

****NOT FOR PRINTED PUBLICATION****

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

UNITED STATES OF AMERICA,	§	
<i>ex rel.</i>	§	
THE STATE OF TEXAS	§	
<i>ex rel.</i>	§	
KAREN REYNOLDS	§	CIVIL ACTION No. 9-09-cv-124
	§	
<i>Plaintiffs,</i>	§	
	§	JUDGE RON CLARK
v.	§	
	§	
PLANNED PARENTHOOD GULF COAST	§	
F/KA PLANNED PARENTHOOD OF	§	
HOUSTON & SOUTHEAST TEXAS, INC.	§	
	§	
<i>Defendant.</i>	§	

ORDER GRANTING IN PART DEFENDANT’S MOTION TO DISMISS

Relator Karen Reynolds brought this *qui tam* action under the False Claims Act (“FCA”), 31 U.S.C. §§ 3729 *et seq.* and the Texas Human Resources Code §§ 32.039 *et seq.* and 36.002 *et seq.*¹ against Defendant Planned Parenthood Gulf Coast f/ka/a Planned Parenthood of Houston & Southeast Texas, Inc.’s (“PPGC”) alleging that PPGC submitted false claims to the federal and Texas governments for Medicaid, Title XX, and Women’s Health Program (“WHP”) reimbursement and falsified patient records to avoid detection. PPGC moves to dismiss this suit pursuant to Fed. R. Civ. P. 12(b)(6) and 9(b). [Doc. # 72]

Taking all of Relator’s well-pleaded facts as true, the court grants PPGC’s motion as to:

- 1) Relator’s claims to the extent they are brought as a separate cause of action under Texas Human Resources Code § 32.039, as there is no private cause of action under this statute

¹The court has supplemental jurisdiction over Relator’s state law claims pursuant to 28 U.S.C. 1367.

even though a knowing violation of Section 32.039(b) can be a basis for recovery under Section 36.002; and

2) Relator's claims brought under Texas Human Resources Code § 36.002 insofar as the alleged conduct occurred prior to May 4, 2007 because the State of Texas did not timely intervene.

The remainder of PPGC's motion is denied.

I. BACKGROUND

From October 1999 through February 2009, Relator held the position of Health Center Assistant at PPGC's Lufkin Clinic. Relator alleges that during the course of her employment, PPGC corporate directors regularly instructed employees at all PPGC clinics² to maximize revenues by increasing "pay-per-visits" for patients who were eligible for medical services charged to government programs such as WHP, Medicaid, and Title XX. Relator claims that PPGC charged for services not actually provided to patients, medically unnecessary services, and services not covered by WHP, Medicaid, and Title XX. Relator asserts that these false claims were submitted to the United States and Texas governments for reimbursement and, to support its claims for payment, PPGC regularly falsified patient charts.

Relator filed her original Complaint under seal on July 30, 2009 against PPGC and two other defendants. [Doc. # 2]. The United States and the State of Texas both declined to intervene in the action [Doc. #21, 22], and the court ordered the case unsealed on March 25, 2011.³ [Doc. # 23].

²PPGC owns, administrates, and operates 10 health care clinics in Texas and two health care clinics in Louisiana.

³A False Claims Act complaint is first served on the Government and remains under seal for sixty days while the Government decides whether to intervene and take over the action. 31 U.S.C. §3730(b)(2). Pursuant to 31 U.S.C. § 3730(b)(3), however, the court granted the

Relator's third amended complaint dismissed all defendants save PPGC and alleges the following six causes of action:

- (1) Count I involves the false presentation of claims for services not rendered under the FCA
- (2) Count II involves false billings for services not medically necessary and not covered by Medicaid under the FCA
- (3) Count III involves falsifying documentation material to the payment of claims under the FCA
- (4) Count IV involves the presentation of claims for services not rendered under the Texas Human Resources Code §§ 32.039 *et seq.* and 36.002 *et seq.*
- (5) Count V involves false billings for services not medically necessary and not covered by Medicaid under the Texas Human Resources Code §§ 32.039 *et seq.* and 36.002 *et seq.*
- (6) Count VI involves falsifying documentation material to the payment of claims under the Texas Human Resources Code §§ 32.039 *et seq.* and 36.002 *et seq.*

II. STANDARD OF REVIEW

PPGC moves for dismissal of Relator's claims under Fed. R. Civ. P. 12(b)(6). Rule 12(b)(6) provides that a party may move a court to dismiss an action for "failure to state a claim upon which relief can be granted." When ruling on a Rule 12(b)(6) motion, the court considers only the complaint and its proper attachments. *Dorsey v. Portfolio Equities, Inc.*, 540 F.3d 333, 338 (5th Cir. 2008).

Once a claim has been adequately stated, "it may be supported by showing any set of facts consistent with the allegations in the complaint." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 563, 127 S. Ct. 1955, 1969 (2007) *see also SW. Bell Tele., LP v. City of Houston*, 529 F.3d 257, 260 (5th Cir. 2008) (quoting *Twombly*). As the Supreme Court recently explained,

Government three extensions, totaling seventeen months, before unsealing the complaint [*See* Docs. # 6, 11, 14, 20].

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to “state a claim to relief that is plausible on its face” . . . A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged . . . The plausibility standard is not akin to a “probability requirement,” but it asks for more than a sheer possibility that a defendant has acted unlawfully . . . Where a complaint pleads facts that are “merely consistent with” a defendant’s liability, it “stops short of the line between possibility and plausibility of ‘entitlement to relief.’”

Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949 (2009).

III. DISCUSSION

PPGC moves to dismiss Relator’s third amended complaint on the following grounds:

- 1) There is no private cause of action under Section 32.039 of the Texas Human Resources Code.
- 2) Relator’s claims under Section 36.002 of the Texas Human Resources Code are barred to the extent the conduct alleged occurred prior to May 4, 2007; and
- 3) Relator’s fraud claims should be dismissed for failure to plead with particularity under either Federal Rule of Civil Procedure 8(a) or 9(b).⁴

The court will address each of these arguments in turn.

A. There is No Private Cause of Action under Texas Human Resources Code § 32.039

Defendant asserts that Relator made a stand alone claim under the Texas Human Resources Code Section 32.039. The Relator refers to Section 32.039 and Section 36.002. To the extent Relator is asserting a separate claim under Section 32.039, it is dismissed for the following reasons.

Section 32.039 provides in relevant part: “A person commits a violation [under this section] if the person presents or causes to be presented to the department a claim that contains a statement or representation the person knows or should know to be false.” Tex. Hum. Res. Code Ann. §

⁴Defendant also moves to dismiss Relator’s claims under Texas Human Resources Code § 36.002 to the extent they are based on claims submitted under Title XX because liability under §36.002 is restricted to false claims submitted to Medicaid. Tex. Hum. Res. Code Ann. § 36.002(2). However, Relator asserts that her Texas Medicaid Fraud Prevention Act (TMFPA) claims are based solely on violations of Medicaid. [Doc. # 77 at 3 n. 1].

32.039(b)(1). Section 32.039, however, does not provide a private cause of action for a violation of the statute. Rather, the statute only sets forth an administrative remedy assessed by and payable to, the Texas Health and Human Services Commission (“the Department”). *See Id.* § 32.039(c)(“A person who commits a violation under Subsection (b) is liable *to the department* for: the amount paid . . . as a result of the violation . . . and payment of an administrative penalty)(emphasis added); *see also Id.* § 32.039(e)(“In determining the amount of the penalty to be assessed under Subsection (c)(2), *the department* shall consider . . .”)(emphasis added).

Generally a statutory penalty or fine is not payable to a private litigant.” *Brown v. De La Cruz*, 156 S.W.3d 560, 564 (Tex. 2004). An individual who seeks to recover a penalty under such a statute “must bring himself clearly within the terms of the statute” by showing some indication within the statute as to “justify implying a private cause of action.” *Id.*

Relator suggests that her Section 32.039 claim is viable because it is referred to as a basis for liability under Section 36.002. *See* Tex. Hum. Res. Code Ann. § 36.002(13)(“A person commits an unlawful act if the person . . . knowingly engages in conduct that constitutes a violation under Section 32.039(b)”). There is no private cause of action under Texas Human Resources Code Section 32.039. Relator has a claim under Section 36.002 for conduct that violates Section 32.039(b); she does not have an independent cause of action under Section 32.039. Accordingly, Counts IV-VI are dismissed to the extent they attempt to assert a separate cause of action under Texas Human Resources Code Section 32.039.

B. The State of Texas’s Failure to Intervene Bars Claims Brought under Texas Human Resources Code § 36.002 insofar as the Conduct Occurred Prior to May 4, 2007

Relator brings claims IV-VI under Texas Human Resources Code Section 36.002, the Texas Medical Fraud Prevention Act (“TMFPA”), alleging that PPGC submitted false claims and falsified records in support of those claims between October 1999 and February 2009. The TMFPA

explicitly authorizes suit to be brought by a private individual on behalf of the individual and the State of Texas against defendants who commit various acts of fraud upon the Medicaid program. Tex. Hum. Res. Code Ann. § 36.101. When an individual brings an action under the TMFPA, the State of Texas may elect to intervene. *Id.* § 36.102(c). Prior to May 4, 2007, the TMFPA provided: “[i]f the state declines to take over the action, the court *shall* dismiss the action.” Act of Sept. 1 2005, 79 Leg., ch. 806 § 12 (amended 2007) (current version at Tex. Hum. Res. Code Ann. § 36.104(b) (West. Supp. 2012) (emphasis added). Although the Legislature amended this section in 2007 to permit private actions to proceed notwithstanding the state’s decision not to intervene, the amendment applies “only to conduct that occurs on or after the effective date [May 4, 2007] of [the] Act.” Acts of 2007, 80th Leg., ch. 29 § 6(a).

The parties dispute the meaning of the word “conduct”. PPGC contends that “conduct” means the Defendant’s conduct which forms the basis of the complaint. Relator, argues that conduct means the date the State made the decision not to intervene and that to hold otherwise would be “wholly illogical in light of the fact that Relator’s lawsuit had not been filed prior to [May 4, 2007].” [Doc. # 77 at 7]. The court agrees with PPGC’s definition.

The court has not found, and the parties have not cited, any Fifth Circuit or Texas state court cases addressing the meaning of the word “conduct” as specifically used in the 2007 TMFPA amendment. The court is faced with conflicting interpretations from Texas federal district courts. The Northern District of Texas has interpreted the word “conduct” to be the actions of the defendant that are the subject of a relator’s complaint, not the decision of the state not to intervene. *See United States ex rel. Wall v. Vista Hospice Care, Inc.*, 778 F. Supp. 2d 709, 724 n. 84 (N.D. Tex. 2011); *see also United States v. HCA Health Servs. of Oklahoma, Inc.*, 2011 WL 4590791 at *5 (N.D. Tex. Sept. 30, 2011). A court in the Southern District of Texas determined that the

“conduct” discussed in Section 36.104 is the State of Texas’s election not to intervene. *United States. ex rel. King v. Solvay SA et al.*, 823 F. Supp.2d 472, 522 (S.D. Tex. 2011) *vacated in part on other grounds by United States ex rel King v. Solvay S.A. et al.*, 2012 WL 1067228 (S.D. Tex. Mar. 28, 2012).

To the extent that the plain meaning of words in a statute is not evident, the court must give effect to the Texas Legislature’s intent. *McIntyre v. Ramirez*, 109 S.W.3d 741, 745 (Tex. 2003). Texas statutes routinely provide that an amendment applies only to “a cause of action that accrues on or after the effective date of this Act⁵” or “conduct that occurs on or after the effective date of this Act⁶” or “civil actions commenced on or after the effective date of this Act.”⁷ Thus, the effective date of Texas statutes are either based on the filing of the plaintiff’s complaint or conduct that is actionable under the statute. The court has not found, and Relator has not cited, any Texas cases that defines conduct to mean anything other than that which forms the basis of the complaint. Nothing in the Texas Human Resources Code suggests that the Legislature intended the word “conduct” to have a different meaning. The court therefore interprets the word “conduct” as used in Section 36.104 to mean the Defendant’s conduct which forms the basis for the Relator’s complaint.⁸

⁵See e.g., Acts of 1991, 72nd Leg., ch. 476 (current version at Tex. Civ. Prac. & Rem. Code Ann. § 101.001)

⁶See e.g., Acts of 1999, 76th Leg., ch. 1477 (current version at Tex. Fam. Code Ann. § 55.11)

⁷See e.g., Acts of 2011, 82nd Leg., ch. 203, § 6.01 (current version at Tex. Civ. Prac. & Rem. Code Ann. § 51.014)

⁸Relator cites *United States. ex rel. Foster v Bristol-Myers Squibb Co.*, 587 F. Supp. 2d. 805, 817-18 (E.D. Tex. 2008), contending that the Northern District’s interpretation is “inconsistent with decisional law from this jurisdiction.” *Foster*, however, does not support Relator’s argument. In *Foster*, the court held that the relator’s claims were governed by the residual limitations period of Texas Civil Practice and Remedies Code § 16.051, which imposes a 4 year limitations period from the day the cause of action accrues. Despite finding that relator’s claims fell within the applicable statute of limitations period, the court dismissed the

Relator alleges that because the conduct complained of falls within the statute of limitations period, she may pursue all TMFPA claims which fall within the four-year statutory period. Simply because the conduct complained of falls within the statute of limitations, does not save Relator's TMFPA claims arising from conduct occurring prior to May 4, 2007. The State of Texas knew of the requirement to intervene for claims based on conduct occurring prior to May 4, 2007, to survive but elected not to so. Accordingly the court dismisses Relator's TMFPA claims in counts IV-VI to the extent the claims seek recovery for billing submitted to the government or false records produced before May 4, 2007.

C. Relator's Claims Brought under the FCA and TMFPA Satisfy Fed. R. Civ. P. 8(a) and 9(b)

PPGC asserts that Relator's claims brought pursuant to the FCA and TMFPA fail to state a claim upon which relief can be granted because the facts as pled do not allow the court to draw the reasonable inference that PPGC's alleged conduct violated either the FCA or the TMFPA. Specifically, PPGC contends that there is nothing fraudulent about a policy to maximize revenues. *See e.g. United States ex rel. Colucci v. Beth Israel Med. Ctr.*, 785 F. Supp. 2d 303, 314 (S.D.N.Y. 2011). The court finds that the facts pled in Relator's third amended complaint state a plausible claim for relief and that these claims have been pled with sufficient particularity to satisfy Rule 9(b).

1. Standard of review under Fed. R. Civ. P. 8(a) and 9(b)

Claims brought under the FCA must satisfy the heightened pleading standard of Fed. R. Civ. P. 9(b), which requires that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." *Grubbs*, 565 F.3d at 185-86. The purpose of Rule

relator's TMFPA claims because the State of Texas did not timely intervene after receiving notice of the complaint.

9(b) is to (1) provide defendants with fair notice of a plaintiff's claims; (2) protect defendants from harm to their reputation; (3) reduce the number of strike suits; and 4) prevent plaintiffs from filing baseless claims while unearthing unknown wrongs through the discovery process. *Id.* at 190.

The particularity requirement demanded by Rule 9(b) is supplemental to Rule 8(a)'s plausibility requirement but does not supercede Rule 8(a). *Id.* at 185-86. In other words, Rule 9(b) requires "simple, concise, and direct" allegations of the "circumstances constituting fraud" which when taken as true, makes relief plausible, not merely conceivable. *Id.*

Generally, to properly allege the circumstances constituting fraud, a plaintiff must set forth the "who, what, when, where, and how" of the alleged fraud. *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 903 (5th Cir. 1997). However, the Fifth Circuit has expressly stated that when analyzing FCA claims, "Rule 9(b)'s ultimate meaning is context specific," and "there is no single construction of Rule 9(b) that applies in all contexts." *Grubbs*, 565 F.3d at 188.

2. Elements of a FCA and TMFPA claim

The FCA assigns civil liability for: (1) the presentment of a false claim to the United States Government or (2) the use of a false record or statement to get a false claim paid. *United States ex rel. Grubbs v. Kanneganti et al.*, 565 F.3d 180, 183-84 (5th Cir. 2009)(citing 31 U.S.C. § 3729(a)(1)(A), (B)).

Presentment under Section 3729(a)(1)(A) requires proof by a preponderance of the evidence a false claim was actually submitted for payment. *Grubbs*, 565 F.3d at 189. Where a complaint does not allege the details of an actually submitted false claim, a relator may survive a motion to dismiss by alleging "particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted." *Id.* at 190. In

other words, to prevail on a false presentment claim, a qui tam plaintiff need not plead the exact dollar amounts, billing numbers, or dates. *Id.*

Section 3729(a)(1)(B) imposes civil liability on any person who “knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim.” To prevail on a false records claim, a plaintiff must prove by a preponderance of the evidence that the defendant made a false record with the requisite intent of securing payment on a false claim. *Id.* at 193. Proof the defendant actually presented the false claim for payment is not required. *Id.* at 192-93.

The TMFPA contains parallel provisions to the FCA. See Tex. Hum. Res. Code Ann. 36.002(1), (12). Because TMFPA claims are analogous to the FCA, the court will look to cases interpreting the elements of FCA claims for guidance in interpreting Relator’s state law claims.

3. Relator’s third amended complaint

PPGC argues that because Relator failed to plead representative examples of patient records which were allegedly altered and facts to support the conclusion that the allegedly false claims were *actually submitted* by PPGC to the state and federal Governments for payment, the third amended complaint does not meet Rule 9(b)’s heightened pleading requirement. [Doc. # 72 at 17-18, 22, 25].

The third amended complaint provides that PPGC violated the FCA and TMFPA by charging patients for services not actually provided, providing medically unnecessary services, and falsifying documentation material to the payment of those claims. Relator alleges that PPGC employees would bill federal and state government programs based on a predetermined list of services regardless of whether the patient’s chart indicated the services were actually provided and, even if provided, were not medically necessary. Although the Complaint does not conclusively show that the claims were actually submitted for payment, the facts as alleged provide the court

with a reliable indicia that lead to a strong inference that the claims were actually submitted.” *Grubbs*, 565 F.3d at 190. The third amended complaint also provides that where a patient’s chart did not contain documentation to support services marked on the bill, PPGC employees routinely altered the chart to match the bill. The court finds that the facts as pled create a plausible claim for relief under the presentment and false records provisions of the FCA and TMFPA.

The complaint has been pled with sufficient particularity to satisfy Rule 9(b). Relator’s third amended complaint contains the basic framework, procedures, and nature of defendant’s alleged fraudulent scheme to maximize revenues along with specific examples in support of PPGC’s alleged fraudulent conduct brought under the FCA and TMFPA. Exhibit 1 to Relator’s third amended complaint specifically lists potential witnesses and their expected testimony in some detail. The third amended complaint apprises PPGC of “who” allegedly committed the wrongful acts, “what” is alleged, “when” the wrongful acts occurred, “where” the acts made the basis of the suit took place, or “how” the alleged fraud occurred.

PPGC allegedly submitted false claims and falsified records to Medicaid on a regular if not daily basis during Relator’s entire period of employment—from October 1999 through February 2009. The acts allegedly occurred at all of PPGC’s 12 clinics.⁹ The names of numerous PPGC employees and directors who allegedly participated in the fraud or were responsible for creating the alleged fraudulent policies are specifically listed in the third amended complaint. [Doc. # 67 at 6]. The third amended complaint describes the specific process by which PPGC caused the submission of the false claims to the government and allegedly falsified records to conceal their fraud.

⁹Even though relator only worked at PPGC’s Lufkin clinics, based on statements made by specific corporate officers at several company meetings, she alleges that the same policies were implemented at all of PPGC’s clinics. [Doc. # 67 ¶ 22].

Accordingly, at this stage, “[d]iscovery can be pointed and efficient, with a summary judgment following on the heels of the complaint if billing records discredit the complaint’s particularized allegations.” *Grubbs*, 565 F.3d at 191.

IV. CONCLUSION

For the reasons discussed above, the court hereby GRANTS IN PART PPGC’s motion to dismiss [Doc. # 72].

The following claims are hereby dismissed with prejudice:

- 1) Any of Relator’s claims brought as a separate cause of action under Tex. Hum. Res. Code § 32.039; and
- 2) Relator’s claims under Tex. Hum. Res. Code § 36.002 in so far as the conduct alleged occurred prior to May 4, 2007.

The remainder of PPGC’s motion is denied.

So **ORDERED** and **SIGNED** this **10** day of **August, 2012**.



Ron Clark, United States District Judge