IN THE **SUPREME** COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

MARK **MARKS, P.A., ET AL.,**

Respondents.

_____/

CASE NO. 85,920
District Court of Appeal,
4th District - No. **93-3259**
94-0339

BFUEF OF AMICUS CURIAE

BILL NELSON
INSURANCE COMMISSIONER

CHARLES FAIRCLOTH, JR.
SENIOR ATTORNEY
FLORIDA BAR NO. 0238041

DEPARTMENT OF INSURANCE
200 **E. GAINES STREET**
FLETCHER BUILDING, SUITE 649
TALLAHASSEE, PL 32399-1050
(904) 413-4041

COUNSEL FOR AMICUS CURIAE

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BRIEF OF AMICUS CURIAE

PRELIMINARY STATEMENT

Amicus curiae, the Florida Division of Insurance Fraud, will be referred to herein as the "Division."

STATEMENT OF THE CASE AND FACTS

As *amicus curiae*, the Department of Insurance, Division of Insurance Fraud, accepts the Petitioner's and Respondent's summary of the case and facts.

SUMMARY OF ARGUMENT

As *amicus* ***curiae,*** the Department of Insurance, Division of Insurance Fraud, will discuss the effect of this Court's decision in the instant case on insurance fraud investigations involving attorneys. The Division is the law enforcement agency responsible for detecting, investigating and assisting in the prosecution of insurance fraud in the State of Florida.

A number of the Division's past and current insurance fraud investigations involve or are directed at attorneys. These investigations illustrate the widely varying types **of** insurance fraud involving attorneys. The investigations also demonstrate the necessity of a broad "any person" statute to prohibit attorneys' individual fraudulent acts working in concert with the anti-conspiracy provisions also in the statute. Comparing Section 817.234, Fla. Stat., with Section 626.989(1), Fla. Stat., plainly shows the Legislature fully intended the broad prohibition against fraudulent insurance acts to include any person involved in **filing** claims against insurers. There is no exception in either statute for any type of licensed professional.

Should this Court affirm the lower tribunals' decision, it will most likely lead to reduced prosecution of individual fraudulent acts on the part of attorneys. The bright line prohibition against "any person" commiting such acts would be replaced by a nebulous analysis of the licensing status of the person making a false claim. This **Court** should not allow such a strained reading of the statute.

ARGUMENT

ISSUE I

THE EXPERIENCE OF THE DIVISION OF INSURANCE FRAUD IS THAT SECTION 817.234(1)(a), FLA. STAT., MUST INCLUDE ATTORNEYS.

The Division of Insurance Fraud is a law enforcement agency within the Florida Department of Insurance. The Division is responsible for detecting, investigating and assisting in the prosecution of insurance fraud in the State of Florida. See, Section 626.989, Fla. Stat.; see also, Section 624.307, Fla. Stat and ***Art.*** V, Section ***6,*** Fla. Const.. The Division by executing its responsibilities has gathered information and formed opinions this Honorable Court should be made aware of in making its decision in the instant case. As ***amicus curiae,*** the Division seeks to inform this Court of the potential effects **of** its decision should the lower courts' decision be upheld. While ***amicus curiae*** may not inject new issues into a proceeding, the Division is not confined to arguing the parties' theories of the case. See, Keating v. State ex rel Ausebel, 157 So.2d **567** (App. **1964).** Instead, the Division **will** use practical examples from its files, while preserving confidentiality, to illustrate the potential effect of this Court's decision.

The lower courts in this case have essentially held that the provisions **of** Section 817.234(1)(a), Fla. Stat., proscribing fraudulent submissions of incomplete statements are not applicable to attorneys during settlement negotiations, The Fourth District Court of **Appeal upon** the State's motion certified the question to this Court as an issue of vagueness of notice. State **v.** Marks, 20 FLW 1220 (Fla. 4th **DCA** 1995). It is the Division's experience, however, that the broad reach of the statute serves a twofold purpose; the criminalization of

both individual fraudulent acts on the part of attorneys during the course of asserting a claim, as well as attorneys' conspiring with claimants for purposes of defrauding insurers.

An example **of** an attorney's individual fraudulent act comes from a case the Division investigated in 1987 in Broward County. The attorney had a client who had slightly injured her back in an automobile accident. About a month later, the same client slightly injured her ankle in a slip-and-fall at a retail store in Dade County, but did not ***make*** a claim. Without the client's knowledge, the attorney submitted a claim to the retail store's insurer claiming that his client had injured her back in the slip-and-fall. In support of the claim, the attorney submitted **an** altered version of the medical report from the earlier automobile accident claim and demanded a $65,000 settlement. Negotiations reduced the settlement of the claim to $3100. The Division investigated the case and the attorney subsequently pled guilty to insurance fraud.

Under the lower courts' decision in the instant case, such fraudulent conduct as this would apparently be acceptable practice. Since the claim was in settlement negotiations conducted by counsel, the reasoning ***goes,*** the "incomplete" information in the claim would not be subject to criminal penalty since the attorney lacked adequate notice **of** what was an "incomplete" claim. The Florida Legislature, however, could not have intended to exclude attorneys from the prohibition against fraudulent claims by dint of them merely being attorneys. The Legislature in fact went **so** far as to further specifically prohibit attorneys from conspiring with or even urging claimants to defraud insurers. **See,** Section 817.234(3), Fla. Stat. It is impossible to imagine that the Legislature would criminalize an attorney urging a claimant to file a false claim while allowing the attorney to intentionally file a

fraudulent "incomplete" claim. In short, the "any person" language of Section 817.234(1)(a) means exactly that, with no exceptions.

In 1992 the Division investigated a Fort Myers attorney for filing a false claim against Allstate Insurance Company in a case that illustrates the twofold purpose of the insurance fraud statute to criminalize both individual and conspiratorial acts. The attorney was representing a woman who had already filed a claim arising from an automobile accident with an uninsured motorist. The woman received the limits of her policy coverage. The attorney, however, filed a second claim under the woman's parents' policy, which covered resident relatives. The woman was subsequently paid under her parents' uninsured motorist coverage. The second claim was incomplete as it did not mention the previous claim or payment.

The Division's investigation revealed that the woman did not reside with her parents and in fact rented a room elsewhere. The investigation also revealed that the attorney had told the woman to say she lived with her parents, and told the woman's landlord to say she only came by the rented room occasionally to care of it while the landlord was out of town. The attorney himself, however, drafted and submitted the second false claim under the parents' insurance. The fraudulent claim resulted in Allstate paying out over $400,000 for the claim due to stackable coverages.

The attorney here conspired to create coverage where none existed, i.e., for a nonresident relative. The attorney himself, however, filed the false claim. This resulted in two separate criminal violations of Section 817.234, Fla. Stat., by the attorney. The first violation was of Section 817.234(1)(a), Fla. Stat., by the filing of the false claim. The

second violation was of Section 817.234(3), by conspiring with the claimant.

If this Court were to accept Appellee **Marks'** position, it would lead to the absurd result that an attorney could file **an** incomplete claim, with the intent to defraud, and not commit a criminal act, while that same attorney by conspiring with the claimant to submit the false claim committed a criminal act. The Legislature plainly felt that insurance fraud was a widespread criminal activity that required **all** persons be prohibited from **filing** false or incomplete claims with the intent to defraud an insurer. See, Section 817.234(1)(a), **Fla.** Stat.

The Legislature then went on, however, to even more specifically control attorneys' actions in insurance claims by making it a criminal act **for an** attorney to assist, conspire with or even to simply **urge** a claimant to violate Section 817. **234.** ***See,*** Section 817.234(3), Fla. Stat. **It** would be absurd to conclude that attorneys are not controlled by the prior statute criminalizing the fraudulent submission while the conspiracy involving the attorney that lead to the fraudulent submission was still a criminal act.

Furthermore, the Division's own statute is quite clear on what constitutes a fraudulent insurance act. Section 626.989(1), Fla. Stat., states:

> **[A]** person commits a "fraudulent insurance act" if he knowingly and with intent to defraud presents, causes to be presented, or prepares with knowledge or belief that it will be presented, to or by an insurer,. . .any written statement as part **of,** or in support of,. . .a claim for payment **or** other benefit pursuant to **any** insurance policy, which he **knows** to contain materially false information concerning any fact material thereto **or if** he conceals, for the purpose of misleading another, information concerning any fact material thereto.

Here again, contrary to the lower courts' opinion in the instant case, the Legislature has defined a fraudulent insurance act to include acts by any person made with the intent to defraud. The Legislature's focus is clearly on an act committed with the requisite intent, not on the class of the person committing the act.

Reading Section 626.989(1), Fla. Stat., *in pari materia* with Section **817.234,** Fla. Stat., since both directly concern insurance fraud, one **is** lead to the inescapable conclusion that the Legislature fully intended to prohibit such acts on the part **of** any person involved in filing claims against insurers. There is simply no exception **for** attorneys or physicians or any other licensed professional.

Should this Court affirm the lower tribunals' decision, it will most likely lead to reduced prosecutions of individual fraudulent acts **on** the **part** of attorneys. An exception the Legislature clearly never intended would be carved out by judicial gloss. **As** a law enforcement agency, the Division would be faced with having to analyze each report of insurance fraud as to whether the alleged perpetrator was an attorney, whether the alleged fraud **was** committed during settlement negotiations, and whether the requisite intent was present.

The bright line prohibition **against** "any person" commiting such acts would be replaced by a nebulous analysis of the licensing status and settlement efforts of the person making a false claim. **Should the** lower courts' **opinions** prevail a simple question **of** the presence or lack **of** intent, **an** analysis common to law enforcement, is replaced by a highly subjective analysis limited by attorney-client privilege and the work product doctrine. The Division's, and therefore the State's, insurance fraud investigations and prosecutions would

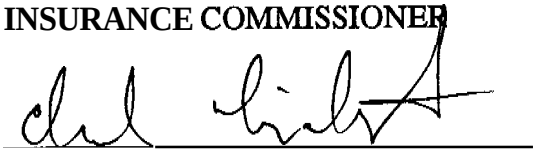
directly suffer as a result. This Court should not allow such a strained reading of the statute to create an exception where, the Legislature clearly intended no exception to be made.

CONCLUSION

For the reasons set forth above, this Honorable Court should answer the certified question in the negative and reverse the opinions of the lower tribunals.

Respectfully submitted,

BILL NELSON
INSURANCE COMMISSIONER



CHARLES FAIRCLOTH, JR.
SENIOR ATTORNEY
Florida Bar #0878936

DEPARTMENT OF INSURANCE
DIVISION OF INSURANCE FRAUD
200 E. GAINES STREET
FLETCHER BUILDING, SUITE 649
TALLAHASSEE, FL 32399-0324
(904) 413-4041

COUNSEL FOR AMICUS CURIAE

OF SERVICE

I HEREBY **CERTIFY** that a true and correct copy of the foregoing has been forwarded by U.S. Mail to Richard L. Polin, Assistant Attorney General, Department of Legal Affairs, Office of the Attorney General, Post Office Box 013241, Miami, FL 33101, H. Dohn Williams, Jr., Esquire, Post Office Box 1722, New River Station, Ft. Lauderdale, FL 33302, and Mark Hicks, Esquire, Hicks, Anderson & Blum, P.A., New World Tower, Suite 2402, 100 North Biscayne Blvd., Miami, FL 33132, this 18th day of July, 1995.

C[illegible]FAII JR.

SENIOR ATTORNEY