

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

**STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,**

Plaintiff,

-vs-

**Case No. 6:03-cv-1645-Orl-28KRS
(Consolidated With Case No.
6:03-cv-1822-Orl-28JGG)**

BRAD M. GOLDSTEIN, et al.,

Defendants.

REPORT AND RECOMMENDATION

TO THE UNITED STATES DISTRICT COURT

This cause came on for consideration without oral argument on the Defendants' Joint Motion to Dismiss (doc. no. 145) the First Amended Complaint and Demand for Jury Trial filed by Plaintiffs State Farm Mutual Automobile Insurance Company and State Farm Life and Casualty Co. (collectively, "State Farm"). State Farm filed a response to the motion. (Doc. No. 164).

This motion was referred to me by the Honorable John Antoon, II, United States District Court Judge, for issuance of a Report and Recommendation.

I. BACKGROUND.

On June 10, 2003, State Farm Mutual Automobile Insurance Company filed a four-count complaint in the United States District Court for the Northern District of Illinois against the following defendants: Brad Goldstein; Robert J. Brown; David K. Goroway; Gary M. Weiss; Comprehensive Medical Group, Inc.; Neurological Consultants, LLC;

Neurology Medical Associates of New Jersey, LLC d/b/a Neuro/Med Associates, LLC; Optimal Medical Group, LLC; Practice Mechanix, Inc.; Premier Medical Group, Inc.; Prism Medical Diagnostics, LLC; Providers Medical Group, LLC and Spectrum DX Services, Inc. On September 29, 2003, the case was transferred to the Jacksonville division of this Court. On November 17, 2003, the case was transferred to the Orlando division. See *State Farm Mutual Automobile Ins. Co. v. Goldstein, et. al.*, Case No. 6:03-cv-1645-Orl-28KRS.

On October 3, 2003, Plaintiffs Comprehensive Medical Group, Inc.; Optimal Medical Group, LLC; Neurological Consultants, LLC; Neuro-Med Associates, LLC; Prism Diagnostics, Inc.; Providers Medical Group, LLC; and B & G Diagnostic Systems, Inc. filed a complaint against State Farm Mutual Automobile Insurance Company in the Circuit Court of the 15th Judicial District in and for Palm Beach County, Florida. State Farm Mutual Automobile Insurance Company removed the suit to the United States District Court for the Southern District of Florida on December 22, 2003, and it was transferred to this Court on the same day. See *Comprehensive Medical Group, Inc., et. al v. State Farm Mutual Automobile Insurance Co.*, Case No. 6:03-cv-1822-Orl-28JGG.

On January 29, 2004, Case No. 6:03-cv-1645-Orl-28KRS and Case No. 6:03-cv-1822-Orl-28JGG were consolidated. Subsequently, State Farm filed a First Amended Complaint and Demand for Jury Trial against the same defendants named in the original

complaint in Case No. 6:03-cv-1645-ORL-28KRS (hereinafter, the "Complaint"). (Doc. No. 110). It is this Complaint that is the subject of the pending motion to dismiss.¹

II. STANDARD OF REVIEW.

A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff can prove no set of facts that would entitle the plaintiff to relief. See *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). A trial court, in ruling on a motion to dismiss, is required to view the complaint in the light most favorable to the plaintiff. See *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

III. ALLEGATIONS OF THE COMPLAINT.

State Farm alleges that the defendants, working together in the Mobile Diagnostics Enterprise, submitted false and fraudulent claims for reimbursement for four types of diagnostic tests that were worthless and unnecessary. These tests are spinal ultrasounds, somatosensory evoked potentials ("SSEPs"), dermatomal evoked potentials ("DEPs"), and nerve conduction velocity tests ("NCVs")(collectively, the "Four Tests"). The Four Tests were ordered for victims of automobile accidents to confirm or exclude the existence of nerve root radiculopathies and isolate the nature and location of neurological dysfunction and inflammation. State Farm asserts that there is no reliable evidence that these tests have diagnostic value for the purposes ordered.

¹ The plaintiffs in Case No. 6:03-cv-1822-ORL-28KRS subsequently filed a second amended complaint in the consolidated case (doc. no. 128) that is the subject of a motion to dismiss filed by State Farm (see doc. no. 131). I will address that motion to dismiss in a separate Report and Recommendation.

State Farm alleges that the roles of the various defendants in the enterprise are as follows:

David Goroway, through Practice Mechanix, Inc. (collectively, the "Goroway Group"), recruits doctors to order the Four Tests for their patients through the Goldstein Group, discussed below. In return, Practice Mechanix, Inc. receives a percentage of the collections from insurance claims for the Four Tests ordered by doctors the Goroway Group recruited.

Brad Goldstein, through Comprehensive Medical Group, Inc., Neurological Consultants, LLC, Neurology Medical Associates of New Jersey, LLC d/b/a Neuro/Med Associates, LLC, Optimal Medical Group, LLC, Premier Medical Group, Inc., Prism Diagnostics, Inc. and Providers Medical Group, Inc. (collectively, the "Goldstein Group"), arranged for technicians to travel to the offices of the doctors who ordered the tests (the "Ordering Doctors") and perform the Four Tests. At the beginning of the enterprise, the Goldstein Group entered into lease agreements with the Ordering Doctors under which it paid the Ordering Doctors a rental fee for use of the Ordering Doctors' offices to conduct the Four Tests. Later in the enterprise, the lease agreement changed to one in which the Ordering Doctors paid the Goldstein Group a fee to conduct the tests. Defendant Gary Weiss, M.D., was the Medical Director for Premier Medical Group, Inc.

Under the original lease agreements, the Goldstein Group submitted the claims for performing and interpreting the Four Tests. Under the latter form of lease agreements, the Ordering Doctors submitted claims to State Farm for reimbursement of

the technical components of the Four Tests. The Goldstein Group supplied the Ordering Doctors with a sample claim form that included the CPT billing codes, units and charges. The Goldstein Group submitted claims to State Farm for reimbursement of the professional components of the Four Tests, that is for reading and interpreting the tests.

Robert Brown, through Spectrum DX Services, Inc. (collectively, the "Brown Group"), trained the technicians employed by the Goldstein Group. The Brown Group also contracted with the Goldstein Group to supply reports interpreting the Four Tests. Spectrum DX Services, Inc. employed Dr. Weiss to interpret the Four Tests. State Farm alleges that Dr. Weiss was not licensed or authorized to practice medicine in many of the states in which he purported to interpret the Four Tests.

In Count One, State Farm seeks a declaratory judgment that it need not pay pending claims for the Four Tests submitted by the Goldstein Group. In Counts Two and Three, it alleges that each of the defendants engaged in a conspiracy and violated the federal Racketeer Influenced and Corrupt Organization ("RICO") statutes, 18 U.S.C. §§ 1962(c), (d) and 1964. In Count Four, it alleges that Comprehensive Medical Group, Inc., Premier Medical Group, Inc., Prism Diagnostics, Inc., Providers Medical Group, LLC, Spectrum DX Services, Inc. and the four individual defendants engaged in common law fraud by making false and fraudulent statements of material facts in the claims for services rendered in Florida that these defendants submitted or caused to be submitted to State Farm.

IV. ANALYSIS.

Defendants assert seven reasons why State Farm's Complaint should be dismissed: (1) the claims are barred by collateral estoppel; (2) the RICO claims are preempted by the McCarran-Ferguson Act; (3) the claims are barred by waiver, estoppel, and voluntary payment; (4) State Farm fails to plead the requisite elements of a RICO claim; (5) State Farm fails to state a claim of fraud under Florida common law; (6) State Farm fails to state a claim for declaratory relief; and (7) several of the claims are barred by the statute of limitations. I will discuss each assertion in turn.

A. Collateral Estoppel.

In the first paragraph of the Complaint, State Farm alleges that the tests at issue are "worthless and unnecessary." (Complaint ¶1). Defendants assert that State Farm has already litigated and lost this issue as to spinal ultrasound tests in a prior case filed in state court.

Defendants submit in support of this argument a copy of the complaint, answer and excerpts from jury instructions in *Brown v. State Farm*, Case No. 95 7752 CC-2, filed in the County Court in and for Brevard County, Florida. (Doc. No. 146, ex. A). For purposes of ruling on a motion to dismiss, the Court cannot consider matters other than those alleged in the Complaint.

Even if the state court documents were considered, they provide insufficient information to determine whether any portion of State Farm's claims are barred by collateral estoppel. Federal courts considering whether to give preclusive effect to state court judgments must apply the state's law of collateral estoppel. *Vasquez v. Metro.*

Dade County, 968 F.2d 1101, 1106 (11th Cir. 1992). Under Florida law, for collateral estoppel to bar relitigation of an issue, five facts must be present: (1) an identical issue must have been presented in a prior proceeding; (2) the issue must have a critical and necessary part of the prior determination; (3) there must have been a full and fair opportunity to litigate that issue; (4) the parties in the two proceedings must be identical; and (5) the issues must actually have been litigated. *Goodman v. Aldrich & Ramsey Enters. Inc.*, 804 So. 2d 544, 546 (Fla. 2nd Dist. Ct. App. 2002). Without reviewing the entire record in the state court proceeding, I cannot determine whether each of these facts exists. Therefore, the motion to dismiss based on collateral estoppel should be denied.

B. McCarran-Ferguson Act.

Defendants contend that State Farm's invocation of the RICO statute to challenge insurance claim payments made to physicians or medical service providers circumvents procedures established under state law to regulate precisely the kind of disputes asserted herein. Defendants argue that State Farm's RICO claims are therefore preempted by the McCarran-Ferguson Act, 15 U.S.C. §§1011-1015.

Congress enacted the McCarran-Ferguson Act ("the Act") in 1945. The Act provides, in relevant part, as follows:

(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the

business of insurance . . . unless such Act specifically relates to the
business of insurance

15 U.S.C. § 1012. The Act “reverses the doctrine of preemption in cases involving state insurance laws, such that a state law specifically regulating the business of insurance shall preempt a conflicting federal law unless that federal law specifically relates to the business of insurance.” *Blackfeet Nat’l Bank v. Nelson*, 171 F.3d 1237, 1244 (11th Cir. 1999).

In *Humana, Inc. v. Forsyth*, 525 U.S. 299 (1999), the United States Supreme Court explained the analysis required to determine whether the Act preempts a federal statute, as follows:

1. Is there a state law enacted for the purpose of regulating the business of insurance?
2. Does the federal law specifically relate to the business of insurance?
3. Would the federal law invalidate, impair or supersede the State’s law:
 - (a) Does the federal law directly conflict with state law;
 - (b) Does the federal law frustrate any declared state policy or interfere with a State’s administrative regime?

Id. at 307-10.

The Complaint provides insufficient information to perform the McCarran-Ferguson preemption analysis for claims other than those submitted in Florida because it does not disclose the states in which the services were rendered that are the subject of

the other disputed claims. (See Complaint, App. tabs A & N).² Thus, it is not possible to determine the applicable state laws, which is a prerequisite to deciding the McCarran-Ferguson preemption issue.

With respect to the Florida claims, the defendants contend that the relevant state law is Florida Statute § 627.736, which addresses personal injury protection (“PIP”) provisions of automobile liability policies. There is no dispute on the present record that this statute was enacted for the purpose of regulating the business of insurance.

There is similarly no dispute that the federal RICO statute does not specifically relate to the business of insurance. See *Forsyth*, 525 U.S. at 307.

The defendants have not shown that the federal RICO statute directly conflicts with section 627.736. Section 627.736 does not provide a administrative procedure for addressing false and fraudulent PIP claims.³ Rather, this section provides, simply, that an insurer is not required to pay a claim “to any person who knowingly submits a false or misleading statement relating to the claim” Fla. Stat. § 627.736(5)(b)1.c. It permits the insurer to bring an action for insurance fraud against any person convicted of, or who

² The Appendix to the Complaint also contains some sample claim forms and correspondence regarding claims. I cannot readily ascertain what state law applies to these sample claims. Moreover, discussion of McCarran-Ferguson preemption by state laws other than those in Florida should await further explication of the actual claims made in each state and the allegedly preemptive state law, rather than addressing the issues in the broad strokes presented by the defendants.

³ The defendants contend that the Florida statute has a mandatory arbitration provision. This provision was declared unconstitutional by the Florida Supreme Court, and subsequently deleted from the statute in 2003. See *Nationwide Mut. Fire Ins. Co. v. Pinnacle Med., Inc.*, 753 So. 2d 55 (Fla. 2000).

pleads guilty or nolo contendere, to a criminal charge of insurance fraud. *Id.* § 627.736(12). Under such a civil action, the insurer is entitled to recover compensatory, consequential and punitive damages and attorney's fees and costs. *Id.*

In *Forsyth*, the Supreme Court addressed the preemptive effect of the Act with respect to a RICO claim alleging insurance fraud by insurers and hospitals in Nevada. The analysis used by the Court is instructive here. Permitting a RICO claim in Florida would not invalidate the right of Florida prosecutors to charge individuals and entities with the crime of insurance fraud. Therefore, the federal RICO claim does not invalidate or supersede Florida law. *See Forsyth*, 525 U.S. at 307. Similarly, the federal RICO claim does not impair Florida's law. Insurance fraud is unlawful under both Florida law and federal RICO. *Id.* at 308.

The Florida civil action for insurance fraud does not accrue until the State prosecutes the defendant criminally. However, review of the legislative history of the anti-fraud provision of section 627.736 does not reveal any Florida policy statement that the first attack on insurance fraud must come through Florida prosecutors. *See* 2001 Fla. Sess. Law Serv. Ch. 2001-27 (C.S.C.S.S.B. 1092)(West). Rather, the legislature stated, in pertinent part, as follows:

The Legislature further finds insurance fraud related to personal injury protection takes many forms, including, but not limited to, . . . unnecessary medical treatment of accident victims billed to insurers by clinics; . . . the intentional overuse or misuse of legitimate diagnostic tests; [and] inflated charges for diagnostic tests or procedures arranged through brokers As a result, the Legislature declares it necessary, among other things, to . . . provide insurers with a civil cause of action for insurance fraud.

Id. The State of Florida has not sought to intervene in this case to assert that a RICO claim for insurance fraud would frustrate the administrative regime or public policy of Florida. Rather, the strong anti-fraud statement of the Florida legislature supports the conclusion that Florida would encourage actions to address insurance fraud committed by Florida healthcare providers.

Under the facts alleged in the Complaint, the RICO claims do not directly conflict with any Florida regulation governing submission of false and fraudulent PIP claims. The defendants have not cited to any Florida administrative regime designed to address the submission of false and fraudulent PIP claims. Further, permitting State Farm to bring a civil action to address what it alleges are false and fraudulent claims submitted to it would not frustrate any declared state policy. Therefore, under the allegations of the Complaint, McCarran-Ferguson preemption does not apply to the claims governed by Florida law. *See Forsyth*, 525 U.S. at 310.⁴ Accordingly, the motion to dismiss based on McCarran-Ferguson preemption should be denied.

C. Waiver, Estoppel and Voluntary Payment.

In the Complaint, State Farm alleges that since 1993 the defendants have submitted or caused to be submitted false and fraudulent claims to State Farm (Complaint ¶ 3), many of which claims have been paid by State Farm (*id.* ¶ 82). The defendants contend that State Farm has lost the right to challenge the propriety of the

⁴ Having reached this conclusion, I will not address State Farm's contention that submitting false and fraudulent claims is not part of the "business of insurance" regulated by Florida.

claims at issue because it has voluntarily paid such claims for ten years. State Farm responds that assertion of these affirmative defenses is inappropriate in a motion to dismiss especially when, as here, the defense is not apparent from the face of the Complaint. See *Hudson Drydocks, Inc. v. Wyatt Yachts, Inc.*, 760 F.2d 1144, 1146 n. 3 (11th Cir. 1985).

The Complaint does not present sufficient facts to conclude that State Farm lost the right to challenge the propriety of the claims at issue under any of the legal theories asserted by the defendants. State Farm alleges that it paid the claims based on false and fraudulent material statements made or caused to be made by the defendants. These allegations are sufficient, at this juncture, to withstand the motion to dismiss. See *Irvine v. Cargill Investor Servs., Inc.*, 799 F.2d 1461, 1463 (11th Cir. 1986)(defenses of estoppel and waiver are not favored and do not apply when party against whom defenses are asserted was not aware of all material facts); *Myers v. Fidelity & Cas. Co.*, 759 F.2d 1542, 1548 (11th Cir. 1985)(voluntary payment doctrine applies only in the absence of fraud).

D. Failure to State a RICO Claim.

1. *Insufficient Allegation of Predicate Acts.*

The defendants contend that State Farm has not adequately alleged the predicate mail fraud offenses underlying the RICO claim because it has not specifically alleged that the defendants made materially false statements on which State Farm relied. This argument is undermined by simply reading the Complaint.

In the Complaint, State Farm alleges in paragraph 65 that every claim at issue materially misrepresents the necessity of the tests for which reimbursement is sought and sets forth the manner and means through which these alleged misrepresentations were made. Among the alleged misrepresentations are use of CPT codes that relate to tests of the arms, legs, thyroid, parathyroid, pelvis, trunk or head when, in fact, the test was not performed on one of these areas; overstating the number of tests performed; and billing for interpretive services that were not rendered. In paragraph 66, State Farm alleges other acts of fraudulent concealment and material representations by the defendants in furtherance of the alleged scheme to defraud. In paragraph 73, State Farm alleges that it relied on the representations made by the defendants. In Appendix A, State Farm further alleges that the defendants mailed or caused to be mailed claims for reimbursement in furtherance of the scheme to defraud.

While the defendants may dispute the factually validity of these allegations, and contend that the allegedly false and fraudulent representations were merely statements of opinion rather than actionable misrepresentations of facts, such disputes are not a matter appropriately resolved in a motion to dismiss. The allegations of the Complaint are sufficient to survive a motion to dismiss. *See Durham v. Business Mgmt. Assoc.*, 847 F.2d 1505, 1511 (11th Cir. 1988).

2. *Insufficient Allegation of RICO Enterprise.*

The defendants contend that State Farm failed sufficiently to allege the existence of an association-in-fact enterprise. The presiding District Judge in this case has recently

reviewed the law applicable to this question. See *Lockheed Martin Corp. v. Boeing Co.*, 314 F. Supp. 2d 1198 (M.D. Fla. 2004). He observed as follows:

In this circuit, “the definitive factor in determining the existence of an enterprise [is] an association of individuals, however loose or informal, which furnishes a vehicle for the commission of two or more predicate crimes”

Id. at 1209 (quoting *United States v. Weinstein*, 762 F.2d 1522, 1537 (11th Cir. 1985)).

The Complaint alleges that the defendants operated collectively to engage in a scheme to defraud State Farm by soliciting doctors to order unnecessary tests, providing a doctor to interpret the tests, and submitting claims or providing forms for the Ordering Doctors to submit claims for reimbursement for these tests. The association-in-fact enterprise had a clear structure, dividing responsibility for various parts of the scheme – including recruiting doctors, interpreting tests, and submitting or providing forms for submitting claims – among various members of the enterprise. The Complaint alleges that the association-in-fact enterprise was of long duration and engaged in an ongoing scheme to defraud. This is sufficient to allege an association-in-fact enterprise. Therefore, the motion to dismiss on this basis should be denied.

E. Failure to State a Common Law Fraud Claim.

The defendants argue that the Complaint fails to state a claim for Florida common law fraud because it does not sufficiently allege facts to show that they made material misrepresentations or that State Farm justifiably relied on those material

misrepresentations. This argument fails for the same reason that defendants' argument that the Complaint did not sufficiently allege predicate acts of mail fraud failed.

F. Failure to State a Claim for Declaratory Relief.

The defendants contend that there is no case or controversy underlying State Farm's request that the Court determine that it need not pay future claims for the Four Tests. The Complaint does not seek a declaratory judgment regarding all future claims of this nature. Rather, it seeks a judgment that the Goldstein Group is not entitled to receive payment for pending claims for reimbursement of the professional component of the Four Tests. (Complaint ¶¶ 76). The defendants' reliance on *Palma v. State Farm Fire & Cas. Co.*, 489 So. 2d 147 (Fla. 4th Dist. Ct. App. 1986), is misplaced because it addresses a declaratory judgment regarding prospective claims, rather than submitted and pending claims.

Nevertheless, I recommend that the Court decline to exercise jurisdiction over this declaratory judgment claim. See *Wilton v. Seven Falls Co.*, 515 U.S. 277, 288 (1995). As State Farm notes in its response to the motion, the defendants have sued to obtain payment of the pending claims in former Case No. 6:03-cv-1822-Orl-28JGG. Under these circumstances, it appears that the issues presented in the declaratory judgment claim can be fully resolved in connection with the defendants' claim for payment of the claims. Therefore, I recommend that the motion to dismiss the declaratory judgment claim be granted.

G. Statute of Limitations.

The defendants contend that the four-year statute of limitations for civil RICO claims bars many of the predicate acts underlying the RICO claim. The statute of limitations began to run from the date of discovery of the injury. See *Pacific Harbor Capital, Inc. v. Barnett Bank, N.A.*, 252 F.3d 1246, 1251 (11th Cir. 2000). State Farm alleges that it did not learn of the defendants' material misrepresentations and could not reasonably have discovered them until shortly before it filed its original complaint. (Complaint ¶ 83).

The issue of when State Farm discovered the facts supporting its RICO claim must be developed through discovery in this case. This is not a question that can be resolved on a motion to dismiss. Therefore, the motion to dismiss on this basis should be denied.

V. RECOMMENDATION.

For the foregoing reasons, I respectfully recommend that Defendants' Joint Motion to Dismiss (Doc. No. 145) be GRANTED with respect to the Declaratory Judgment claim and DENIED in all other respects.

Failure to file written objections to the proposed findings and recommendations contained in this report within ten (10) days from the date of its filing shall bar an aggrieved party from attacking the factual findings on appeal.

Recommended in Orlando, Florida this 15th day of July, 2004.

Karla R. Spaulding

KARLA R. SPAULDING
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:
Presiding District Judge
Counsel of Record
Unrepresented Party
Courtroom Deputy