist. 1998). The policy at issue was one for disability insurance and was received by the plaintiff in

January 1989. The plaintiff began receiving disability benefits in 1993, and claimed that he did not discover the error until *October 1994*, when the defendant producer informed plaintiff that he did not obtain a policy with disability benefits that increased with inflation. *Id.* at 1009. The plaintiff sued for breach of contract and negligent misrepresentation, and the trial court dismissed the case as untimely. *Id.* The Appellate Court reversed, holding that—because of the fiduciary duty owed by the insurance broker—the plaintiff was not presumed to have known the contents of his policy. *Id.* at 1013. Tellingly, although the suit was filed in 1997 after the effective date of Section 2-2201(b), the cause of action accrued before its effective date. As such, *Perelman* relied exclusively on pre-Section 2-2201 case law and never considered the effect of Section 2-2201(b) which strictly limited civil liability predicated upon a fiduciary relationship.

Similarly, in *Broadnax v. Morrow*, the appellate court reviewed the dismissal of a negligence action filed by a customer against his insurance broker in connection with a property insurance policy that was applied for and procured *in April 1995*. 326 Ill.App.3d 1074, 1076 (4th Dist. 2002). A fire loss occurred in October 1995, and the insurer denied the plaintiff's claim and filed a successful declaratory judgment action in May 1996. *Id.* The plaintiff then filed suit against his insurance producer in 1999, which was ultimately dismissed as untimely pursuant to the statute of limitations set forth in Section 13-214.4. *Id.* at 1077. The

appellate court affirmed, finding that the plaintiff knew or should have known of his potential claim against the producer in May 1996 when the insurer denied coverage. *Id.* at 1082. In arriving at its conclusion, the appellate court considered *Indiana Insurance Co. v. Machon & Machon, Inc.*, 324 Ill.App.3d 300 (1st Dist. 2001), which held that a cause of action for negligent procurement of insurance accrued upon the breach of the contract and not when the party first sustains damages. *Id.* at 1078-79. The court distinguished *Indiana Insurance*, however, because it found that a fiduciary relationship that existed between the plaintiff and the insurance broker defendant. *Id.* Again, as in *Perelman*, the decision in *Broadnax* never considered the effect of Section 2-2201(b) because it did not take effect until January 1, 1997—which was after the cause of action under consideration in that case accrued.

In the present case, the Appellate Court relied upon the decisions in *Perelman* and *Broadnax* to find that "when an insurance agent owes a fiduciary duty to an insured, a cause of action for breach of that duty accrues at the time of the breach, but is subject to tolling by application of the discovery rule." *Am. Fam. Mut. Ins. Co. v. Krop*, 2017 IL App (1st) 161071 at ¶35. However, following passage of Section 2201(b), an insurance producer in Illinois only owes a fiduciary duty in the context of claims arising out of the wrongful retention of premiums or claim payments. 735 ILCS 5/2-2201(b); 215 ILCS 5/500-115(a). The Krops' third-party claims in this case against American Family agent Andy

Varga have nothing to do with the wrongful retention of premiums or claims payments; rather, they allege only that Varga was negligent in failing to procure the level of coverage previously in place in 2012. *Krop*, 2017 IL App (1st) 161071 at ¶¶1, 9.

Any claims the Krops may have had against Varga accrued *fifteen years* after the effective date of Section 2-2201(b). Accordingly, any reliance by the Appellate Court upon *Perelman*, *Broadnax*, or any other decision involving a pre-1997 occurrence holding that a fiduciary relationship existed between the Krops and Mr. Varga was erroneous as a matter of law.

In essence, the appellate court's decision below has the effect of subjecting an "insurance producer [like Mr. Varga]…to civil liability under standards governing the conduct of a fiduciary or fiduciary relationship." Such a decision is in direct contravention of the plain language of Section 2-2201(b) and must be reversed. In addition, the practical implications of any lingering fiduciary duties notwithstanding the plain language of Section 2-2201 implicate the very concerns raised by the courts in *Murphy* and *Farmers Insurance Co.*

Beyond the "moral hazard" concerns referenced in *Farmers Insurance, Co.*, there is a "morale hazard" presented by a regime that relieves insureds of knowing and understanding the insurance policies they receive, accept, and subsequently renew without complaint. "Morale Hazard" has been defined as a "[c]ircumstance increasing loss-

occurrence probability or abnormal loss due to an insurance policy applicant's indifferent attitude after policy issuance." See, e.g., https://thelawdictionary.org/morale-hazard/. It describes an unconscious change in the insured's conduct or behavior, in contrast to "moral hazard," which contemplates a deliberate change in behavior. *Id.* In this case, the Appellate Court's decision will have the undesirable effect of encouraging policy holders to take an indifferent attitude toward the policies they accept and renew, when the public policy of this state should be to encourage policyholders to know the contents of their insurance policies and to bring any discrepancies in the policy to the attention of either their insurer or insurance broker. *Connelly v. Riordan*, 246 Ill. App. 3d 898, 902 (1st Dist. 1993).

IV. The Appellate Court Erred In Its Application Of The Discovery Rule.

In the present case, Third Party Defendant-Appellant Andy Varga moved to dismiss the Krops' claims against him pursuant to Illinois' two-year statute of limitations for insurance producers, which is set forth at Section 13-214.4 of the Illinois Code of Civil Procedure. The Appellate Court found that the Krops' claims against Varga were timely because the discovery rule tolled the running of the statute of limitations until the insurer in this case, American Family, denied coverage. As set forth above, the Appellate Court erroneously relied upon non-existent fiduciary duties to reach its conclusion. Where, as here, no fiduciary relationship

existed between the customer and the insurance agent, the relevant question is when the customer knew or should have known that the insurance agent did not procure the policy they allegedly requested. Because this fact was apparent on the face of the policy, the Krops' cause of action accrued when they received the policy in question back in 2012, and their third-party complaint against Varga, filed in 2015, was untimely and properly dismissed by the circuit court.

When faced with an argument that a claim is time-barred, a court first must consider the applicable statute of limitations. Illinois' two-year statute of limitations for insurance producers is set forth in Section 13-214.4. The statute states as follows:

> All causes of action brought by any person or entity under any statute or any legal or equitable theory against an insurance producer, registered firm, or limited insurance representative concerning the sale, placement, procurement, renewal cancellation of, or failure to procure any policy of insurance shall be brought within 2 years of the date the cause of action accrues.

735 ILCS 5/13-214.4 (West 2016). The statute, by its plain language, applies to "all causes of action" under "any legal theory." *Indiana Ins. Co. v. Machon & Machon, Inc.*, 324 Ill.App.3d 300, 303 (1st Dist. 2001); *United General Title Ins. Co. v. Ameritite, Inc.*, 365 Ill.App.3d 142, 151-2 (1st Dist. 2006).

The next inquiry must be to determine when the cause of action accrued. The well-established rule in Illinois is that, for contract actions

and torts arising out of contractual relationships, the cause of action accrues at the time of the breach of contract, not when a party sustains damages. *Hermitage Corp. v. Contractors Adjustment Co.*, 166 Ill.2d 72, 77 (1995)(citing *West American Ins. Co. v. Sal E. Lobianco & Son Co.*, 69 Ill.2d 126, 132 (1977)); *Indiana Ins. Co.*, 324 Ill.App.3d at 303 (same). Nevertheless, in this case the Appellate Court applied the "discovery rule," which was developed to ameliorate the application of the statute of limitations in certain situations. *Hermitage*, 166 Ill.2d at 77-8. The discovery rule, when properly applied, delays the commencement of the statute of limitations until the plaintiff knows or reasonably should know of his injury. *Id.* However, "the discovery rule protects a plaintiff only until he knows or reasonably should know of his injury, not until he has actual knowledge." *Gale v. Williams*, 299 Ill.App.3d 381, 387 (3rd Dist. 1998).

In certain circumstances, an insured may not reasonably have knowledge about a lack of insurance coverage until the insurer denies a claim. See, e.g., *State Farm Fire & Cas. Co. v. John J. Rickoff Sheet Metal Co.*, 394 Ill.App.3d 548, 550 (1st Dist. 2009)(considering denial of coverage to additional insured). In other circumstances, by contrast, the scope of the policy can easily be determined on its face, and the insured is charged with a duty to read the policy and know its contents, such that the cause of action for failure to properly procure insurance accrues when the insured receives a copy of the policy. *RVP, LLC v. Advantage*

Ins. Servs., 2017 IL App (3d) 160276, ¶¶32, 40 (where coverage limits were clear on the face of the policy, and it was received by the plaintiffs prior to being renewed twice, plaintiffs knew or should have known of their coverage limits upon receiving the policies).

Under the facts of this case, the Krops allegedly requested that Varga procure a homeowner's insurance policy with American Family that was the equivalent of their prior Travelers Insurance Company policy, which provided coverage for certain intentional acts. *Krop*, 2017 IL App (1st) 161071 at ¶4. The Krops received their American Family policy (which did not provide coverage for intentional acts) in March 2012, **and then proceeded to renew the policy in 2013, 2014, and 2015**—which was even after their request for coverage was denied by the insurer in August 2014. *Id.*, ¶¶5-6. These facts beg the question of whether, in moving the policy to American Family, the Krops were motivated by a desire for simply a lower premium than for coverage of intentional acts.

Under Illinois law, the insured bears the burden of knowing the contents of insurance policies and has an affirmative duty to bring any discrepancies in the policy to the attention of the insurer. *Furtak v. Moffett*, 284 Ill. App. 3d 255, 257 (1st Dist. 1996). Where, as here, the plaintiff accepts and repeatedly renews the policy obtained by the producer, Illinois courts appropriately hold the insured to be on notice of any deficiencies apparent on the face of the policy so as to bar any future

complaint. *Foster*, 36 Ill. App. 3d at 598; *Connelly*, 246 Ill. App. 3d at 901; *RVP, LLC*, 2017 IL App (3d) 160276 at ¶40. The appellate court erred when it found that the Krops' claim did not accrue until the insurer denied coverage—especially **where the Krops chose to renew such coverage even after American Family denied their claim.** For this additional reason, the decision of the appellate court in this matter should be reversed, and the judgment of the circuit court dismissing the Krops' third-party claims against their insurance agent should be affirmed.

CONCLUSION

When it passed Section 2-2201 of the Illinois Code of Civil Procedure, the Illinois Legislature explicitly eliminated any fiduciary relationship as the basis of civil liability against an insurance producer—except in those limited circumstance where it is alleged that the producer misappropriated or wrongfully withheld premium funds or claims payments. 735 ILCS 5/2-2201(b). Notwithstanding the plain language of this provision of the Code of Civil Procedure, Illinois courts have erroneously continued to rely on caselaw interpreting claims that predated the 1997 effective date of Section 2-2201(b) to find that a fiduciary relationship still obtains between an insurance producer and an insured. The Appellate Court in this case fell victim to this caselaw in a manner which directly contradicted Section 2-2201(b). This Court should reverse the decision of the Appellate Court in this case. In doing

so, this Court should clearly announce that Section 2-2201(b) means what it says—that a fiduciary relationship no longer exists between an insurance producer and an insured beyond the limited circumstances set forth in Section 2-2201(b) and the Illinois Insurance Code.

Respectfully submitted,

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Rule 341(c) Certificate of Compliance

I hereby certify that this brief conforms the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, and the Rule 341(c) certificate of compliance, is 21 pages.

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NOTICE OF FILING and PROOF OF SERVICE

In the Supreme Court of Illinois

AAMERICAN MUTUAL INSURANCE COMPANY, *Plaintiff-Counter Defendant,* v. WALTER KROP, etc., et al., *Defendants-Counter Plaintiffs,*	)	
WALTER KROP, et al., *Third-Party Plaintiffs-Appellees,* v. ANDY VARGA, *Third-Party Defendant-Appellant.*	)	No. 122556

The undersigned, being first duly sworn, deposes and states that on the 3rd day of January, 2018, there was electronically filed and served upon the Clerk of the above court the *Amicus Curiae* Brief of The Independent Insurance Agents of Illinois in Support of Third-Party Defendant-Appellant Andy Varga, and that on the same day, a pdf of same was e-mailed to the following counsel of record:

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Within five days of acceptance by the Court, the undersigned states that he will send to the above court thirteen copies of the *Amicus Curiae* Brief bearing the court's file-stamp.

/s/ Brendan J. Nelligan
Brendan J. Nelligan

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

/s/ Brendan J. Nelligan
Brendan J. Nelligan

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1/9/2018 10:42 AM
Carolyn Taft Grosboll
SUPREME COURT CLERK