No. 2—10—0258 & 2—10—0273 cons.
Order filed February 22, 2011



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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

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| MARTIN CARTAGE AND EXPRESS, INC., | ) | Appeal from the Circuit Court |
| | ) | of Du Page County. |
| Plaintiff-Appellant, | ) | |
| | ) | |
| v. | ) | No. 08—L—605 |
| | ) | |
| ARTHUR J. GALLAGHER AND COMPANY, | ) | |
| | ) | |
| Defendant-Appellee and | ) | |
| Third-Party Plaintiff | ) | |
| | ) | Honorable |
| (Lincoln General Insurance Company, | ) | Hollis L. Webster, |
| Third-Party Defendant). | ) | Judge, Presiding. |

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JUSTICE ZENOFF delivered the judgment of the court.
Justices Hutchinson and Hudson concurred in the judgment.

**ORDER**

*Held*: The trial court erred in dismissing plaintiff's complaint as barred by the two-year limitations period for actions pertaining to "sales" of insurance policies; as its claim was framed by its complaint, plaintiff did not contest the manner by which it obtained the policies, instead seeking funds that allegedly came due upon the policies' expiration.

Plaintiff, Martin Cartage & Express, Inc., sued defendant, Arthur J. Gallagher & Company, for its alleged failure to return unearned premiums under the terms of an insurance policy purchased by plaintiff from defendant. The trial court granted defendant's motion to dismiss the complaint

under section 2—619(a)(5) of the Code of Civil Procedure (Code) (735 ILCS 5/2—619(a)(5) (West 2008)) as barred by the two-year statute of limitations set forth in section 13—214.4 of the Code (735 ILCS 5/13—214.4 (West 2008)). Following the denial of its motion for reconsideration, plaintiff timely appealed. The issue on appeal is whether the two-year statute of limitations set forth in section 13—214.4 of the Code applies to plaintiff's cause of action. More specifically, the issue is whether plaintiff's cause of action concerns the "sale" of an insurance policy. See 735 ILCS 5/13—214.4 (West 2008). For the reasons that follow, we reverse and remand.

## I. BACKGROUND

Plaintiff is an Illinois corporation engaged in the cargo transportation business. Defendant is an Illinois corporation engaged in the sale of insurance products. Plaintiff's cause of action seeks a return of unearned premiums allegedly owed under a policy of insurance.

According to the complaint, in February 2004, plaintiff purchased an insurance policy from defendant, which policy covered the period from February 11, 2004, through February 11, 2005 (Policy One). The premium was based upon vehicle usage at a rate of $16.64 per 100 miles of use. Total use was estimated at 720,000 miles, and plaintiff paid defendant a $119,824 premium based on the estimate. The actual mileage of the insured vehicles for the term of Policy One was 560,380. According to plaintiff, this resulted in an earned premium of $93,247.23, and thus plaintiff was due a refund of $26,576.77 under the terms of Policy One.

The complaint further alleged that, in February 2005, plaintiff renewed Policy One for an extended period from February 11, 2005, through February 11, 2006 (Policy Two). The premium for Policy Two was based upon vehicle usage at a rate of $17.15 per 100 miles of use. Total use was estimated at 980,000, and plaintiff paid defendant a $168,114 premium based on the estimate. The

actual mileage of the insured vehicles for the term of Policy Two was 792,880. According to plaintiff, this resulted in an earned premium of $135,978.92, and thus plaintiff was due a refund of $32,135.08 under the terms of Policy Two.

On October 21, 2008, defendant filed a third-party complaint against Lincoln General Insurance Company, alleging that, to the extent any refund is due plaintiff, such payments should be made by Lincoln General, as the insurance carrier and provider of the policies at issue.

On October 8, 2009, defendant moved to dismiss the complaint, arguing that it is barred by the two-year statute of limitations set forth in section 13—214.4 of the Code. According to defendant, plaintiff's cause of action as to Policy One accrued upon Policy One's February 11, 2005, expiration, and its cause of action as to Policy Two accrued upon Policy Two's February 11, 2006, expiration. Thus, according to defendant, plaintiff's complaint, filed more than two years later on May 29, 2008, is untimely.

Plaintiff argued in response that section 13—214.4 of the Code is limited to causes of action "concerning the sale, placement, procurement, renewal, cancellation of, or failure to procure any policy of insurance" (735 ILCS 5/13—214.4 (West 2008)). According to plaintiff, it makes no claim relating to the sale price of the policies and has tendered payment in full. Plaintiff maintained that its cause of action arises out of the breach of the insurance policy, specifically the provision providing for the return of unearned premiums, and thus it is governed by the 10-year statute of limitations for written contracts provided by section 13—206 of the Code (735 ILCS 5/13—206 (West 2008)). Plaintiff also argued that defendant should be equitably estopped from relying on the statute of limitations.

On November 12, 2009, the trial court, relying on *United General Title Insurance Co. v. AmeriTitle, Inc.*, 365 Ill. App. 3d 142 (2006), and *Indiana Insurance Co. v. Machon & Machon, Inc.*, 324 Ill. App. 3d 300 (2001), granted defendant's motion and dismissed plaintiff's complaint, stating: "I think that the law is clear that the two-year statute applies to all causes of action brought by any person or entity under any theory, and this breach of contract theory would be included in that statute. And I do find that a cause of action for return of premiums falls within the sale provision of the statute." Further, the court rejected plaintiff's argument that defendant should be equitably estopped from relying on the statute of limitations.

The trial court denied plaintiff's subsequent motion for reconsideration and found that there was no just reason to delay appeal or enforcement of the order. Plaintiff timely appealed. Plaintiff argues that the trial court erred in dismissing its complaint against defendant, because the statute of limitations set forth in section 13—214.4 of the Code is inapplicable to its cause of action.

## II. ANALYSIS

Defendant moved to dismiss plaintiff's complaint under section 2—619(a)(5) of the Code, which authorizes a court to dismiss a complaint if the complaint was "not commenced within the time limited by law." 735 ILCS 5/2—619(a)(5) (West 2008). A motion to dismiss a complaint under section 2—619(a)(5) admits the legal sufficiency of the complaint, along with all well-pleaded facts and the inferences drawn therefrom. *Sorce v. Armstrong*, 399 Ill. App. 3d 1097, 1098 (2010). We review *de novo* dismissals under section 2—619(a)(5). *Alvarez v. Pappas*, 229 Ill. 2d 217, 220 (2008). In deciding whether the dismissal was proper, we are necessarily called upon to interpret section 13—214.4 of the Code. Questions of statutory interpretation are issues of law, which are similarly reviewed *de novo*. *Id.*

Section 13—214.4 of the Code provides that "[a]ll 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 2008).

In interpreting a statute, the primary objective is to ascertain and give effect to the intent of the legislature. *General Motors Corp. v. State of Illinois Motor Vehicle Review Board*, 224 Ill. 2d 1, 13 (2007). The most reliable indicator of the legislature's intent is the language of the statute, which "must be afforded its plain, ordinary, and popularly understood meaning." *Alvarez*, 229 Ill. 2d at 228. If the language of the statute is clear and unambiguous it must be given effect as written and we may not resort to further aids of construction. *Krautsack v. Anderson*, 223 Ill. 2d 541, 553 (2006). "In determining the meaning of undefined terms in a statute, a court may turn to the dictionary for assistance." *Alvarez*, 229 Ill. 2d at 225.

The sole issue here is whether plaintiff's cause of action concerns the "sale" of a policy of insurance. Plaintiff argues that it does not because, according to plaintiff, the sale had long been completed. According to plaintiff, its "complaint relates to an insurance policy fully paid in advance, with the contractual agreement that unearned premiums for undriven mileage would be returned to the Plaintiffs subsequent to the expiration of the policy in accordance with an audit of the mileage actually driven." In response, defendant maintains that the cause of action does concern the sale of the policies because "at the heart of every 'sale' is the promise to pay a certain price. Here, the parties dispute the price of the insurance policies sold to and purchased by [plaintiff]." According

to defendant, plaintiff brought its cause of action because "an agreement was apparently not reached on the payment."

We agree with plaintiff and find that its cause of action does not concern the sale of the policies. Black's Law Dictionary defines "sale" as: "The transfer of property or title for a price" (*Black's Law Dictionary* 1364 (8th ed. 2004)), and further as: "The agreement by which such a transfer takes place" (id.). It notes that the four elements of a sale are: "(1) parties competent to contract, (2) mutual assent, (3) a thing capable of being transferred, and (4) a price in money paid or promised." *Id*. Defendant attempts to frame the dispute as being one concerning the "price" of the policies. However, the factual allegations of the complaint, which we must take as true for purposes of the motion to dismiss (*see Morr-Fitz Inc. v. Blagojevich*, 231 Ill. 2d 474, 488 (2008)), establish that the parties did agree on a price. According to the complaint, the price, *i.e.* the premium amount, for Policy One "was based upon vehicle usage at a rate of $16.64 per 100 miles of use," and the premium for Policy Two "was based upon vehicle usage at a rate of $17.15 per 100 miles of use." These price-per-mile formulas were applied to estimated mileage to determine the premiums by which plaintiff paid for the policies. We agree with plaintiff that, as alleged in the complaint, the sale of each policy took place when the premium was paid, and plaintiff makes no claim concerning either sale. Rather, the issue is whether defendant breached the terms of the policies (which were attached to the complaint) after they expired by failing to refund amounts actually paid for miles not driven.

Neither of the cases relied on by the trial court supports its conclusion that section 13—214.4 of the Code applies to plaintiff's cause of action. Unlike the issue in the present case, the issue presented in *Indiana Insurance* concerned *who* may bring an action under section 13—214.4. There,

the plaintiff, an insurance company, sued the defendant, its agent, seeking reimbursement for a claim paid to an insured. The plaintiff alleged that it had issued a policy to the insured, which policy provided for " 'actual cash value' coverage in the instance of a fire loss and specifically excluded 'replacement cost' benefits." *Indiana Insurance*, 324 Ill. App. 3d at 301. At some point thereafter, the defendant transmitted a document to the insured that indicated the insured's building was covered at " 'replacement cost.' " *Id.* The plaintiff argued that, as a direct result of the defendant's conduct, the plaintiff became liable to the insured for the replacement cost of the building. Its cause of action sought the difference between the replacement cost and the actual cash value that it would have been obligated to pay under the original policy. *Id.*

On appeal from the trial court's grant of the defendant's motion to dismiss, the plaintiff argued that section 13—214.4 of the Code was limited to claims brought by insureds against insurance brokers or agents and that it did not apply to causes of action brought by insurance companies. The First District disagreed and affirmed the dismissal. The First District did not specifically address whether the nature of the plaintiff's cause of action "concern[ed] the sale, placement, procurement, renewal, cancellation of, or failure to procure any policy of insurance" as required by section 13—214.4 of the Code (735 ILCS 5/13—214.4 (West 2008)). Rather, it stated: "The statute as written is unequivocal and subject to only one reasonable interpretation: that *all* causes of action brought by *any* person or entity under *any* theory against an insurance producer shall be brought within two years of the date the cause of action accrues." (Emphasis in original.) *Id.* at 303. In so stating, however, the court overly broadened the reach of the statute as it did not note the statute's limited causes of actions. Indeed, the court's statement effectively rendered the limiting language meaningless.

Like *Indiana Insurance*, *United General* involved a complaint brought by an insurance underwriter against its agent. According to the complaint, United General and AmeriTitle entered into an agreement (the Agreement) that allowed AmeriTitle to solicit applications for title insurance and to issue insurance commitments on behalf of United General. AmeriTitle issued a title loan policy to Washington Mutual Bank, insuring that the title to a piece of real estate was in the name of Josephine Czech and that Washington Mutual had the first mortgage lien on the property. It was later discovered that a land trust held title to the property and that the trust had executed a mortgage that predated Washington Mutual's loan. United General demanded that AmeriTitle reimburse and indemnify it for the amount it had spent to resolve the title and lien issues pursuant to the policy, but AmeriTitle refused. United General sued AmeriTitle, and AmeriTitle moved to dismiss, arguing that the complaint was time-barred under section 13—204 of the Code (relating to contribution and indemnity claims) and under section 13—214.4 of the Code. The trial court granted the motions. *Id*. at 145-47.

On appeal, United General argued, *inter alia*, that section 13—214.4 of the Code did not apply, because its claim arose out of and concerned its Agreement with AmeriTitle and did not concern the sale, placement, procurement, renewal, or cancellation of an insurance policy as required by section 13—214.4. According to United General, its claim against AmeriTitle arose from AmeriTitle's breach of its contractual duty under the Agreement to properly review a chain of title rather than from the policy. The First District disagreed. *Id*. at 151. The court found that, based on the allegations in the complaint, which focused specifically on AmeriTitle's acceptance of Washington Mutual's application for a commitment for an insurance policy and its issuance of the policy, United General's claim concerned the sale and procurement of an insurance policy. *Id*. at

152-53. In rejecting United General's argument that the allegations in the complaint related to the Agreement (specifically to AmeriTitle's breach of its contractual duty under the Agreement to properly review a chain of title) and thus that the 10-year statute of limitations relating to written contracts (735 ILCS 5/13—206 (West 2004)) should control, the court stated, "[w]e do not believe that the gravamen of United General's complaint rests on the nonperformance of a contractual obligation sufficient to invoke the statute of limitations set forth in section 13—206." *Id*. at 154. Thus, the court looked to the allegations in the complaint when determining whether the cause of action fell within the provisions of section 13—214.4 of the Code.

Unlike the complaints in *Indiana Insurance* and *United General*, here the gravamen of plaintiff's complaint rests upon the alleged breach of contractual duties by defendant. Both *Indiana Insurance* and *United General* involved causes of action by insurance companies seeking indemnification from their agents for claims they were required to pay to insureds under coverage provided by insurance policies, where the insureds' claims resulted from acts of the agents *that occurred during the sale and procurement of the policies*. For instance, the claim in *Indiana Insurance* resulted from the agent's act of transmitting a document to the insured indicating that the insured's building was covered at replacement cost rather than actual cost as provided in the policy. And the claim in *United General* resulted from the agent's act of failing to properly review a chain of title during the sale and procurement of the policy. This case is distinguishable because none of the allegations involve any acts that took place during the sale of any policy. Plaintiff has no quarrel with how it procured the policies or what it paid to purchase them. Instead, it seeks money that allegedly came due upon their expiration. Regardless whether its claim has merit, it does not concern a sale.

Accordingly, we hold that, because plaintiff's cause of action does not concern the "sale" of an insurance policy, it is not barred by the two-year statute of limitations set forth in section 13—214.4 of the Code.

## III. CONCLUSION

Based on the foregoing, we reverse the dismissal of plaintiff's complaint and remand for further proceedings.

Reversed and remanded.