2011 IL App. (1st) 110379-U

SECOND DIVISION
NOVEMBER 15, 2011

No. 1-11-0379

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MOUNT MANSFIELD INSURANCE GROUP, INC.,	)	Appeal from the Circuit Court of Cook County
Plaintiff-Appellant,	)	
v.	)	07 L 9629
AMERICAN INTERNATIONAL GROUP, INC., INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, ILLINOIS NATIONAL INSURANCE COMPANY, NATIONAL UNION FIRE INSURANCE COMPANY, AIG RISK MANAGEMENT, INC., and AIG CLAIM SERVICES, INC.,	)	Honorable Charles Winkler, Judge Presiding
Defendants-Appellees.	)	

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Quinn and Justice Cunningham concurred in the judgment.

ORDER

Held: Claims for breach of contract, breach of fiduciary duty, and spoliation were properly dismissed because plaintiff failed to allege crucial facts in complaint supporting, among other things, agency authority of individuals who negotiated alleged contracts.

¶1 Plaintiff Mount Mansfield Insurance Group, Inc., filed this action against defendants American International Group, Inc. (AIG), Insurance Company of the State of Pennsylvania (PENN), Illinois National Insurance Company (ILLCO), National Union Fire Insurance Company (NUFIC), AIG Risk Management, Inc. (AIGRM), and AIG Claims Services, Inc.

(AIGCS). In its final form, the complaint alleged breach of contract, breach of fiduciary duty, and negligent spoliation of evidence. The trial court dismissed all of these claims under section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2010)). We affirm.

¶2 I. BACKGROUND

¶3 The alleged facts of this case are extraordinarily complex, so we will briefly overview plaintiff's allegations and refer to additional relevant allegations as necessary during our analysis. Plaintiff is a "captive" insurance company, which is a type of insurance company that is formed by other companies in order to manage the insurance risk of the parent companies.[1] In 1992, as part of a plan to reduce the insurance risk of plaintiff's parent companies, plaintiff alleged that it entered into a complex series of agreements with AIG and a group of its affiliates or subsidiaries, some of which are named defendants in this lawsuit and some of which are not. In essence, plaintiff claims that AIG and its affiliates agreed to manage all aspects of the program. The whole endeavor was to be initially capitalized by plaintiff's parent companies and then sustained by insurance premiums from the parent companies.

¶4 The plan did not work out. Plaintiff eventually lost millions of dollars in assets, which plaintiff alleges was due to AIG's mismanagement. (Whether this mismanagement was deliberate or merely negligent is unclear, since plaintiff makes both claims at different points.) In late 1996, AIG allegedly informed plaintiff that plaintiff was nearly insolvent and needed a significant infusion of cash in order to stay afloat. Plaintiff believed that this was not true, though how plaintiff knew this is unclear given that plaintiff also alleges that all of its records and account books were in the possession of one or more defendants. Regardless, plaintiff refused to deposit additional funds. According to plaintiff, AIG then offered to buy plaintiff out

[1] The parent companies formed a company known as MMIG, Inc., which in turn formed plaintiff.

for about $200,000, which plaintiff believed to be much lower than its actual net worth. Again, plaintiff refused.

¶5 According to plaintiff, AIG (or one of the other defendants[2]) retaliated against plaintiff by altering plaintiff's records to make it appear that plaintiff's cash reserve needs were much higher than they actually were and then presented the doctored accounts to the Vermont Department of Insurance.[3] This resulted in a protracted regulatory investigation and the initiation of a regulatory "rehabilitation" proceeding beginning in 1997. During the proceeding, plaintiff was placed under the control of another AIG affiliate, AIG Insurance Management Services (AIMS), which is not a named defendant in this case. AIG and the other defendants continued to run the insurance program during the rehabilitation and, according to plaintiff, continued to mismanage it.

¶6 About five years later, a Vermont court found that the reserves in the accounts were inaccurate and that plaintiff was not in fact insolvent. The court released plaintiff from rehabilitation. According to the complaint, plaintiff was unable to gain control of its records from defendants until 2003, and some records could not be located until 2005. Plaintiff filed the current action in the circuit court in 2007.[4]

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[2] It is sometimes difficult to tell which defendant allegedly performed a particular action because the complaint and plaintiff's brief use "AIG" interchangeably in order to refer to both the company itself and defendants collectively.

[3] Plaintiff is incorporated in Vermont, making plaintiff subject to the regulatory authority of the State of Vermont.

[4] It appears that MMIG brought an ultimately unsuccessful shareholder derivative action against defendants in 1997 (*Aldworth v. AIG,* No. 97 L 14647 (Cir. Ct. Cook Co.)), and in 2005 plaintiff itself filed a lawsuit against defendants (see *Mount Mansfield Insurance Group, Inc. v. American International Group, Inc.*, 372 Ill. App. 3d 388 (2007) (reversing dismissal of the lawsuit on *res judicata* grounds and remanding to the circuit court)). We do not know what eventually happened to the 2005 lawsuit after remand. The parties did not refer to or explain it in their briefs, though defendants do mention the 1997 shareholder action in connection with their statute of limitations argument.

¶7 Plaintiff's first four complaints were dismissed for failure to state a claim or were voluntarily amended, and the complaint that is now primarily at issue on appeal is the fourth amended complaint. In this complaint, which contains 14 counts and runs to 46 pages (138 pages if exhibits are included), plaintiff brought claims for breach of oral and written contracts, breach of fiduciary duty, and negligent spoliation. As they had with the previous complaints, defendants moved to dismiss under section 2-615 of the Code of Civil Procedure (735 ILCS 2-65 (West 2010)).[5] Following full briefing and extensive oral arguments, the trial court granted defendants' motion and dismissed the complaint. Plaintiff appeals.

¶8 II. ANALYSIS

¶9 Plaintiff's fourth amended complaint is complicated, so we will take a few moments here to set forth a coherent framework for plaintiff's theories before analyzing them.[6] This appeal comes to us on defendants' motion to dismiss under section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2010)), so we assume that all well-pleaded facts in the complaint are true and interpret them in the light most favorable to plaintiff. See *Vitro v. Mihelcic*, 209 Ill. 2d 76, 81 (2004). We review the legal sufficiency of the complaint *de novo*. See *id.*

¶10 The factual background set forth in the complaint details a long history of interaction between plaintiff and various defendants and third parties, starting in 1992 before plaintiff was even incorporated. In essence, plaintiff alleges that in the early 1990s, at the suggestion of a third party, representatives of plaintiff's parent companies met with alleged agents of AIG or one

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[5] Defendant also moved to dismiss under section 2-619 (735 ILCS 2/2-619 (West 2010)), on the grounds of statute of limitations and the existence of an arbitration clause. Given our disposition of this appeal, we do not reach these arguments.

[6] The previous complaints were apparently no easier to comprehend in the circuit court, and the record contains several memorandum orders and transcripts of hearings in which the circuit court explained the complaint's pleading deficiencies and how to remedy them.

of its affiliates and heard a presentation about how to reduce insurance risk exposure through the creation of a captive insurance company. Plaintiff's parent companies liked what they heard and decided to create plaintiff. The parents were responsible for initial capitalization and would pay insurance premiums, while AIG or its designates would be responsible for managing the operations of the whole program. The plan did not work out, allegedly due to AIG's mismanagement of plaintiff's affairs.

¶ 11 The complaint is complicated because plaintiff has many alternative theories about who is responsible for the alleged mismanagement and exactly which obligations they breached. The problem is exacerbated by the fact that few of these theories are supported by written contracts attached to the complaint. (Plaintiff asserts that this is defendants' fault, but we will discuss that allegation further when we address the spoliation claim.) Plaintiff alleges that several oral agreements were reached during preliminary discussions with AIG's alleged agents, and that these agreements included terms that were later not included in the written agreements.

¶ 12 There are two important written agreements attached to the complaint: a 1994 "Management Agreement" between AIG Captive Management Company (AIGCMC) and plaintiff, in which AIGCMC agrees to take on management responsibilities for the whole program,[7] and a 1993 "Reinsurance Agreement" (with addenda) between plaintiff and PENN, ILLCO, and NUFIC. The idea behind most of plaintiff's complaint, however, is that during the negotiations leading up to the execution of these written agreements, AIG or AIGRM agreed to create something that plaintiff calls the "All Inclusive Insurance Agreement," under which, among other things, those defendants "would be responsible for every aspect of the insurance program and be a fiduciary to [plaintiff]," and that "AIG and AIGRM were to make sure that

[7] AIGCMC is not a party to this case, but plaintiff alleges (without supporting facts) in the complaint's background section that it is either a wholly owned subsidiary of AIG or was acting as AIG's agent at the time.

[plaintiff] was protected and that all written contracts for every aspect of the insurance program were timely prepared and would protect [plaintiff]." The problem, of course, is that none of these rather expansive duties appear in any written contract with the named defendants, so plaintiff alleges either that (1) the contract was oral and in addition to the written agreements that plaintiff later executed with AIGCMC and PENN, ILLCO, and NUFIC; or (2) alternatively, defendants failed to draft the written agreement that included all of these duties, as required under the oral agreement.

¶ 13 We have not said much about the other named defendants yet because their involvement in this whole affair is attenuated and based on a fairly complicated theory of agency. Based on some statements by AIG's alleged agents, plaintiff is essentially alleging that all of the defendants are effectively indistinguishable or acted in concert and are therefore responsible for each other's actions.

¶ 14 Taking all of this into account, what we have are these core allegations: in 1992, defendants' agents made an oral agreement (or agreements) with plaintiff prior to and separate from subsequently executed written contracts, in which defendants agreed to become plaintiff's fiduciaries and manage the captive insurance program. Defendants then allegedly (1) failed to reduce the oral agreement to writing or, alternatively, failed to preserve the written contract that memorialized the oral agreement; (2) breached the oral agreement by mismanaging the insurance program; (3) breached any written agreements that may have been made by mismanaging the program; or (4) breached their fiduciary duties by mismanaging the program. Each count in the complaint is simply a variation on these themes and allegations.

¶ 15 The starting point, then, is the 1992 meeting at which the oral agreements were allegedly made and that underpins many of the remaining allegations. Given that many of the allegations against the various named defendants depend on a theory of agency, it makes sense to begin there.[8]

¶ 16 A. Agency

¶ 17 In May 1992, plaintiff met with Jack Costigan and Jack Giesen, whom it alleges were agents of not only AIG and AIGRM but all defendants. In support of this allegation of agency, plaintiff alleges at various points in the complaint that Giesen and Costigan presented themselves as "representatives" of AIG and AIGRM, and represented that "it would make no difference to [plaintiff] if [plaintiff] was dealing with AIGCM or directly with AIGRM," or that "the AIG family of entities were seemless [*sic*] and could be considered as one entity. [Giesen and Costigan] represented that they could make representations on behalf not only of AIG and AIGRM, but on behalf of their divisions, subsidiaries and affiliates." Plaintiff also alleged, without giving any details, that "[f]requently, one individual would sign on behalf of more than one AIG entity."

¶ 18 Plaintiff alleged that at the May 1992 meeting Giesen and Costigan orally proposed not only the All Inclusive Insurance Agreement but also a "Reinsurance Agreement," which was a program that was designed to allow AIG subsidiaries or affiliates and "fronting" companies to provide insurance to plaintiff's shareholders but make plaintiff financially responsible for any net losses. Both the All Inclusive Insurance Agreement and the Reinsurance Agreement allegedly ran for recurring policy periods of one year beginning in 1992/1993. Plaintiff accepted Giesen and Costigan's offer (when and how it was accepted is not specified), and Giesen and Costigan also allegedly agreed to reduce the oral agreements to writing and forward them to

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[8] In fact, plaintiff concedes in its reply brief that agency is crucial to this case, noting that agency "is determinative for Counts I, II, IV, V, IX, X, XI, XII, and XIII."

plaintiff. They never did, which is allegedly why plaintiff is now forced to proceed on theories of breach of oral contract rather than written contract.

¶ 19 Given that plaintiff alleges that the oral contracts were concluded with Giesen and Costigan, as a threshold matter plaintiff's claims against defendants depend in large part on adequately pleading that Giesen and Costigan were agents of defendants in May 1992. At the pleading stage a plaintiff must allege specific facts in support of a claim of agency. See *HPI Health Care Services, Inc. v. Mt. Vernon Hospital, Inc.*, 131 Ill. 2d 145, 163 (1989). As the supreme court has explained,

> "a plaintiff can establish the existence of an agency relationship even though the plaintiff cannot directly demonstrate its existence (*e.g.*, by showing that the principal and agent had expressly agreed to the agency). In the absence of such direct proof, the plaintiff may establish the existence of an agency relationship through circumstantial evidence from which it can be inferred that an agency relationship existed. [Citation.] Nevertheless, the plaintiff must still allege specific facts regarding the circumstances of the situation from which the existence of the relationship can be inferred." *Id.*

¶ 20 So what specific facts does plaintiff allege about Costigan and Giesen? We know that they met with plaintiff in May 1992 (and maybe later, though precisely when, where, and under what circumstances is not at all clear), and that they presented themselves as "representatives" of AIG.[9] They also represented that there was no functional distinction between defendants. The

[9] We think it important to point out a significant anomaly in plaintiff's allegations here. The complaint alleges that plaintiff concluded the oral contracts with Giesen and Costigan in May 1992, but the complaint also alleges that plaintiff "was incorporated under the law of the state of Vermont then received authority to transact business on June 12, 1992." We find it odd that plaintiff claims to have concluded an oral contract with defendants before plaintiff even existed. This could conceivably be possible if a promoter concluded the deal and plaintiff subsequently ratified it after incorporation (see, *e.g.*, *Carallo v. Irwin*, 2011 IL App (1st) 102765, ¶ 35), but the complaint does not contain any allegations to that effect. Regardless, neither defendants nor the trial court raised this anomaly as part of the motion to dismiss, so we will not explore it further.

complaint does not detail where this meeting took place or who the attendees were, nor does it explain who exactly Giesen and Costigan are or how they came by their alleged authority to represent defendants' interests. The complaint tells us next to nothing about Giesen and Costigan other than that they claimed to act on defendants' behalf.

¶21 This threadbare claim is problematic, given the long-settled principle that "the mere statements of the agent made out of the presence of the principal and not subsequently approved by him are not admissible to establish the existence of such relationship. [Citations.] This is in recognition of the rule that the principal is the source of power and that the agent's authority can be proved only by tracing it to that source in some word or act of the alleged principal." *Evanston v. Piotrowicz*, 20 Ill. 2d 512, 519-20 (1960); accord *Lang v. Consumers Insurance Service, Inc.*, 222 Ill. App. 3d 226, 232 (1991). Other than Giesen and Costigan's own statements, the complaint does not set forth any facts that would lead us to believe that any of the defendants approved the agreements that Giesen and Costigan allegedly entered into with plaintiff. In fact, it is telling that plaintiff alleges that Giesen and Costigan agreed to reduce the oral All Inclusive Insurance Program and Reinsurance Agreement to writing and forward copies to plaintiff, purportedly on defendants' behalf. Yet the complaint also alleges that this never happened, which indicates that, assuming for the moment that Giesen and Costigan did in fact make an oral agreement with plaintiff, defendants did not subsequently approve their actions. Taking the complaint at face value, such actions by defendants are incompatible with plaintiff's claim that Giesen and Costigan were acting as defendants' agents when the alleged oral agreements were concluded in May 1992.

¶22 In support of its claim that Giesen and Costigan were in fact defendants' agents, plaintiff relies largely on *Devers v. Prudential Property & Casualty Insurance Co.*, 86 Ill. App. 3d 542

(1980). In that case, the plaintiff called the defendant's office in order to obtain an automobile insurance policy. After providing information to and discussing the policy with individuals at the office, the plaintiff was told that the defendant would send her a bill and the policy. The plaintiff was involved in a car accident that very night, but the defendant denied coverage on the ground that the individuals who spoke with the plaintiff lacked agency authority. After a bench trial found in favor of the defendant, this court reversed on appeal. We held that the plaintiff had demonstrated enough facts to establish a prima facie case of apparent agency, and therefore the burden shifted to the defendant to prove lack of actual authority. See *id.* at 545-47.

¶ 23 *Devers* is easily distinguishable on its facts. As we noted in *Devers*,

> "While it is generally true that authority cannot be proved by declarations of the alleged agent [citation] the case law is settled that a member of the public who telephones a business concern may presume that the person answering the telephone has authority to speak for the business firm. [Citations.] Plaintiff telephoned the listed number for [defendant] and was connected with [the purported agent], who entered into a detailed conversation about plaintiff's coverage, inquired about the type of automobile involved, and assured plaintiff that she was covered. We believe that these acts and circumstances are sufficient proof of Moscoff's implied authority as defendant's agent." *Id.* at 546.

¶ 24 As we observed above, the complaint in this case contains no details about the circumstances of the May 1992 meeting with Giesen and Costigan. We are not told whether plaintiff arranged the meeting by calling AIG's offices, whether the meeting occurred in AIG's offices, or even whether Giesen and Costigan introduced themselves with AIG-printed business cards or operated out of AIG offices. There are simply no factual allegations in the complaint from which we can infer that Giesen and Costigan had authority to act on behalf of AIG in May 1992, other than their own representations. This is insufficient to support an allegation of agency against AIG, much less against the other defendants. See *HPI Health Care Services, Inc.*, 131 Ill. 2d at 163.

¶ 25 Regarding the rest of defendants, aside from plaintiff's allegation that Giesen and Costigan claimed to represent the entire "AIG family," the only allegation that could conceivably support a claim that they acted as agents for all defendants is plaintiff's claim that "[f]requently, one individual would sign on behalf of more than one AIG entity." Yet there are no details in the complaint to support this allegation, and the complaint alleges no specific dates, locations, documents, or other circumstances to explain what it means. We are left to guess what the complaint is referring to, which is insufficient to state an allegation of agency. See *id.* at 163; *Napleton v. Village of Hinsdale*, 229 Ill. 2d 296, 305 (2008) ("Because Illinois is a fact-pleading jurisdiction, a plaintiff must allege facts, not mere conclusions, to establish his or her claim as a viable cause of action.").

¶ 26 Leaving aside the complaint's facial deficiencies, we are compelled to observe that plaintiff's brief on appeal on this point contains what we can most charitably describe as mischaracterizations of the record. In support of its agency argument, plaintiff argues that the complaint in fact alleges that Giesen and Costigan "operated out of the AIG office [citation] and that they called a meeting on behalf of AIG. [Citation.]" These allegations would certainly make this case much more analogous to *Devers*, but plaintiff's arguments (which include citations to the record) misrepresent the actual allegations contained in the complaint. Contrary to plaintiff's representations in its brief, nowhere does the complaint contain an allegation that Giesen and Costigan worked out of AIG offices. Moreover, the section of the complaint cited by plaintiff merely alleges that Giesen and Costigan made "representations in or about late May 1992" and that "[t]here [*sic*] representations *** were repeated at numerous conferences with [plaintiff] in 1992, 1993, 1994, and 1995 ***." Nowhere does the complaint confirm plaintiff's assertion that Giesen and Costigan "called a meeting on behalf of AIG." We remind plaintiff's appellate counsel of their duty of candor. See Ill. S. Ct. R. 137 (eff. Feb. 1, 1994); Ill. Rs. Prof. Conduct 3.3(a)(1) (eff. Jan. 1, 2010).

¶ 27 With all of that said, the complaint simply does not plead sufficient facts from which we can infer that Giesen and Costigan were acting as agents of defendants in May 1992, even if we assume for the sake of argument that they did discuss an oral contract with plaintiff for the All Inclusive Services agreement and the Reinsurance Agreement at the May 1992 meeting. As the circuit court noted when it arrived at the same conclusion, plaintiff's failure to adequately allege agency is fatal to the majority of the counts in the complaint.

¶ 28 B. Breach of Contract Counts

¶ 29 Without agency, most of plaintiff's breach of contract counts fail to state a claim against defendants. We will examine each briefly in turn, though most of the deficiencies are the same. The various counts make similar accusations, but each count is directed against specific defendants or is limited to particular time periods. A breach of contract claim requires allegations "of a valid and enforceable contract, performance of the contract by the plaintiff, breach of the contract by the defendant, and resulting injury to the plaintiff." *Carlton at the Lake, Inc. v. Barber*, 401 Ill. App. 3d 528, 531 (2010). "Included in the formation of a valid contract are offer and acceptance, consideration, and definite and certain terms." *Id.*

¶ 30 Although defendants also argue (and the trial court agreed) that plaintiff has failed to state a claim for breach of contract because the terms of the alleged contract are insufficiently definite and certain, we need not reach that issue because of the problems with plaintiff's agency allegations. Given Costigan and Giesen's lack of agency authority, the only way that defendants could be bound by the alleged contracts is through ratification. As the supreme court has explained, "ratification of an unauthorized act is tantamount to an original authorization and confirms what was originally unauthorized. [Citation.] The principle behind the doctrine of ratification is that the person ratifying secures a benefit through the actions of another who is acting on his behalf with apparent or implied authority. [Citation.] If there is no benefit, ratification will not be implied." *Horwitz v. Holabird & Root*, 2121 Ill. 2d 1, 14-15 (2004).

¶ 31 Count I claims that AIG and AIGRM breached the oral All Inclusive Insurance Agreement that was concluded in May 1992 with Giesen and Costigan. Given that the complaint fails to establish agency, plaintiff must plead that AIG and AIGRM somehow ratified the All Inclusive Insurance Program in order to state a valid breach of contract claim against those defendants. Regarding the benefit that defendants allegedly received from this oral agreement, the complaint alleges:

> "108. AIG and AIGRM assessed charges and withdrew substantial funds during 1992 to pay themselves for this all inclusive agreement and thereby received good and valuable consideration.
>
> 109. AIG and AIGRM assessed charges and withdrew substantial funds during 1993 to pay themselves for this all inclusive agreement and thereby received good and valuable consideration.
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> 110. This good and valuable consideration *was separate and apart from other charges and fees* that were being assessed by other AIG and AIGRM subsidiaries and affiliates. By way of example and not limitation, separate fees

were charged for investment advisory services. [Citation to Exhibit K of the complaint.]

111. According to AIG Insurance Management Services, Inc., the Premium assumed in 1992/1993 was $10,415,391.80. One percent of that [*i.e.*, the alleged fee to defendants] would be $104, 153.92. If that was all that was charged by AIG and AIGRM, it was not broken out separately, but was included in the almost $3,000,000 in expenses charged to [plaintiff] by defendants. [Citation to Exhibit L of the complaint.]" (Emphasis added.)

¶ 32 These are incredibly vague allegations, but it appears that plaintiff is essentially alleging that AIG and AIGRM's benefit was additional fees received from plaintiff that were not covered by other, written agreements such as the Management Agreement or the Reinsurance Agreement. The most specific allegation is paragraph 110, which purports to refer to an attached exhibit as an example of the benefit conferred to AIG and AIGRM. Yet Exhibit K turns out to be a one-page summary of plaintiff's investment income from the years 1994 and 1995, several years after the alleged oral contract. There is a line item for "Investment Fees," which we assume is what plaintiff is referring to in paragraph 110, but there is no indication anywhere in Exhibit K regarding to whom this fee was paid. Exhibit L, referred to in paragraph 111, is similarly unhelpful. That exhibit is simply a one-page summary (from 1997) of plaintiff's financials going back to 1992/1993, but nowhere does it indicate that any fees were paid to AIG or AIGRM. Exhibit L merely summarizes plaintiff's underwriting income and losses for those years.

¶ 33 Much like the agency allegations and again contrary to plaintiff's assertions, the complaint contains only conclusory allegations without supporting facts that AIG and AIGRM received some benefit from the alleged oral All Inclusive Insurance Agreement above and beyond what may have been contemplated by other written agreements. Even if we assume that plaintiff made an oral contract with Giesen and Costigan for this program, these conclusory allegations cannot support plaintiff's claim that AIG and AIGRM ratified the alleged contract. Count I therefore fails to state a claim for breach of contract against AIG and AIGRM.

¶ 34 Count II is also directed against AIG and AIGRM. This count alleges breach of a written All Inclusive Services Agreement contract, and the only new allegations are that Giesen and Costigan agreed to reduce the oral agreement to writing and failed to do so. Oddly, this count does not contain any allegations of a breach, which makes it deficient as a matter of law. See *Carlton at the Lake*, 401 Ill. App. 3d at 531. The count does purport to incorporate Count I by reference, but this merely imports Count I's fatal infirmities into Count II. Either way, Count II fails to state a claim for breach of contract against AIG and AIGRM.

¶ 35 Count III is another attempt to plead breach of the alleged All Inclusive Services Agreement, this time against AIG and AIGRM "through" AIGCMC and AIMS. According to this count, plaintiff signed the Management Agreement with AIGCMC in 1994, as well as an addendum (between AIMS and plaintiff) at the end of 1995 that noted that AIMS was an alias of AIGCMC and retroactively extended the Management Agreement through 1995. Plaintiff alleges that Giesen and Costigan had presented the Management Agreement to plaintiff in early 1994, and that the Management Agreement "was not intended to limit the scope or extend the duties and obligations of AIG and AIGRM under the prior oral agreements." Plaintiff then repeats verbatim its allegations of breach from Count I.

¶ 36 It is difficult to tell precisely what plaintiff's theory is on this count. Given that plaintiff refers to the Management Agreement and claims that this breach occurred "through" AIMS and

AIGCMC, it appears that plaintiff is alleging that AIG and AIGRM somehow breached the Management Agreement. Yet the complaint does not specify which provisions of the Management Agreement were allegedly breached, and AIG and AIGRM are not signatories of the Management Agreement. If plaintiff means to allege that the 1994 Management Agreement somehow incorporated or ratified the oral All Inclusive Services Agreement, then the complaint fails to allege that fact. Indeed, this count claims (without providing any details) that the Management Agreement "was to supplement the prior all inclusive services agreement," an allegation that is not supported by any language in the Management Agreement itself. (This allegation also raises the specter of the parol evidence rule, which we will discuss in detail in relation to Counts V and VI.) What is more, even if either of these two theories is what plaintiff intended to allege, there are no facts in the complaint that support the allegation that AIGCMC and AIMS were agents of AIG and AIGRM other than plaintiff's oft-repeated, insufficient allegation about Giesen and Costigan's representations. Either way, this count fails to state a claim for breach of written contract.

¶ 37 Count IV is yet another attempt to plead AIG and AIGRM's breach of the All Inclusive Services Agreement, this time as an oral contract for the 1996 policy period "through" AIGCMC. This count adds nothing new, instead merely repeating the same alleged breaches from previous counts and incorporating by reference Count I. This count claims that the oral agreement from Count I was "continuing and in effect in 1996," so we must assume that plaintiff is claiming another, later breach of the same All Inclusive Services Agreement discussed in Count I. What is odd about this count is that it purports to be "through" AIGCMC, yet contains no allegations about AIGCMC at all. Regardless, this count fails for the same reasons already discussed in relation to Count I.

¶ 38 Counts V and VI are different from the previous counts. In these counts, plaintiff alleges that AIG and AIGRM (Count V) or ILLCO, PENN, and NUFIC (Count VI) breached an alleged oral "reinsurance" agreement that was concluded, like the other alleged oral agreements, at the May 1992 meeting by plaintiff and Costigan and Giesen. Like the previous counts, then, this count also suffers from plaintiff's failure to adequately allege agency. Even so, there are other problems with these counts, so let us assume for the purpose of argument on these counts that agency between defendants was adequately alleged. According to plaintiff, pursuant to the alleged oral reinsurance agreement AIG and AIGRM, through subsidiaries, would issue insurance policies as a primary insurer and run the insurance program, while plaintiff would provide funding and induce its shareholders and other companies to purchase insurance through the reinsurers. The agreement allegedly began in 1992 and continued for successive policy periods.

¶ 39 What is interesting, however, is that attached to the complaint is the *written* Reinsurance Agreement signed by plaintiff and PENN in 1993 (made effective retroactively to September 1992), with later addenda for 1994 and 1995 that included NUFIC and ILLCO. Plaintiff acknowledges this written agreement, but claims that the Reinsurance Agreement was merely a supplement to the more comprehensive preexisting oral agreement and, among other things, "did not properly include terms and conditions and improperly included terms and conditions that were not agreed to by [plaintiff]." Plaintiff also alleges that

> "[u]pon information and belief, there were employees in the insurance program who were not insured by PENN, ILLCO or NUFIC in 1995. Such employees would be subject to the oral agreement. Moreover, [the written reinsurance agreement] was not to in any way minimize the benefits and protections of

[plaintiff] nor was [one of the attached addenda]. Therefore, the oral agreement would benefit [plaintiff] throughout the insurance program."

¶ 40 Of course, AIG and AIGRM are not signatories of the written Reinsurance Agreement but, taking plaintiff's agency theory at face value for the sake of argument, this written contract also applies to AIG and AIGRM because plaintiff claims that the companies in the AIG family are one and the same.

¶ 41 In essence, plaintiff concedes that it signed a written contract with PENN (and later ILLCO and NUFIC) that is effective for the same period and does many of the same things as the alleged oral agreement, but plaintiff claims that the written contract does not represent the entire agreement of the parties. In making these allegations in Counts V and VI, however, plaintiff is quite obviously trying to circumvent the parol evidence rule, which "generally precludes evidence of understandings, not reflected in a writing, reached before or at the time of its execution which would vary or modify its terms. *** A party may not introduce parol or extrinsic evidence to show additional consistent terms of a contract unless the writing is incomplete or ambiguous." *Eichengreen v. Rollins, Inc.*, 325 Ill. App. 3d 517, 521-22 (2001).

¶ 42 There are two problems with plaintiff's allegations. First, although plaintiff claims that the written reinsurance agreement was missing terms, it does not specify which terms were left out. Plaintiff lists a number of alleged "offers" in Count V, but does not identify these as terms that were omitted from the written Reinsurance Agreement. In fact, Count V merely recites (many paragraphs later) that unspecified terms and conditions were improperly omitted or included in the written Reinsurance Agreement, and we are left to guess what these terms are. Count VI is no more specific, merely reiterating the same allegations against PENN, ILLCO, and NUFIC.

¶ 43 This leads us to the second problem. The parol evidence rule only precludes evidence that is intended to vary or contradict a "fully integrated writing" (*id.* at 521), which makes the next question whether the Reinsurance Agreement is integrated. There is no integration clause in the Reinsurance Agreement, so whether parol evidence may be considered depends on how comprehensive the Reinsurance Agreement is. Compare *Air Safety v. Teachers Realty Corp.*, 185 Ill. 2d 457, 466 (1999) (holding that "the four corners rule precludes the consideration of extrinsic evidence where a contract contains an integration clause and is facially unambiguous"), with *Eichengreen*, 325 Ill. App. 3d at 522-24 (citing *J&B Steel Contractors v. C. Iber & Sons*, 162 Ill. 2d 265 (1994), and examining the face of an alleged agreement that lacked an integration clause in order to determine whether it represented the full agreement of the parties). The written Reinsurance Agreement comprehensively sets out the rights and responsibilities of both plaintiff and the reinsurers, and it covers such topics as the terms of the agreement, premiums and commissions, claims handling procedures, claims service fees, required reports and remittances, reserve deposits, indemnification procedures, taxes, right to inspect accounts, termination, and choice of law. The Reinsurance Agreement does not mention any additional agreements between the parties regarding the reinsurance program, nor does it refer to any discussions about the program during the May 1992 meeting. In fact, the Reinsurance Agreement on its face is effective beginning in September 1992, which is the same period that plaintiff alleges was covered by the alleged oral reinsurance agreement, yet the written Reinsurance Agreement does not mention a preexisting oral contract at all, much less state that it is only intended to supplement one. Moreover, the agreement was modified at least three times via addenda, yet none of these addenda mention additional terms or oral agreements regarding reinsurance. Given the comprehensive nature of the written contract and the lack of specificity in plaintiff's claims, we see no reason to believe that the written Reinsurance Agreement did not represent the full agreement of the parties. *Cf. Eichengreen*, 325 Ill. App. 3d at 524-25. The parol evidence rule therefore precludes modifying obligations of AIG and AIGRM (Count V) or alternatively PENN, ILLCO, and NUFIC (Count VI) under the written Reinsurance Agreement by evidence of a prior oral reinsurance agreement. Those counts were therefore properly dismissed.

¶ 44 Counts VII and VIII are perhaps the most straightforward of the counts, alleging only that PENN (Count VII) and ILLCO and NUFIC (Count VIII) breached the written Reinsurance Agreement. Plaintiff claims that those defendants breached a number of their duties under the Reinsurance Agreement, but notably fails to identify which provisions of the agreement were breached. In fact, it does not appear that the duties that plaintiff alleges were breached are even contained in the contract.[10] For example, plaintiff alleges that PENN, ILLCO, and NUFIC "[f]ailed to always extend good faith and fair dealing to [plaintiff] and to work in the best interests of [plaintiff]." However, no such term appears in the written contract, and plaintiff does not cite to one. Similarly, plaintiff alleges that PENN, ILLCO, and NUFIC "[f]ailed to minimize all fees and commissions," yet there is no provision in the contract that requires them to do so. In fact, the section of the contract entitled "Premium and Commission" contains a table of specific percentages of various fees, commissions, and premiums that are due under the contract to plaintiff. We could go on, but the point is clear: despite many conclusory allegations, plaintiff does not actually allege that PENN, ILLCO, or NUFIC breached any of their obligations

[10] Plaintiff apparently did not recognize this deficiency until defendant pointed it out in its response brief, and so in its reply brief plaintiff belatedly presents an entirely new theory: the written Reinsurance Agreement is "ambiguous on its face" and defendants obviously "forgot to put all the obligations of the fronting insurance company and reinsurers into the agreement." Plaintiff did not raise this ambiguity theory in its opening brief, and in fact the brief only contained a single paragraph defending these counts on another basis. Given that plaintiff failed to mention this theory in its initial brief, we need not consider it. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008). Even if we were to reach this argument, the parol evidence rule again presents an insurmountable hurdle to these two counts.

under the written Reinsurance Agreement. Without a valid allegation of breach there can be no liability. See *Carlton at the Lake*, 401 Ill. App. 3d at 531. Counts VII and VIII were properly dismissed.

¶ 45 Count IX deals with the alleged failure of defendants to manage the claims process, and for this count plaintiff's theory is somewhat unclear but involves a breach of "duty." (Unlike all of the other counts, this one is not titled.) Plaintiff alleges that "AIG, AIGRM, PENN, ILLCO, and NUFIC had nondelegatable [*sic*] duties to perform claims management services in the most cost effective and efficient manner and to at all times minimize Ultimate Net Loss to [plaintiff] and to maximize [plaintiff's] possessive profitability." Plaintiff similarly alleges that "AIG, AIGRM, AIGCS, and AIMS had the nondelegatable [*sic*] duty to use their best efforts to oversee, supervise and manage the claim process so as to insure that it was performed in the most cost efficient and effective manner and would at all times minimize the Ultimate Net Loss to [plaintiff] and would maximize the profitability of [plaintiff]." It appears that these are contractual duties, given that plaintiff claims that these duties arose from the Reinsurance Agreement and the All Inclusive Services Agreement. To the extent that these alleged duties may have arisen from the written Reinsurance Agreement, we can find no provision in the written agreement that imposes such duties. To the extent that plaintiff is referring to the alleged oral agreements, we have already found that those agreements were not adequately alleged or are barred. Plaintiff's allegations of breach of duty on this count consequently fail and this count was properly dismissed.

¶ 46 C. Breach of Fiduciary Duty

¶ 47 Counts X through XIII claim various breaches of defendants' alleged fiduciary duty to plaintiff, essentially by failing to properly administer the insurance program, attempting to convert plaintiff's assets, and forcing plaintiff into rehabilitation in Vermont.

¶ 48 "A fiduciary relationship may be found to exist as a matter of law from the relationship of the parties, such as an attorney-client relationship, or may be found to exist by the facts of a particular situation, such as a relationship where trust is reposed on one side and results in superiority and influence on the other side." *Long v. Lyon*, 311 Ill. App. 3d 959, 963 (2000). "The burden of pleading and proving the existence of a fiduciary relationship lies with the party seeking relief, and where the alleged relationship does not exist as a matter of law, facts from which a fiduciary relationship arises must be pleaded and proved by clear and convincing evidence." *Hensler v. Busey Bank*, 231 Ill. App. 3d 920, 928 (1992). Importantly, "[i]n order to establish a fiduciary relationship, the trust and confidence allegedly reposed by the first party must actually be accepted by the second party." *Id.*

¶ 49 Plaintiff does not allege that a fiduciary relationship existed as a matter of law, but rather alleges that defendants were its fiduciaries because plaintiff "was a new company and did not have sophistication in insurance programs or reinsurance programs," whereas defendants "had the greatest experience available to run an insurance program." Based on the "real and substantial difference in the knowledge, experience and sophistication in all aspects of the insurance program between [plaintiff] and [defendants]," plaintiff asserts that a fiduciary relationship arose.

¶ 50 Other than the conclusory allegation that defendants were more sophisticated than plaintiff in insurance matters, the main fact that plaintiff relies on for the existence of the fiduciary relationship is that defendants managed all aspects of the insurance program. Plaintiff claims that this management relationship amounted to the complete entrustment of its affairs to defendants. Plaintiff asserts that this reliance is sufficient for a fiduciary relationship to exist. See, *e.g.*, *id.* at 964 (noting that one of the factors for determining whether a fiduciary relationship may exist in fact is " the extent to which the allegedly servient party entrusted the handling of his business and financial affairs to and reposed faith and confidence in the dominant party.") The problem with plaintiff's allegations, however, is that there are no well-pleaded facts in the complaint that support this conclusion. Most of the complaint is a recitation of the various ways that defendant allegedly mismanaged the captive insurance program. Plaintiff presents itself as an innocent bystander that was completely controlled by defendants, but a close reading of the complaint demonstrates that plaintiff and defendants were active participants in the reinsurance program and each played their own role. Plaintiff was responsible for marketing insurance policies to its shareholder companies, while defendants were responsible for administering the claims and reinsurance portion of the program. Contrary to plaintiff's allegations in these counts, there is no indication that defendants ever accepted a level of responsibility for the management of the insurance program that would make them fiduciaries to plaintiff. To the extent that plaintiff alleges that defendants' control over plaintiff's records and accounts is evidence of such a relationship, this was apparently done pursuant to the reinsurance agreement with PENN, ILLCO, and NUFIC, or the Management Agreement with AIGCMC, as were a host of other actions that plaintiff seeks to use to support its allegations of a fiduciary relationship, yet none of these agreements impose a fiduciary obligation on defendants.[11] *Cf.*

[11] Plaintiff repeatedly claims in its briefs that defendants are also fiduciaries as a matter of law because they acted as plaintiff's agents, but this theory is not supported by the allegations contained in Counts X through XIII. Rather than pleading that defendants were fiduciaries because they were plaintiff's agents, these counts allege only that defendants were fiduciaries because they exercised a high level of control over plaintiff's affairs and were more sophisticated than plaintiff in insurance matters. Nowhere in these counts does plaintiff allege that defendants were plaintiff's agents, much less plead sufficient facts to support allegations of agency. *Cf. Capitol Indemnity Corp. v. Stewart Smith Intermediaries*, 229 Ill. App. 3d 119, 126 (1992).

Hensler, 231 Ill. App. 3d at 928. Although plaintiff claims that the alleged oral contracts contained such a clause, we have already addressed the insufficiency of those alleged agreements.

¶ 51 Neither Count X nor Count XI sufficiently pleads the existence of a fiduciary relationship, so they must be dismissed. Counts XII and XIII merely incorporate the previous counts and recite various breaches of the fiduciary relationship. Because Counts X and XI fail to state claims, Counts XII and XIII also fail.

¶ 52 D. Spoliation

¶ 53 The last count in the complaint alleges negligent spoliation of evidence based on defendants' alleged failure to draft written contracts memorializing all of the alleged oral agreements from the May 1992 meeting or, alternatively, failure to preserve those contracts and produce them in this case. Illinois does not recognize an independent tort of spoliation of evidence. See *Boyd v. Travelers Insurance Co.*, 166 Ill. 2d 188, 192-93 (1995). This kind of claim is instead based in ordinary negligence, in which a plaintiff must allege the familiar elements of duty, breach, causation, and damages. See *Dardeen v. Kuehling*, 213 Ill. 2d 329, 336 (2004). In the context of a spoliation claim, the duty element contains two prongs:

> "As a threshold matter, we must first determine whether such a duty arises by agreement, contract, statute, special circumstance, or voluntary undertaking. [Ciation.] If so, we must then determine whether that duty extends to the evidence at issue—*i.e.*, whether a reasonable person should have foreseen that the evidence was material to a potential civil action. [Citation.] If the plaintiff does not satisfy both prongs, there is no duty to preserve the evidence at issue." *Id.*

¶ 54 Plaintiff's allegations in Count XIV fail for several reasons. First, plaintiff alleges that defendants despoiled evidence because they failed to create the documents at issue. This does not follow: defendants cannot negligently fail to preserve something that does not exist.

¶ 55 Second, plaintiff's alternative contention that the contracts *were* created but were not preserved is completely speculative. In nearly every count of the complaint dealing with an allegedly missing written agreement, as for example in Count I, plaintiff merely speculates that "[i]f a written *** agreement between defendants and [plaintiff] ever existed, it has never been in the possession and control of [plaintiff]." Plaintiff never offers any facts to support the allegation that any of the missing written agreements were ever created, only speculation that they may have been created and that if they were created then they must have been destroyed by defendants. Moreover, plaintiff never identifies in Count XIV the documents that it alleges were negligently destroyed. Plaintiff merely makes the broad allegation that "[t]o the extent that any written contract is unavailable at this time, that is the direct and proximate result of defendants' negligent spoliation of those written agreements." Once again, plaintiff fails to allege any specific facts in support of its claims.

¶ 56 Third, Count XIV fails the first prong of the duty analysis because plaintiff fails to identify the source of the alleged duty to preserve the documents. Plaintiff's only allegation on this point is that "defendants had a duty to draft written agreements and to maintain all agreements and preserve them. They had the duty to present these to [plaintiff] upon request." Plaintiff does not specify whether this alleged duty arises from contract, statute, circumstance, or some other method. Plaintiff accordingly fails to state a claim for negligence. See *Dardeen*, 213 Ill. 2d at 336.

¶ 57 E. Dismissal of Fraud Count in First Amended Complaint

¶ 58 The last issue that plaintiff raises relates to the dismissal with prejudice of a count in the first amended complaint that alleged fraud. According to this count, AIG made a series of material misrepresentations in marketing materials that it provided to plaintiff, asserting among other things that AIG could provide "specialized and sophisticated skill and knowledge" regarding captive insurance. The trial court dismissed this count with prejudice, noting not only that plaintiff's fraud allegations lacked the required specificity, but also that the allegedly fraudulent statements "are almost universally statements of future intent and performance. Such statements are not actionable as fraud in Illinois."

¶ 59 Plaintiff now contends that it was erroneous for the trial court to dismiss this count with prejudice without giving plaintiff a chance to replead. The basis for this argument, however, is not that plaintiff could have remedied the defects in this count by alleging more facts about the circumstances surrounding the marketing materials. Instead, plaintiff maintains that it has sufficiently pled *other* instances of fraudulent statements and actions by AIG, specifically that AIG falsely told plaintiff that it wanted to exit the captive insurance market, AIG's alleged inflation of plaintiff's reserve requirements, and AIG's alleged representations to Vermont that plaintiff was insolvent.

¶ 60 The decision of whether to grant leave to amend is within the sound discretion of the trial court. See *Loyola Academy v. S & S Roof Maintenance, Inc.*, 146 Ill. 2d 263, 273 (1992). There are four relevant questions in determining whether leave to amend should be allowed: "(1) whether the proposed amendment would cure the defective pleading; (2) whether other parties would sustain prejudice or surprise by virtue of the proposed amendment; (3) whether the proposed amendment is timely; and (4) whether previous opportunities to amend the pleading could be identified." *Id.*

¶ 61 Plaintiff's argument fails on the first factor, so we need not look further. None of these allegations were raised in the fraud count in the first amended complaint, yet plaintiff neglects to mention this fact in its brief. That count alleged only fraud in connection with "claims-related marketing materials," which AIG apparently gave to plaintiff's parent companies in 1991, whereas plaintiff now claims that it stated a fraud claim based on allegations about AIG's actions nearly ten years after the time period alleged in the fraud count of the first amended complaint. Plaintiff obviously recognizes that it cannot cure the deficiencies in the fraud allegations regarding the marketing materials, so it is essentially asking for leave to amend the complaint to include *entirely new* fraud counts based on other allegations that for whatever reason were not included in the original fraud count.[12] Plaintiff offers no authority to support such a request. The only question on this issue is whether the trial court abused its discretion in dismissing the fraud count with prejudice. Plaintiff's allegations cannot cure the deficiency in the marketing-materials fraud count, so the trial court did not abuse its discretion by dismissing the fraud count with prejudice.

¶ 62 III. CONCLUSION

¶ 63 For all of these reasons, the fourth amended complaint was properly dismissed pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2010)), and the trial court did not abuse its discretion by dismissing with prejudice the fraud count from the first

[12] Why plaintiff did not include fraud counts based on these allegations in the first amended complaints is completely unclear, but it is obvious from the record that plaintiff was aware of these facts at the time of the first amended complaint. Plaintiff's motion to reconsider raises this exact issue (in fact, plaintiff's appellate brief on this point is copied verbatim from the motion to reconsider), but it does not explain how these allegations could cure the deficiency in the fraud count. Moreover, if plaintiff truly believed that the first amended complaint alleged fraud independent of the marketing materials, then those allegations should have been included as stand-alone causes of action. For whatever reason, they were not. Even so, dismissal with prejudice of the marketing fraud count did not prevent plaintiff from consolidating those other allegations into fraud counts of their own in the second amended complaint. Yet it did not do so.

amended complaint. We do not reach defendants' alternative contention that plaintiff's claims are also subject to dismissal under section 2-619.

¶ 64 Affirmed.