

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>STATE FARM MUTUAL AUTOMOBILE</b>	:	
<b>INSURANCE COMPANY, ET AL.</b>	:	
<b>Plaintiffs,</b>	:	
	:	<b>CIVIL ACTION NO. 02-7389</b>
v.	:	
	:	
<b>MIDTOWN MEDICAL CENTER INC.,</b>	:	
<b>ET AL.</b>	:	
<b>Defendants.</b>	:	

**MEMORANDUM AND ORDER**

**Tucker, J.**

**March 14, 2005**

Presently before this Court is Defendants’ Motion for Summary Judgment (Docs. 223 & 224). For the reasons set forth below, upon consideration of Defendants’ Motion, Plaintiffs’ Responses (Docs. 245 & 246), and oral argument held before this Court on February 25, 2005, this Court will grant in part and deny in part Defendants’ Motion.

**BACKGROUND**

From the evidence of record taken in a light most favorable to the non-moving party, the pertinent facts are as follows Plaintiffs State Farm Mutual Automobile Insurance Company and State Farm Fire and Casualty Insurance Company (“State Farm”) are Illinois corporations duly organized and licensed to engage in the writing of automobile insurance policies in Pennsylvania. State Farm provides insurance coverage to its customers for, *inter alia*, medical payments, uninsured motorist benefits, underinsured motorist benefits and liability for bodily injury arising out of automobile accidents.

Generally, Plaintiffs allege that during all relevant times, the Defendants, their agents and employees, without the knowledge and consent of State Farm, agreed and conspired together to

devise and participate in a scheme to defraud State Farm by means of false and fraudulent representations. Compl. ¶ 19. This scheme began when Defendants Simon Fishman (“Fishman”) and Ronald Nestel (“Nestel”) established and operated the Midtown Medical Centers (“Midtown”). Thereafter, Defendants Nestel and Fishman opened the Tabor Chiropractic Center, P.C. (“Tabor”) and established Physicians Management Company, Inc. (“PMC”).

Plaintiffs state that Fishman and Nestel owned, operated, controlled and managed Midtown and Tabor although neither was licensed or eligible to be licensed in the practice of chiropractics, physical therapy or medicine. Thus, Nestel and Fishman allegedly engaged in the practice of medicine without a license in violation of the Medical Practice Act, the Chiropractic Practice Act, and the Business Corporation Law.

As part of the Defendants’ conspiracy and scheme to defraud State Farm, the Plaintiffs claim the following: (1) Nestel and Fishman recruited individuals who had been in accidents to obtain purported medical treatment at Midtown and/or Tabor; (2) many of the medical examinations, physical therapy and other treatments allegedly provided to these individuals at Midtown and/or Tabor were, in fact, never performed, and some concerned areas of the body not injured; (3) many of the examinations with the consulting physicians were, in fact, billed in a manner that inaccurately described the service level for the purpose of securing a higher reimbursement from State Farm, sometimes referred to as “upcoding;” (4) payments made by State Farm were, without the knowledge or consent of State Farm, divided between Defendants and the consulting doctors under an unapproved fee arrangement; (5) Defendants hired employee chiropractors, physicians and other non-physician individuals to provide medical treatment, including diagnostic testing, which was billed as if provided by a chiropractor or physician; and (6) false and fraudulent medical reports, bills

and other records were prepared by Defendants and sent to State Farm, sometimes by US mail, to obtain payment on behalf of Midtown/Tabor and the other Defendants.

Between 1998 and the present, State Farm avers that it paid out over \$213,193.00 on medical payments in which bills of Midtown and Tabor were submitted, some by US mail, as part of individual claimants' damages. Compl. ¶ 45. Also, between 1998 and the present, State Farm avers that it paid out over \$630,554.00 on medical payments in which bills and records of Midtown and Tabor were submitted, some by US mail, as part of individual claimants' damages. Compl. ¶ 47. The billing submitted by Defendants contains fraudulent misrepresentations intended to extract payments from State Farm, which State Farm relied on in making those payments to Defendants. Plaintiffs now bring this cause of action for fraud, the corporate practice of medicine, unjust enrichment, restitution, and violations of the civil RICO statute.

#### **STANDARD OF REVIEW**

Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(c). An issue is “genuine” if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed.2d 202 (1986). A factual dispute is “material” if it might affect the outcome of the case under governing law. Id.

A party seeking summary judgment always bears the initial responsibility for informing the district court of the basis of its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317,

322, 106 S. Ct. 2548, 2552, 91 L. Ed.2d 265 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the movant's initial Celotex burden can be met simply by "pointing out to the district court that there is an absence of evidence to support the non-moving party's case." Celotex, 477 U.S. at 325, 106 S. Ct. at 2553-54. After the moving party has met its initial burden, "the adverse party's response, by affidavits or otherwise as provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). That is, summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing "sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322, 106 S. Ct. at 2552-53. "[I]f the opponent [of summary judgment] has exceeded the 'mere scintilla' [of evidence] threshold and has offered a genuine issue of material fact, then the court cannot credit the movant's version of events against the opponent, even if the quantity of the movant's evidence far outweighs that of its opponent." Big Apple BMW, Inc. v. BMW of North America, Inc., 974 F.2d 1358, 1363 (3d Cir. 1992). Under Rule 56, the court must view the evidence presented on the motion in the light most favorable to the opposing party. Anderson, 477 U.S. at 255, 106 S. Ct. at 2513-14.

### **DISCUSSION**

Defendants argue that all seven (7) Counts of Plaintiffs' Amended Complaint should be dismissed. Specifically, Defendants submit the following:

(1) Counts I and III for common law fraud and statutory insurance fraud, respectively, should be dismissed as filed beyond the applicable statute of limitations;

(2) Counts I, III, VI, and VII for common law fraud, statutory insurance fraud, unjust enrichment and restitution should be dismissed because Plaintiffs cannot establish the required

elements of justifiable reliance and/or intent to defraud;

(3) Count II for the corporate practice of medicine, *inter alia*, should be dismissed because Plaintiffs lack standing; and

(4) Counts IV and V, Plaintiffs' RICO claims brought pursuant to 18 U.S.C. §§ 1962(c), 1962(d) & 1964(c), should be dismissed because Plaintiffs cannot establish the existence of an "enterprise," nor do Plaintiffs have sufficient evidence of a pattern or practice of fraudulent billing.

Plaintiffs deny that Counts I and III should be dismissed pursuant to the statute of limitations. To the contrary, Plaintiffs claim that the Complaint was filed within the applicable statute of limitations. Plaintiffs deny that Counts I, III, VI and VII for common law fraud, statutory insurance fraud, unjust enrichment and restitution, should be dismissed for lack of justifiable reliance or intent to defraud. Those issues should be left to the province of the jury because they involve genuine issues of material fact. Likewise, Plaintiffs deny that Count II should be dismissed for lack of standing. Lastly, Plaintiffs deny that Counts IV and V should be dismissed for failure to establish the existence of a RICO enterprise and/or conspiracy. The Court will address each of Defendants' arguments in turn.

#### **I. Statute of Limitations as to Counts I and III**

Claims for common law fraud and statutory insurance fraud are subject to a two-year statute of limitations. 42 Pa. Cons. Stat. Ann. § 5524(7). Defendants argue that, upon information revealed by a memo written on September 12, 2000, the Plaintiffs' original Complaint was filed beyond that

two-year deadline.<sup>1</sup> See Defs' Mot. Exh. 25.<sup>2</sup> According to this memo, Defendants allege that Plaintiffs were well aware of the information upon which the Complaint is based in or around February 2000, and at the very latest, September 12, 2000. Thus, Defendants submit that Plaintiffs were aware of and investigating the operations at Midtown as of September 12, 2000. For these reasons, Defendants request summary judgment on Plaintiffs' fraud claims.

In opposition, Plaintiffs state that Defendants have no proof that an investigation of Midtown commenced at any specific time. Therefore the issue of the statute of limitations is disputed and a genuine issue of material fact for the jury. Plaintiffs specifically deny that an investigation of Midtown pre-existed the September 12, 2000 memo. There is no evidence that Plaintiffs were doing anything other than investigating what was believed, at the time, to be an isolated instance of a claimant treating for a questionable injury resulting from a motor vehicle accident which caused little to no damage to the vehicle involved.

Plaintiffs aver that the Complaint was filed within two years of discovering information which imposed a duty to investigate. Specifically, interviews with two people in October 2000 revealed substantial information that there were fraudulent practices at Midtown. Therefore, the Plaintiffs submit that they filed this action within the two year statute of limitations.

This Court finds, after reviewing the evidence proffered, that a genuine issue of material fact exists as to when the Plaintiffs' investigation of Midtown began and when Plaintiffs' were on inquiry notice of a cause of action against Defendants. "The question of whether a plaintiff has exercised

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<sup>1</sup>Plaintiffs' Complaint was filed on September 20, 2002.

<sup>2</sup>The memo in question memorializes an interview by two State Farm claims adjusters with Defendant Dr. Frank Solomon, D.C. ("Dr. Solomon"), in which Dr. Solomon was asked about his relationship with Defendants Fishman and Nestel.

due diligence in discovering his own injury is usually a question for the jury, see e.g., DeMartino v. Albert Einstein Medical Center, Northern Div., 313 Pa. Super. 492, 460 A.2d 295 (Pa. Super. 1983), but when it appears that no factual question has been presented, the court may conclude that the statute of limitations operates as a bar to the claim.” Noyes v. General Am. Life Ins. Co., 1998 U.S. Dist. LEXIS 514, \* 29 (E.D. Pa. Jan. 16, 1998); see e.g., Cathcart v. Keene Indus. Insulation, 324 Pa. Super. 123, 471 A.2d 493 (Pa. Super. 1984).

It is clear that a factual question has been presented. Defendants’ interpretation of the submitted memo is simply that, an interpretation. It is for the jury to decide if Plaintiffs knew or should have known of a cognizable claim against Defendants before September 20, 2000. In this case there is a disputed factual question as to whether the statute of limitations expired before the Plaintiffs’ Complaint was filed. For that reason, this Court will deny Defendants’ Motion for Summary Judgment based on the applicable statute of limitations.

## **II. Counts I, III, VI & VII: Common Law Fraud, Statutory Insurance Fraud, Unjust Enrichment and Restitution**

The elements of fraud under Pennsylvania law are as follows: (1) a representation; (2) that is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) the resulting injury was proximately caused by the reliance. See Thibodeau v. Comcast Corp., 2004 U.S. Dist. LEXIS 20999, \*20 (E.D. Pa. Oct. 21, 2004) (citing Giannone v. Ayne Inst., 290 F. Supp. 2d 553, 566-67 (E.D. Pa. 2003)).

Defendants argue that Plaintiffs are unable to establish the elements of intent, justifiable reliance and a resulting injury as a matter of law. An in depth discussion of Plaintiffs’ fraud claims

is not warranted as just about every fact with regard to these claims is in dispute. For example, (1) the parties' experts, Dr. Jane McBride and Dr. Michael Miscoe, disagree as to whether Defendants intentionally miscoded the bills submitted to State Farm; (2) the parties dispute whether the deposition testimony of patients at Midtown confirms that they were actually treated for the services that were billed; and (3) the parties dispute whether Plaintiffs justifiably relied on the allegedly fraudulent bills submitted after fall 2000. Thus, this Court finds that the Defendants' intent, Plaintiffs' justifiable reliance and injury are questions for the jury. Defendants' Motion for Summary Judgment on Counts I and III is denied.

Separately, Defendants claim that Count III, alleging violations of 18 Pa. C.S. § 4117, as related to the provision of unnecessary medical treatment by Defendants, is preempted by 75 Pa. C.S. § 1797. In support of this proposition, Defendants rely on Gemini Physical Therapy & Rehab., Inc. v. State Farm Mut. Auto. Ins. Co., 40 F. 3d 63 (3d Cir. 1994). As agreed upon by both parties, the Gemini case's holding was limited to remedies available to insureds claiming insurer "bad faith." Pls' Brief at 32; Defs' Brief at 12. As bad faith is not at issue in this case, Gemini is not controlling authority. Pls' Brief at 32. Defendants ask this Court to apply the same rationale used in Gemini to hold that § 4117 is preempted by § 1797, but cite no case law compelling that result. After reviewing relevant case law, this Court finds that § 4117 is not preempted by § 1797, and Plaintiffs may proceed with their claim under the insurance fraud statute. Allstate Ins. Co. v. Am. Rehab & Physical Therapy, Inc., 330 F. Supp. 2d 506, 510-11 (E.D. Pa. 2004) (holding that it was not error for the court to allow the jury to consider plaintiffs' claim for statutory insurance fraud under 18 Pa. Cons. Stat. Ann. § 4117, because 75 Pa. Cons. Stat. Ann. § 1791 did not provide an exclusive remedy for plaintiffs' recovery).

Consequently, as fraud is a question for the jury, Plaintiffs may be entitled to recover for unjust enrichment and may be entitled to restitution. As such, dismissal of both of these claims would be inappropriate on summary judgment and Counts VI and VII shall remain.

### **III. Count II: Corporate Practice of Medicine, *inter alia***

In the Amended Complaint, Plaintiffs allege that Defendants Nestel and Fishman engaged in the practice of medicine, in that they operated Midtown, Tabor and/or Physicians Management, without a license in violation of the Corporate Practice of Medicine Doctrine, Medical Practice Act, Chiropractic Practice Act, and Business Corporation Law. Defendants aver that Plaintiffs have no standing to bring these claims. Plaintiffs counter that they do have standing to bring a claim for the corporate practice of medicine and that they have more than sufficient evidence to prove the allegations.

According to the Medical Practice Act and the Chiropractic Practice Act, civil penalties may be levied against any person who practices medicine and surgery, chiropractic or other areas of practice requiring a license without being properly licensed to do so under the Act. See 63 P.S. §§ 422.39 & 625.703 (2004). This penalty is assessed by the State Board of Medicine, by a vote of the majority of the maximum number of the authorized membership. Id. Neither of these Acts provides for a private right of action. Likewise, Pennsylvania case law provides no support or guidance in connection with a private right of action for the corporate practice of medicine. See Allstate Ins. Co. v. Am. Rehab & Physical Therapy, Inc., Civil Action No. 01-5076, Doc. No. 36 (E.D. Pa. Nov. 24, 2003) (Joyner, J.) (“Plaintiffs’ request for relief [under the Medical Practice Act] lacks support in Pennsylvania case law.”).

As a result, this Court finds that Plaintiffs lack standing to bring a claim under Pennsylvania

law for the corporate practice of medicine. Defendants' Motion for Summary Judgment on Count II is granted.

**V. Counts IV and V: RICO and RICO Conspiracy Claims**

Defendants seek summary judgment on Counts IV and V of Plaintiffs' Amended Complaint, alleging violations of 18 U.S.C. §§ 1962(c) & (d), stating that: (1) Plaintiffs have not pled a distinct enterprise within the meaning of 18 U.S.C. § 1962(c) and (2) Plaintiffs have insufficient evidence to prove a pattern of racketeering activity. Section 1962(c) provides in relevant part:

It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(c) (2005). Section 1962(d) provides in relevant part:

It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

18 U.S.C. § 1962(d) (2005).

To establish liability under § 1962(c), one must allege and prove the existence of two distinct entities: (1) a "person;" and (2) an "enterprise" that is not simply the same "person" referred to by a different name. Cedric Kushner Promotions, Ltd. v. Don King, 533 U.S. 158, 161 (2001). Defendants argue that Plaintiffs have alleged nothing more than an enterprise consisting of the Defendants "associated in fact," which does not satisfy the distinctiveness requirement of § 1962(c). Defs' Brief at 16. As such, the Amended Complaint does not allege a RICO violation because it does not involve the corrupt use or takeover by *Defendants* of an *enterprise* separate from themselves. In other words, since there is no difference between the Defendants and the enterprise, there is no violation of RICO.

“The Act says that it applies to ‘persons’ who are ‘employed by or associated with’ the ‘enterprise.’” Kushner, 533 U.S. at 161 (quoting 18 U.S.C. § 1962(c)). Liability under § 1962(c) “depends on showing that the Defendants conducted or participated in the conduct of the ‘enterprise’s affairs’ not just their own affairs.” Kushner, 533 U.S. at 163 (quoting Reves v. Ernst & Young, 507 U.S. 170, 185 (1993)). The Supreme Court held in Kushner that:

The corporate owner/employee, a natural person, is distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its different legal status. And we can find nothing in the statute that requires more “separateness” than that. . . . [T]he employee and the corporation are different “persons,” even where the employee is the corporation’s sole owner. After all, incorporation’s basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs.

Id. A complete overlap between the Defendant persons and the members of an association-in-fact enterprise does not defeat the distinctiveness requirement. “A distinct enterprise exists even when the very same persons named as Defendants constitute the association-in-fact enterprise.” Perlberger v. Perlberger, 1999 U.S. Dist. LEXIS 1407, \* 8 (E.D. Pa. Feb. 11, 1999). Plaintiffs brought suit against Defendant persons and the corporations they owned, operated or contracted with. This Court finds that although the enterprise is comprised of the named Defendants, it is separate and distinct from its constituent members, and Plaintiffs have sufficiently pled a distinct enterprise under § 1962(c).

Next, Defendants posit that Plaintiffs have failed to prove a pattern of racketeering activity as required by § 1962(c). A “pattern” is defined as “at least two acts of racketeering activity” occurring within a ten year period. 18 U.S.C. § 1961(5) (2005). “Racketeering activity” includes the offenses of mail fraud and wire fraud. Moore v. Reliance Standard Life Ins. Co., 1999 U.S. Dist.

LEXIS 6699, \*4 (E.D. Pa. May 10, 1999).

The essential elements of an offense under 18 U.S.C. § 1341 for mail fraud are: (1) the existence of a scheme to defraud; (2) the participation by the defendant in the particular scheme charged with the specific intent to defraud; and (3) the use of the United States mails in furtherance of the fraudulent scheme. United States v. Hannigan, 27 F.3d 890, 892 (3d Cir. 1994). Defendants claim that Plaintiffs cannot prove that Defendants intentionally made any fraudulent representations, and thus cannot prove fraud. As stated *supra*, many, if not all of the facts surrounding Plaintiffs' fraud claims are in dispute, and it will be for the jury to decide if Defendants engaged in racketeering activity. As a result, summary judgment is inappropriate on Counts IV and V on this basis. Accordingly, summary judgment on Counts IV and V is denied.

#### **CONCLUSION**

For the foregoing reasons, this Court will grant in part and deny in part Defendants' Motion for Summary Judgment. Count II of Plaintiffs' Complaint alleging violations of the Corporate Practice of Medicine Doctrine, the Medical Practice Act, the Chiropractic Practice Act, and Business Corporation Law is dismissed. All other Counts of the Complaint shall remain.

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**Plaintiffs,** :  
 : **CIVIL ACTION NO. 02-7389**  
v. :  
 :  
**MIDTOWN MEDICAL CENTER INC.,** :  
**ET AL.** :  
**Defendants.** :

**ORDER**

**AND NOW**, this 14<sup>th</sup> day of March, 2005, upon consideration of Defendants' Motion for Summary Judgment (Docs. 223 & 224), Plaintiffs' Responses (Docs. 245 & 246), and oral argument held before this Court on February 25, 2005, **IT IS HEREBY ORDERED AND DECREED** that Defendants' Motion for Summary Judgment is **GRANTED IN PART AND DENIED IN PART**.

**IT IS FURTHER ORDERED** that:

1. Defendants' Motion for Summary Judgment as to Count II alleging violations of the

Corporate Practice of Medicine Doctrine, the Medical Practice Act, the Chiropractic Practice Act, and Business Corporation Law is **GRANTED**.

2. Defendants' Motion as to Counts I, III, IV, V, VI and VII is **DENIED**.
3. This case shall be given a DATE CERTAIN to proceed to trial on **Monday, July 18, 2005**.

**BY THE COURT:**

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**Hon. Petrese B. Tucker, U.S.D.J.**