**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF ILLINOIS – EASTERN DIVISION**

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| 1501 WASHINGTON ST. LOUIS, LLC, and LAST HOTEL MASTER TENANT, LLC,<br><br>*Plaintiffs,*<br><br>v.<br><br>THE CINCINNATI INSURANCE COMPANY, and ROBERTSON RYAN AND ASSOCIATES, INC.,<br><br>*Defendants.* | ) | Case No. 2020 CH 4414 |

**DEFENDANT ROBERTSON RYAN AND ASSOCIATES' MOTION TO DISMISS COUNT III OF THE PLAINTIFFS' COMPLAINT**

Defendant, ROBERTSON RYAN AND ASSOCIATES, INC. ("Robertson Ryan"), by its attorneys, Gordon Rees Scully Mansukhani, hereby moves to dismiss Count III of the Plaintiffs' Complaint with prejudice, pursuant to Federal Rule of Civil Procedure Rule 12(b)(6), and in support thereof submits the following memorandum.

Dated: October 12, 2020

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Respectfully submitted,

**ROBERTSON RYAN AND ASSOCIATES, INC.,**

By: 

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## INTRODUCTION

"In order to find a duty to provide specific coverage, the insured must make a request for that specific coverage." *Office Furnishings, Ltd. v. A.F. Crissie & Co.*, 2015 IL App (1st) 141724, ¶ 25. Illinois law "does not obligate an insurance producer to procure a policy that is not specifically requested by the insured." *Skaperdas v. Country Cas. Ins. Co.*, 2015 IL 117021, ¶ 40. Here, the Plaintiffs fail to state a claim against their insurance agency, Robertson Ryan, because the Plaintiffs do not allege that they specifically requested coverage for business losses due to pandemics such as Covid-19. Rather, the Plaintiffs allege only that they requested coverage for "contamination," "communicable diseases," and "viruses," and Robertson Ryan procured a policy for the Plaintiffs that explicitly covered all three items.

Here, the subject policy clearly excluded coverage for pandemics. Illinois law "does not require an agent to obtain the best possible coverage for a customer." *Skaperdas*, 2015 IL 117021, ¶ 39. "Insureds have an affirmative duty to review the terms of a new policy issued to them" and "they are deemed to know the information the policy contains." *Babiarz v. Stearns*, 2016 IL App (1st) 150988, ¶ 43. The Plaintiffs fail to state a claim because the policy clearly excluded coverage for pandemics, and Robertson Ryan did not have a duty to procure coverage for pandemics when the Plaintiffs did not specifically request any such coverage.

Finally, the Plaintiffs must establish that the requested insurance "could have been secured elsewhere." *Geraghty v. Continental W. Life Ins. Co.*, 281 Ill.App.3d 669, 678 (1st Dist. 1996). Robertson Ryan is not liable to the Plaintiffs simply because the Plaintiffs' insurance carrier, Cincinnati, denied coverage for the Plaintiffs' claim. Here, the Plaintiffs fail to state a claim because the Plaintiffs do not allege the existence of any insurance policy in the marketplace that Robertson Ryan could have procured for the Plaintiffs that provides coverage for pandemics such as Covid-19.

## PLAINTIFFS' ALLEGATIONS

1. On June 2, 2020, the Plaintiffs filed this insurance coverage action against their business property insurer (Cincinnati Insurance Company) and their independent insurance agency (Robertson Ryan), seeking insurance coverage for their claimed business losses due to the COVID-19 pandemic. (See Plaintiffs' Complaint; ECF 1-1).

2. The Plaintiffs allege that they are the "owner operators" of a hotel located in St. Louis, Missouri. (ECF 1-1; ¶ 17). The Plaintiffs allege that the Covid-19 pandemic and the related orders of the Governor of Missouri and the City of St. Louis forced them to suspend or reduce their business operations. (ECF 1-1: ¶ 1-10). The Plaintiffs allege they tendered a claim for their alleged business losses to Cincinnati, and Cincinnati denied the claim. (ECF 1-1; ¶¶ 6, 8).

3. The Plaintiffs' complaint includes three counts, consisting of the following:

- Count I, against Cincinnati, seeking a declaratory judgment that Cincinnati's policy provides coverage for the Plaintiffs' claimed losses due to the COVID-19 pandemic (ECF 1-1; Count I);

- Count II, against Cincinnati, alleging that Cincinnati denied the Plaintiffs' claim in bad faith, in violation of 215 ILCS 5/155 (ECF 1-1; Count II);

- Count III against Robertson Ryan, sounding in negligence, and alleging that Robertson Ryan "breached its duty to Plaintiffs by obtaining a Policy which Cincinnati has now denied includes the coverage sought by Plaintiffs." (ECF 1-1; Count III, ¶ 97).

4. Regarding Cincinnati, the Plaintiffs allege that Cincinnati is obligated to provide coverage for the Plaintiffs' claimed losses under any one of three different coverage provisions in Cincinnati's policy: (1) the Business Income provision; (2) the Extra Expense provision; (3) the Civil Authority provision; and (4) the Crisis Event provision. (ECF 1-1; ¶¶ 27, 34).

5. Regarding Robertson Ryan, the Plaintiffs allege that Robertson Ryan had a duty to "obtain an insurance policy which contained the coverage sought by Plaintiffs." (ECF 1-1; ¶ 96).

The Plaintiffs alleged that Robertson Ryan breached its duty "by obtaining a Policy which Cincinnati has now denied includes the coverage sought by Plaintiffs." (ECF 1-1; ¶ 97).

6. More specifically, the Plaintiffs allege that they "instructed" Robertson Ryan in July 2019 "to obtain insurance which included coverage for business interruption and losses due to (i) contamination, (ii) communicable diseases, and (iii) viruses." (ECF 1-1; ¶ 22) (enumeration added).

7. Robertson Ryan procured the subject policy as requested by the Plaintiffs, which includes all of the coverages that the Plaintiffs allege they requested. The subject policy provides coverage for business losses caused by a "Covered Crisis Event," which the policy defines as including: (i) contamination, (ii) communicable diseases, and (iii) viruses. Specifically, the policy defines "Covered Crisis Event" in relevant part as follows:

> The necessary closure of all or part of your "covered location" due to any sudden, accidental and unintentional **contamination** or impairment of the "covered location" which results in clear, identifiable, internal or external visible symptoms of bodily injury, illness or death of any person. This includes "covered locations" contaminated by a "**covered communicable disease**" or Legionnaires' disease but it does not include "covered locations" contaminated in whole or in part by other "pollutants", "fungi" or bacteria except as provided by "covered communicable disease." (ECF 1-1; § H.2.b., PageID# 149) (emphasis added).

8. The Policy defines "covered communicable disease" as follows:

> "Covered communicable diseases" means any disease or any related or resulting diseases, **viruses**, complexes, symptoms, manifestations, effects, conditions or illnesses, except this endorsement does not apply to any "loss" directly or indirectly attributable to Anthrax, Avian Influenza, Crimean-Congo Hemorrhagic Fever, Dengue Hemorrhagic Fever, Ebola Hemorrhagic Fever, Francisella Tularensis, Influenza, Lassa Fever, Marburg Hemorrhagic Fever, Meningococcal disease, Plague, Rift Valley Fever, Severe Acute Respiratory Syndrome, Smallpox, Tularemia, Yellow Fever or any pandemic or similar influenza which is defined by the United States Center for Disease Control as virulent human influenza that may cause global outbreak, or pandemic, or serious illness. (ECF 1-1; § H.1., Page ID# 149) (emphasis added).[1]

[1] Using the same language as this definition, the Crisis Event provision had an exclusion for losses caused by "viruses, bacterium, or other microorganisms" unless the loss was caused by a "covered communicable disease." (ECF 1-1; § D.2.d., Page ID# 146).

9. The Plaintiffs admit that the World Health Organization declared COVID-19 a "pandemic" in March 11, 2020. (ECF 1-1; ¶ 5).

10. The Plaintiffs allege that they are Delaware limited liability companies with their principal places of business in St. Louis, Missouri, and "corporate offices" in Chicago, Illinois. (ECF 1-1; ¶ 11-12). The Plaintiffs allege that Cincinnati is an Ohio corporation with its principal place of business in Fairfield, Ohio. (ECF 1-1; ¶ 13). The Plaintiffs allege that Robertson Ryan is a Wisconsin corporation "with offices throughout Wisconsin and Illinois." (ECF 1-1; ¶ 14). While the Plaintiffs omitted Robertson Ryan's principal place of business from their complaint, the Plaintiffs attached the subject insurance policy to their complaint, which reveals that Robertson Ryan's principal place of business is located in Milwaukee, Wisconsin. (ECF 1-1; Page ID# 29).

**CHOICE OF LAW**

"In diversity cases, choice of law issues must be resolved by applying the choice of law rules of the forum state." *In re Aircrash Disaster*, 948 F.Supp.747, 753-54 (N.D. Ill. 1996), *citing Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). In Illinois, "absent an express choice of law, insurance policy provisions are generally governed by the location of the subject matter, the place of delivery of the contract, the domicile of the insured or of the insurer, the place of the last act to give rise to a valid contract, the place of performance, or other place bearing a rational relationship to the general contract." *Lapham-Hickey Steel Corp. v. Protection Mut. Ins. Co.*, 166 Ill.2d 520, 526-27 (1995).

"Before a court can apply a choice-of-law analysis to determine which state's law applies to the dispute, it must first determine if there is a conflict in the laws of the two states." *SBC Holdings, Inc. v. Travelers Cas. & Sur. Co.*, 374 Ill.App.3d 1, 13 (1st Dist. 2007). "A conflict exists if the difference in laws will result in a difference in outcome." *Id.* "If the law of the jurisdictions

in question is essentially the same on the disputed point, there is no need to apply a choice-of-law analysis." *Id.* "In the absence of a conflict, Illinois law applies as the law of the forum." *Dearborn Ins. Co. v. Int'l Surplus Lines Ins. Co.*, 308 Ill.App.3d 368, 373 (1999).

Here, the insured hotel is located in Missouri, Cincinnati Insurance is located in Ohio, Robertson Ryan is located in Wisconsin, and the Plaintiffs filed suit in Illinois alleging they have "corporate offices" there. This brief addresses the laws of all four states to demonstrate that there is no difference between the laws of those states that results in a different outcome with respect to the issues raised in this motion. Accordingly, there is no need to engage in a choice-of-law analysis at this stage, and Illinois law should apply as the law of the forum state.[2]

## ARGUMENT

### I. The Plaintiffs' claim against Robertson Ryan must be dismissed because Robertson Ryan procured the coverage that the Plaintiffs requested and Robertson Ryan did not owe the Plaintiffs a duty to procure any coverage beyond that which the Plaintiffs requested.

Under Illinois law, an insurance agent[3] shall exercise "ordinary care and skill" in procuring "the coverage requested by the insured." *See* 735 ILCS 5/2-2201(a).[4] "Under [Illinois law], a duty to exercise ordinary care arises only after coverage is requested by the insured or proposed insured." *Skaperdas*, 2015 IL 117021, ¶ 37. "At that point, [Illinois law] requires insurance producers to exercise ordinary care and skill in responding to the request, either by providing the

[2] There may be other aspects of this litigation for which a conflict of law might arise, such as issues of damages. While Robertson Ryan maintains that this litigation must be dismissed at the outset, Robertson Ryan reserves the right to raise such conflicts of law in the event that this litigation proceeds.

[3] The Illinois Supreme Court has confirmed that the term "insurance producer" used in Section 2-2201 includes both "captive agents" who sell only one insurance carrier's products and independent agencies who sell multiple insurance carriers' products (sometimes referred to in the case law as brokers). *Am. Family Mut. Ins. Co. v. Krop*, 2018 IL 122556, ¶ 28. Accordingly, Robertson Ryan is an insurance producer under Section 2-2201. *Id.*

[4] The Illinois legislature has codified an insurance agent's common law duty of care in section 2-2201(a) of the Code of Civil Procedure. *See Office Furnishings*, 2015 IL App (1st) 141724, ¶ 22. In Missouri, Wisconsin, and Ohio, the source of an insurance agent's duty of care remains the common law of those states, as will be detailed in the citations below. While the source of the duty is different in Illinois compared to the other states, the substance of an insurance agent's limited duty of care is the same in all four states.

desirable coverage or by notifying the applicant of the rejection of the risk." *Skaperdas*, 2015 IL 117021, ¶ 37. These principles are the same in Missouri,[5] Wisconsin,[6] and Ohio.[7]

Illinois law explicitly states that insurance producers are not fiduciaries and they do not owe any fiduciary duties to the insured when procuring insurance.[8] 735 ILCS 5/2-2201(b); *Krop*, 2018 IL 122556, ¶ 29 ("a claim for negligent failure to procure insurance does not involve a fiduciary duty"). Ohio similarly holds that the relationship between an insurance agent and the insured does not create any fiduciary relationship. *See Tornado Techs., Inc. v. Quality Control Inspection, Inc.*, 977 N.E.2d 122, 127 (Ohio Ct. App. 2012) (explaining that an insurance agency relationship is an "ordinary business relationship"). While Wisconsin does not explicitly disclaim a fiduciary relationship, Wisconsin holds that "absent special circumstances, an insurance agent's duty to an insured is limited" to exercising "reasonable skill and diligence in the transaction of the business entrusted to him or her." *Avery v. Diedrich*, 734 N.W.2d 159, 164-65 (Wisc. Sup. Ct. 2007). "Special circumstances exist when something more than a standard insured-insurer relationship exists, such as an express agreement that an agent will advise the insured about his or

[5] Under Missouri law, "a broker or agent who undertakes to procure insurance for another for compensation owes a duty of reasonable skill, care, and diligence in obtaining the requested insurance." *Busey Truck Equip., Inc. v. Am. Family Mut. Ins. Co.*, 299 S.W.3d 735, 738 (Mo. Ct. App. 2009). "The scope of the agency of either an agent or a broker normally is limited to procuring the insurance requested by the insured." *Emerson Elec. Co. v. Marsh & McLennan Cos.*, 362 S.W.3d 7, 13 (Mo. Sup. Ct. 2012).

[6] Under Wisconsin law, "an insurance agent has a duty to exercise reasonable skill and diligence in the transaction to which he or she is entrusted." *Avery v. Diedrich*, 734 N.W.2d 159, 164 (Wisc. Sup. Ct. 2007). "An insurance agent does not have a duty to procure requested insurance coverage until there is an agreement that the agent will do so." *Id.* at 161. "Generic requests for coverage are insufficient to trigger an obligation on the agent's part to procure a specific type of insurance or coverage for a specific risk." *Olson v. Wis. Mut. Ins. Co.*, 2018 Wisc. App. LEXIS 794, *17-18 (Wisc. App. Ct. 2018) (collecting cases).

[7] "Ohio law recognizes a cause of action against an insurance agency for negligent procurement where the agency fails to act with reasonable diligence in providing an insured with requested coverage." *Amankwah v. Liberty Mut. Ins. Co.*, 62 N.E.3d 814, 816 (Ohio Ct. App. 2016). "An insurance agency has a duty to obtain the coverage its insured requests." *Robson v. Quentin E. Cadd Agency*, 901 N.E.2d 835, 845 (Ohio Ct. App. 2008).

[8] Section 2-2201 creates one exception to the rule that insurance agents do not owe the insured any fiduciary duties. 735 ILCS 5/2-2201(b). That exception is for claims asserting that the insurance agent wrongfully retained or misappropriated money that the producer received for premiums, premium deposits, or claim payments. *Id.* Here, the Plaintiffs have not alleged that Robertson Ryan wrongfully retained or misappropriated any funds. Accordingly, the exception to Section 2-2201(b) does not apply, and Robertson Ryan does not owe the Plaintiffs any fiduciary duties under Illinois law.

her coverage." *Id.* at 165. Missouri nominally describes insurance agents as fiduciaries, but "the scope of the agency of either an agent or a broker normally is limited to procuring the insurance requested by the insured," which is substantially identical to an insurance agent's duty to exercise ordinary care and skill in Illinois. *Emerson Elec. Co. v. Marsh & McLennan Cos.*, 362 S.W.3d 7, 13 (Mo. Sup. Ct. 2012) (describing insurance agent's duty as a "duty to exercise reasonable care, skill and diligence in procuring insurance").[9]

Consistent with the fact that agents are not fiduciaries, agents do not owe any duty to advise the insured about the need for coverage that the insured has not requested, because such a duty would create a fiduciary obligation that exceeds the agent's limited duty to exercise ordinary care to procure the specific coverage that the insured requested. *Melrose*, 399 Ill.App.3d at 920-921 (finding that an agent did not owe any fiduciary duty to advise insured about the need for workers compensation insurance when the insured did not specifically request such coverage); *See Also Office Furnishings*, 2015 IL App (1st) 141724 ¶ 26 (finding that an agent did not owe the plaintiff any duty to review the accuracy of the factual information in the plaintiff's insurance application, and the agent did not owe the plaintiff any duty to advise the plaintiff on the necessity of providing accurate information in its application, because that "would extend the Section 2-2201 duty beyond that expressly defined by the legislature").

[9] *Emerson* involved a claim that an insurance agency breached a duty of loyalty to the plaintiff by depositing the plaintiff's premium payments in an interest-bearing account where the interest accrued to the benefit of the agency. 362 S.W.3d 7. The plaintiff argued that the interest-bearing account created an improper incentive for the insurance agency to sell policies that charged higher premiums, resulting in higher interest payments for the agency. *Id.* The Missouri Supreme Court maintained that insurance agents owed a fiduciary duty of loyalty to their clients, but the Court rejected the plaintiff's argument that the interest-bearing accounts necessarily violated any such duty. *Id.* The Court explained that agents are authorized to earn commissions based on the premiums and Missouri law authorized the interest bearing accounts. *Id.* In the context of an insurance agent's handling of the client's premium payments, Missouri's characterization of insurance agents as fiduciaries is consistent with 735 ILCS 5/2-2201(b) in Illinois, which provides that insurance agents can be held to fiduciary standards in claims alleging the wrongful retention or misappropriation of premium payments or claim payments. Again, this exception does not apply in this case because the Plaintiffs have not alleged and cannot allege that Robertson Ryan retained or misappropriated any payments.

Courts in Missouri,[10] Wisconsin,[11] and Ohio[12] have similarly found that insurance agents do not have any duty to advise insureds regarding the availability or advisability of coverage beyond that specifically requested by the insured. *See e.g.*, *Nelson v. Davidson*, 456 N.W.2d 343, 356 (Wisc. Sup. Ct. 1990) (finding that the majority view nationwide is that agents do not have a duty to advise, and explaining that "the creation of a duty to advise could afford insureds the opportunity to insure after the loss by merely asserting they would have bought the additional coverage had it been offered").

Also consistent with the fact that insurance agents are not fiduciaries, Illinois law "does not require an agent to obtain the best possible coverage for a customer." *Skaperdas*, 2015 IL 117021, ¶ 39. Similarly, "a duty may not be imposed under [Illinois law] based on a vague request to make sure the insured is covered." *Id.* at ¶ 42. "In order to find a duty to provide specific coverage, the insured must make a request for that specific coverage; a general request to make sure the insured is covered is insufficient to create such a duty." *Office Furnishings*, 2015 IL App (1st) 141724, ¶ 25.

[10] In Missouri, "neither agents nor brokers have a duty to advise the insured on its insurance needs or on the availability of particular coverage, unless they specifically agree to do so." *Emerson Elec. Co. v. Marsh & McLennan Cos.*, 362 S.W.3d 7, 13 (Mo. Sup. Ct. 2012). Also, "an insurance agent or broker does not have an obligation to explain the policy to the insured." *Busey Truck Equip., Inc. v. Am. Family Mut. Ins. Co.*, 299 S.W.3d 735, 738 (Mo. App. Ct. 2009).

[11] "An insurance agent has no affirmative duty under existing Wisconsin law, absent special circumstances, to inform an insured concerning the availability or advisability" of coverage. *Avery v. Diedrich*, 734 N.W.2d 159, 165 (Wisc. Sup. Ct. 2007). "[Wisconsin] Courts have also concluded that in the absence of special circumstances insurance agents do not have a duty to inform about or recommend policy limits higher than those selected by the insured, update the contents limit of the insureds' policy or to advise them regarding the adequacy of coverage, advise the insured to increase the limits of its insurance coverage for personal property, or anticipate what liabilities an insured may expect a policy to cover or to identify which exclusions in a policy an insured may deem important." *Id.* at 165-66 (collecting cases, internal citations omitted); *See Also Sprangers v. Greatway Ins. Co.*, 498 N.W.2d 858, 864 (Wisc. Ct. App. 1993) (holding that insurance agents do not have any affirmative duty to "explain each and every exclusion to each insured in the absence of any such request").

[12] *Fry v. Walters & Peck Agency, Inc.*, 750 N.E.2d 1194 (Ohio Ct. App. 2001) (affirming judgment in favor of insurance agent, finding that "absent specific inquiry by the insured, [the insurance agent] had no duty to explain" the policy).

Courts in Missouri,[13] Wisconsin,[14] and Ohio[15] have similarly found that insurance agents do not have any duty to procure the best possible coverage, and insurance agents do not have any duty to anticipate the insured's needs beyond the coverage specifically requested by the insured. *See e.g., Emerson Elec. Co. v. Marsh & McLennan Cos.*, 362 S.W.3d 7, 14 (Mo. Sup. Ct. 2012) (rejecting argument that an insurance agent has a duty to procure the best coverage, and explaining that "impos[ing] a duty to give advice or recommend insurance would in effect make agents and brokers into financial counselors or guardians of insureds and require them to have unreasonable knowledge of their insured's needs and of the marketplace.")

To illustrate the foregoing, the Illinois Supreme Court found in *Skaperdas* that the plaintiff stated a claim against his insurance agent for negligent failure to procure when the plaintiff alleged that he asked his agent to add the plaintiff's fiancé to the plaintiff's auto insurance policy, but the agent failed to do so, thereby causing the plaintiff and his fiancé to be uninsured for a subsequent accident. 2015 IL 117021, ¶¶ 4-5, 45. The Court explained that the "plaintiff's complaint fit within the specific statutory language" of Section 2-2201, and the agent had a duty to "procure the insurance coverage specifically requested by [the plaintiff]." *Id.* at ¶ 45.

In contrast, *Skaperdas* cited with approval the First District's decision in *Melrose Park Sundries, Inc. v. Carlini*, where a convenience store owner claimed that her broker failed to procure workers compensation insurance. 399 Ill.App.3d 915 (1st Dist. 2010). The store owner admitted that she never specifically requested workers compensation insurance. *Id.* at 917. Instead, she

[13] *See Emerson Elec. Co. v. Marsh & McLennan Cos.*, 362 S.W.3d 7, 20 (Mo. Sup. Ct. 2012) (finding that an insurance agent "normally has no duty to scour the market for the best priced insurance or to advise the insured as to what insurance would best meet its needs").

[14] "Generic requests for coverage are insufficient to trigger an obligation on the agent's part to procure a specific type of insurance or coverage for a specific risk." *Olson v. Wis. Mut. Ins. Co.*, 2018 Wisc. App. LEXIS 794, *17-18 (Wisc. App. Ct. 2018) (collecting cases)

[15] *See First Catholic Slovak Union v. Buckeye Union Ins. Co.*, 499 N.E.2d 1303 (Ohio Ct. App. 1986) (finding that insurance agency did not have any obligation to anticipate the plaintiff's insurance needs in the absence of proof that the plaintiff expressly raised those needs to the agency's attention).

testified that she directed her agent to "make sure that all of the requirements for insurance were taken out, including the building, the liquor, any type of liability policy." *Id.* at 917. The agent procured property and "liquor liability" insurance, but not workers compensation insurance. *Id.* at 917. The appellate court affirmed summary judgment in favor of the agent, finding that "Section 2-2201 does not obligate an insurance producer to procure a policy for the insured which had not been requested." *Id.* at 920. The court also explained that the agent did not have any duty to advise the owner about the need for workers compensation coverage, because such a duty would create a fiduciary obligation that the Illinois legislature expressly disavowed by statute. *Id.* at 920-921; *see also Williams v. State Farm Fire & Cas. Co.*, 509 N.W.2d 294 (Wisc. Ct. App. 1993) (plaintiff's requests for "full coverage" with "no holes" regarding his personal umbrella liability policy did not create any duty for insurance agent to procure liability policy for plaintiff's investment property that plaintiff neither mentioned nor requested).

Consistent with the Illinois courts' analysis, the Seventh Circuit has observed that "a duty to the insured arises only after specific coverage is requested, and courts have not considered negligence claims grounded in more general negligence principles outside the scope of § 2-2201(a)'s language." *M.G. Skinner & Assocs. Ins. Agency v. Norman-Spencer Agency, Inc.*, 845 F.3d 313, 320-322 (7th Cir. 2017) (explaining that Illinois courts are "reluctant to expand the duties of brokers and agents beyond those articulated in the statute"), *citing Office Furnishings*, 2015 IL App (1st) 141724, ¶ 26 (finding that an agent did not owe the plaintiff any duty to review the accuracy of the plaintiff's insurance application, and the agent did not owe the plaintiff any duty to advise the plaintiff on the necessity of providing accurate information in its application, because that "would extend the Section 2-2201 duty beyond that expressly defined by the legislature"); *See Also Hoover v. Country Mut. Ins. Co.*, 2012 IL App (1st) 110939, ¶¶ 46-48 (affirming dismissal

of common law negligent misrepresentation and voluntary undertaking claims against insurance agent because those causes of action do not apply to insurance agents).

Here, the Plaintiffs allege that they "instructed" Robertson Ryan "to obtain insurance which included coverage for business losses due to (i) contamination, (ii) communicable diseases, and (iii) viruses." (ECF 1-1; ¶ 22) (enumeration added). Robertson Ryan procured for the Plaintiffs a policy that included all three coverages. Specifically, the Crisis Event endorsement provided coverage for business losses due to "contamination" caused by "covered communicable diseases," which the policy defined to include "viruses." (ECF 1-1; §§ H.1 and H.2.b. Page ID# 149). The Plaintiffs admit that they received the policy and they paid their premiums for the policy. Accordingly, Robertson Ryan discharged any duty that it owed to the Plaintiffs by procuring the coverage that the Plaintiffs requested.

The Crisis Event endorsement contains an exclusion for "any pandemic" but the Plaintiffs do not allege that they specifically requested any coverage for pandemics. (ECF 1-1; § H.1., Page ID# 149). The Plaintiffs admit that the policy featured a "detailed list" of 16 excluded diseases, followed by the generalized exclusion for "any pandemic." (ECF 1-1; ¶ 36-37). Illinois "does not require an agent to obtain the best possible coverage for a customer." *Skaperdas,* 2015 IL 117021, ¶ 39. Rather, Illinois "only requires the agent to exercise ordinary care and skill in obtaining the coverage requested by the insured." *Id*. Robertson Ryan procured the coverage that the Plaintiffs allege they requested. Robertson Ryan did not owe the Plaintiffs any duty to recommend coverage that the Plaintiffs did not request, or explain to the Plaintiffs how the exclusion for pandemics affected their coverage. *See Office Furnishings*, 2015 IL App (1st) 141724 ¶ 26. The Plaintiffs' argument, "distilled to its essence, is that [Robertson Ryan] had a fiduciary duty to procure [pandemic] insurance despite the fact that no such coverage was requested" and "this argument

necessarily fails because section 2-2201(b) precludes claims against insurance producers for breach of fiduciary duty." *Melrose*, 399 Ill.App.3d at 921. Accordingly, the Plaintiffs' claims against Robertson Ryan must be dismissed because Robertson Ryan procured the coverage that the Plaintiffs requested, and Robertson Ryan did not owe the Plaintiffs a duty to procure any coverage beyond that which the Plaintiffs requested.

## II. The Plaintiffs' claim against Robertson Ryan must be dismissed because the Plaintiffs had a duty to read their policy, and it is clear from the plain language of the policy that coverage for pandemics was excluded.

"Insureds have an affirmative duty to review the terms of a new policy issued to them" and "even if they do not read the policy, they are deemed to know the information the policy contains." *Babiarz v. Stearns*, 2016 IL App (1st) 150988, ¶ 43; *See Also Am. Family Mut. Ins. Co. v. Krop* 2018 IL 122556 (explaining that "customers generally know their own goals better than their insurance agent does" and "insurance customers can read their policies and learn of any defects"). The fact that insureds have an affirmative duty to review their policy is consistent with the facts that insurance agents do not have any affirmative duty to advise insureds regarding the availability or advisability or particular coverages, and an insurance agent's duty is limited to procuring the coverage that the insured specifically requested. *See Krop*, 2018 IL 122556, ¶ 29. Courts in Missouri,[16] Wisconsin,[17] and Ohio[18] similarly hold that insureds have a duty to review their policy and confirm whether it meets their needs.

[16] In Missouri, "an insured has a duty to promptly examine its policy to ensure it contains the terms of coverage desired or agreed upon, and if the policy does not, to reject it by promptly notifying the insurer of its dissatisfaction therewith." *Jenkad Enters., Inc. v. Transportation Ins. Co.*, 18 S.W.3d 34, 38 (Mo. App. Ct. 2000)

[17] In Wisconsin, "an insured must read the policy once it is delivered to determine whether it provides the insurance coverage requested." *Baker v. Rural Mut. Ins. Co.*, 2017 Wisc. App. LEXIS 664 (Wisc. Ct. App. 2017), quoting Wisconsin Jury Instructions – Civil 1023.6 (2016).

[18] "Ohio law also recognizes a corresponding duty on the part of an insured to review the insurance policy and know the extent of insurance coverage issued." *Amankwah v. Liberty Mut. Ins. Co.*, 62 N.E.3d 814, 816 (Ohio Ct. App. 2016). "The insured has a duty to examine the policy, know the extent of its coverage, and notify the agent if the coverage is inadequate." *Robson v. Quentin E. Cadd Agency*, 901 N.E.2d 835, 844 (Ohio Ct. App. 2008).

Here, the Plaintiffs admit that they received the subject policy and that they paid their premiums for the policy. (ECF 1-1; ¶ 1-2). The Plaintiffs admit that the Crisis Event endorsement contains a "detailed list" of 16 excluded diseases, followed by the generalized exclusion for "any pandemic." (ECF 1-1; ¶ 36-37). The Plaintiffs do not allege that they specifically requested any coverage for pandemics prior to the onset of the Covid-19 pandemic, either before or after their receipt of the subject policy. (ECF 1-1). Instead, the Plaintiffs admit that they paid the premium for the subject policy that clearly excluded coverage for pandemics. (ECF 1-1; ¶ 1-2). If the Plaintiffs wanted coverage for pandemics, then the Plaintiffs had a duty to review their policy to determine whether it included such coverage, and specifically request it if they believed the policy did not provide such coverage. Accordingly, the Plaintiffs' claims against Robertson Ryan must be dismissed because Robertson Ryan procured the coverage that the Plaintiffs requested, and Robertson Ryan did not owe the Plaintiffs a duty to procure any coverage beyond that which the Plaintiffs requested.

## III. The Plaintiffs' claim against Robertson Ryan must be dismissed because the Plaintiffs have failed to allege that coverage for pandemics such as COVID-19 could have been secured in the marketplace.

In Illinois, the plaintiff in an action alleging negligence in responding to a request for insurance must establish that the requested insurance "could have been secured or that the insurance could have been secured elsewhere." *Geraghty v. Continental W. Life Ins. Co.*, 281 Ill.App.3d 669, 678 (1st Dist. 1996). In Missouri, an agent does not have a duty to procure coverage for a risk that is "uninsurable in any reputable company." *Zeff Distributing Co. v. Aetna Casualty & Surety Co.*, 389 S.W.2d 789, 796 (Mo. Sup. Ct. 1965). In Wisconsin, the plaintiff must establish that the requested policy was both commercially available as a general matter, and that an insurer would have issued the requested policy to the plaintiff specifically. *See Emer's Camper Corral,*

*LLC v. Alderman*, 943 N.W.2d 513 (Wisc. Sup. Ct 2020) (explaining that "if the insured requests a policy that is not available in the market, the insured's harm comes from its unavailability, not from the broker's failure to obtain what does not exist"). Ohio similarly holds that a plaintiff cannot establish causation if the requested policy is not actually available in the marketplace. *Carpenter v. Scherer-Mountain Ins. Agency,* 733 N.E.2d 1196, 1203 (Ohio Ct. App. 1999) ("The causation element requires a plaintiff to establish that he would not have suffered a loss but for the insurance agent's negligence"); *see also First Catholic Slovak Union v. Buckeye Union Ins. Co.*, 499 N.E.2d 1303, 1036 (Ohio Ct. App. 1986) (affirming judgment for insurance agent when "there was substantial evidence that no insurer would have provided greater protection" if the agent had attempted to procure the requested coverage).

Here, if the Cincinnati policy does not provide coverage for the Covid-19 pandemic, then the Plaintiffs have not alleged the existence of any insurance policy in the marketplace that Robertson Ryan could have procured that does provide coverage for the Covid-19 pandemic. Robertson Ryan is not liable to the Plaintiffs simply because Cincinnati denied coverage for the Plaintiffs' claim. Accordingly, Count III of the Plaintiffs' Complaint must be dismissed for failure to state a claim, because the Plaintiffs have failed to allege the existence of any insurance policy that Robertson Ryan could have procured that does provide coverage for the Covid-19 pandemic.

WHEREFORE, Defendant, ROBERTSON RYAN AND ASSOCIATES, INC., respectfully requests that this Honorable Court enter an Order dismissing Count III of the Plaintiffs' Complaint with prejudice, and for any further relief that this Honorable Court finds just and appropriate.

Dated: October 12, 2020

Respectfully submitted,

**ROBERTSON RYAN AND ASSOCIATES, INC.,**

By: 

*Brian H. Myers, one of its Attorneys.*

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**CERTIFICATE OF SERVICE**

I hereby certify that on October 12, 2020, I electronically filed the foregoing document with the Clerk of Court, and sent a copy of the foregoing document via electronic mail to:

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By: /s/ Brian H. Myers
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