

IN THE
SUPREME COURT OF FLORIDA

CASE NO.: 96,910

STATE OF FLORIDA,

Petitioner,

vs.

CHARLES BRADFORD,

Respondent.

Discretionary Review From the
Fourth District Court of Appeal

JOINT BRIEF AMICUS CURIAE OF
STEVEN WARFIELD, LAKEWOOD CHIROPRACTIC CLINIC,
P.A., NORTH FLORIDA HEALTH CARE, INC.,
d/b/a WARFIELD CHIROPRACTIC CENTER,
MARK E. KLEMPNER, CASMAR, INC., AND CRAIG J. OSWALD
IN SUPPORT OF RESPONDENT

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CERTIFICATE OF INTERESTED PERSONS

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In accordance with the Florida Supreme Court Administrative Order, issued on July 13, 1998, and modeled after Rule 28-2(d), Rules of the United States Court of Appeals for the Eleventh Circuit, counsel for Steven Warfield, Lakewood Chiropractic Clinic, P.A, North Florida Health Care, Inc. d/b/a Warfield Chiropractic Center, Mark E. Klempler, Casmar, Inc., and Craig J. Oswald, hereby certify that the instant brief has been prepared with 14 point, Times Roman, a font that is proportionately spaced.

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STATEMENT OF THE INTEREST OF THE AMICI

The *amici* in this case are chiropractors and chiropractic clinics who, along with two other persons, were charged by statewide grand jury indictment, subsequently superseded by an information, alleging multiple violations of §817.234(8), Florida Statutes, which prohibits unlawful solicitation for the purpose of making certain insurance claims. *Amici* also were charged with one count of violation of Florida's RICO Act, §895.02(3), Florida Statutes, predicated solely upon the solicitation charges. As occurred in the case presently under review, the *amici* raised, *inter alia*, challenges in the trial court to the constitutionality and construction of §817.234(8).

Following the Fourth District's decision in *Bradford v. State*, 740 So.2d 569 (Fla. 4th DCA 1999), the instant case under review by this Court, the Circuit Court, Fourth Judicial Circuit, Duval County, granted a joint motion by *amici* and their co-defendants to dismiss the information for its failure to allege an essential element of intent to defraud, as to which the State conceded it had no evidence. After the State's timely appeal of the dismissal, the First District Court of Appeal on April 6, 2000 certified the trial court's order as requiring immediate resolution by the Court pursuant to

Fla.R.App.P. 9.125. *See State v. Cronin*, Case No. 2000-749. This Court has not yet taken action upon the First District's pass-through certification.

Pursuant to Fla.R.App.P. 9.370, the written consents of the parties to the filing of this brief are attached hereto.

SUMMARY OF THE ARGUMENT

The decision under review in *Bradford v. State*, 740 So.2d 569 (Fla. 4th DCA 1999) should be approved or, alternatively, §817.234(8) should be held unconstitutional. Section 817.234(8) unconstitutionally restricts commercial speech protected by the First Amendment and does not directly advance a substantial state interest through narrowly tailored means. Alternatively, the only manner in which the statute can withstand constitutional attack is by construing it in a sufficiently narrow manner so as to directly advance the State's substantial interest in preventing insurance fraud. That was done by the court below in holding the statute constitutional by limiting its application to cases in which solicitation is made with an intent to defraud. Because courts must construe statutes to be constitutional where possible, statutes suffering apparent constitutional infirmity may be given a narrowing construction to survive constitutional challenge where such construction may be applied consistent with the federal and state constitutions and the legislative intent. Section 817.234(8) is unconstitutional or, to be found constitutional, must be construed to include as an essential element an intent to defraud.

ARGUMENT

I.

SECTION 817.234(8), FLORIDA STATUTES, UNCONSTITUTIONALLY RESTRICTS COMMERCIAL SPEECH IF INTENT TO DEFRAUD IS NOT AN ELEMENT OF THE OFFENSE.

A. Section 817.234(8), Florida Statutes, Is a Blanket Ban on All Solicitation of Accident Victims by Professionals.

Section 817.234(8), Florida Statutes states:

It is unlawful for any person, in his or her individual capacity or in his or her capacity as a public or private employee, or for any firm, corporation, partnership, or association, to solicit any business in or about city receiving hospitals, city and county receiving hospitals, county hospitals, justice courts, or municipal courts; in any public institution; in any public place; upon any public street or highway; in or about private hospitals, sanitariums, or any private institution; or upon private property of any character whatsoever for the purpose of making motor vehicle tort claims or claims for personal injury protection benefits required by s. 627.736. Any person who violates the provisions of this subsection commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

The plain language of the statute criminalizes any solicitation of business, by any person, if the solicitor acts with a purpose of filing a motor vehicle tort claim or a claim for PIP benefits, regardless of the time, place or manner of the solicitation, whether the solicitor acts with any fraudulent intent, or whether the solicitor acts with a “legitimate” purpose in addition to the purpose proscribed by the statute.¹

In effect, the statute bans all solicitation of motor vehicle accident victims by professionals, including chiropractors. All automobiles registered in Florida are required to carry PIP coverage. All victims of auto accidents have (or should have under law) recourse to PIP coverage – for eighty percent of all reasonable expenses for necessary medical services arising out of an accident. *See*, § 627.736(1)(a), Fla. Stat. Thus, any person injured in an auto accident is normally entitled to make a PIP claim. A professional treating an accident victim for, or advising the victim about, the victim’s accident-related injuries would be derelict in his duties if he did not make a PIP claim on behalf of the victim or at least suggest to the victim that some of the expense of treatment could be covered by PIP benefits. Thus, a professional acts with a “purpose” of filing a PIP claim any time he solicits business from a motor vehicle

¹ Such as seeking to add clients to one’s lawful chiropractic business, or seeking to provide appropriate treatment of patients’ legitimate medical needs.

accident victim. In effect, § 817.234(8), Florida Statutes, prohibits any professional from soliciting any auto accident victim, regardless of the time, place, or manner of the solicitation and regardless of the solicitor's motives or truthfulness. "Because of the value inherent in truthful, relevant information, a state may ban only false, deceptive or misleading commercial speech." *Mason v. The Florida Bar*, ___ F.3d ___, ___, slip op. 1969, 1972 (11th Cir. April 6, 2000) (copy attached), citing *Ibanez v. Florida Dept. of Bus. and Prof'l. Regulation*, 512 U.S. 136, 142 (1994). Neither Bradford nor amici were accused of false, deceptive or misleading speech.

B. The *Central Hudson* Test Is the Appropriate Analysis to Determine Whether § 817.234(8) Is Constitutional.

The test for determining whether a state's regulation of commercial speech violates First Amendment protections is set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980). Under *Central Hudson*, commercial speech must concern lawful activity and not be misleading in order to receive First Amendment protection. *Central Hudson*, 447 U.S. at 566. Assuming those conditions are met, regulation of the speech is constitutional if the government asserts an interest which is substantial, the regulation directly and materially advances the asserted interest, and the regulation is not more extensive than necessary to serve the interest. *Central Hudson*, 447 U.S. at 566, *supra*. The regulation does not have to be the least restrictive means, but does have to be "in proportion to the interest served," and "narrowly tailored to achieve the desired objective." *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 632 (1995).

Section 817.234(8), Florida Statutes, prohibits non-misleading commercial speech regarding otherwise lawful activity. Such conduct is deserving of First Amendment protection, subject to the *Central Hudson* test. See *Barr v. State*, 731 So.2d 126 (Fla. 4th DCA 1999) (applying the *Central Hudson* test to § 817.234(8) in a case similar to the instant case); see also *Hershkowitz v. State*, 744 So.2d 1268 (Fla. 3d

DCA 1999) (adopting Fourth District's analysis in *Bradford* and *Barr*); *Bailey v. Morales*, 190 F.3d 320, 323 (5th Cir. 1999) (analyzing similar violations of Texas anti-solicitation statute under *Central Hudson* test).

C. Application of the *Central Hudson* Test.

1. *The State Has a Substantial Interest in Preventing Insurance Fraud.*

In previous cases in which criminal defendants have challenged the constitutionality of § 817.234(8), Florida Statutes, the state has asserted that it has an interest in preventing insurance fraud and that its interest is “substantial” for purposes of the *Central Hudson* test. The state has a substantial interest in preventing insurance fraud. See *Bradford*, 740 So.2d at 571; *Barr*, 731 So.2d at 129; *Hershkowitz*, 744 So.2d at 1269-70.

2. *Section 817.234(8), Florida Statutes, Does Not Directly Advance the State's Interest in Preventing Insurance Fraud If Intent to Defraud Is Not an Element of the Offense.*

The court below addressed the “directly advances” prong of the *Central Hudson* test. The court conceded Bradford’s assertion that § 817.234(8), standing alone, “does not speak directly to the state’s interest in preventing insurance fraud.” *Bradford*, 740 So.2d at 571. However, the court held that subsection (8) directly speaks to the State’s interest in preventing insurance fraud only when read *in pari materia* with subsection (1) of the statute because intent to defraud then becomes an element of the offense.² *Bradford*, 740 So.2d at 571. In *Hershkowitz v. State*, 744 So.2d 1268, 1269 (Fla. 3d DCA 1999), the Third District Court of Appeal expressly adopted *Bradford*’s reasoning and analysis. Thus, according to both Florida district courts of appeal which have considered the issue, § 817.234(8), Florida Statutes, satisfies the “directly advances” prong of the *Central Hudson* test only because intent to defraud is an element of the offense. However, the state argues in the instant case that intent to defraud cannot be read into the statute.

While there is some anecdotal evidence of the use of “runners” by lawyers who orchestrate insurance fraud schemes, *see Barr v. State*, 731 So.2d 126 (Fla. 4th DCA 1999) (citing the Dade County Grand Jury Report, Fall Term 1974, filed August 11,

² The effect of reading subsection (8) *in pari materia* with subsection (1) is addressed in detail at II.A.1., *infra*.

1975 (the "Grand Jury Report")), the evidence does not indicate that §817.234(8)'s blanket ban on all solicitation of accident victims would directly and materially advance the state's interest in preventing insurance fraud. The situation concerning the 1974 Dade County Grand Jury involved lawyers using runners to solicit accident victims, then referring the victims to doctors who would perform unnecessary tests or treatments in order to pierce the \$1,000.00 PIP threshold that existed at the time. Only by incurring medical expenses beyond that amount could the lawyers maintain lucrative tort claims for pain and suffering on behalf of the accident victims. The Legislature has since changed the no-fault law so that entitlement to recover for pain, suffering, or mental anguish is now tied to the character of the victim's injury, *i.e.*, whether it is significant, permanent, and/or disfiguring, rather than being tied to a dollar amount of medical expenses. *See* §627.737(2), Fla. Stat. Thus, the incentive of lawyers, doctors, or even chiropractors to engage in the kind of fraud scheme described in the Grand Jury Report has been eliminated. Given the change in the law, the Grand Jury Report is no longer significant evidence of a connection between mere solicitation of accident victims and insurance fraud.

Further, the connection, or lack thereof, between the restriction and the state's asserted interest can be understood by determining whether the conduct of the person opposing the restriction actually infringes a valid and substantial state interest.

Edenfield v. Fane, 507 U.S. 761, 771 (1993) (the fact that the defendant's conduct was merely non-misleading solicitation of business highlighted the tenuous connection between the state's interest in preventing fraud, overreaching, and compromised independence and the state's total ban on direct, in-person, uninvited solicitation by a CPA). As in *Edenfield*, the conduct at issue herein is solely non-misleading solicitation of business. There is no allegation of fraudulent intent or conduct, or any misleading, on the part of Charles Bradford or the *amici*.

Although the State has a substantial interest in preventing insurance fraud, §817.234(8) does not directly and materially advance that interest unless intent to defraud is an element of the offense. The limited anecdotal evidence of a connection between insurance fraud and the use of runners is outdated in light of §627.737(2), Florida Statutes and, thus, there is no evidentiary support for the argument that §817.234(8)'s apparent ban on all solicitation of accident victims advances the state's interest. See *Edenfield*, 507 U.S. at 771 (holding that the burden is on the state to support the connection with evidence). To pass constitutional muster under *Central Hudson*, the state further must carry its burden of establishing that the regulation advances its substantial interests "in a direct and effective manner." *Mason*, ___ F.3d at ___, slip op. at 1974 (citations omitted).

In addition, the *amici* and others prosecuted in Florida under §817.234(8) are not even alleged to have engaged in any fraudulent conduct or intended fraud. Thus, there is no evidence that the harms feared are real or that § 817.234(8) will in fact alleviate them to any degree unless the statute is applied only against those who solicit with an intent to commit fraud. Section 817.234(8), without a fraud element, thus “provides only ineffective or remote support for the government’s purpose,” and is an unconstitutional restriction on commercial speech. See *Central Hudson*, 447 U.S. at 564; see also *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (complete statutory ban on price advertising of alcoholic beverages held unconstitutional because there was no evidence that the restriction on speech would significantly reduce market-wide consumption of alcoholic beverages and, thus, any significant change in consumption would be purely fortuitous); *Greater New Orleans Broadcasting Assoc., Inc. v. United States*, 527 U.S. 173 (1999) (federal statute prohibiting the broadcasting of advertising for privately owned casino gambling held unconstitutional because the government failed to connect broadcasting advertising for casinos with increased casino gambling and compulsive gambling, particularly in light of statutory exceptions for broadcast advertising for Indian tribal casinos); *Dept. of Professional Regulation, Board of Accountancy v. Rampell*, 621 So.2d 426 (Fla. 1993) (Florida statute which prohibited direct, in person, uninvited solicitation by a CPA of a specific potential

client did not directly advance the state's asserted interest in maintaining the quality and independence of CPAs where numerous other forces sufficiently protected the interest and the net effect of the statute was simply to eliminate price competition); *Beckwith v. Dept. of Business and Professional Regulation, Board of Hearing Aid Specialists*, 667 So.2d 450 (Fla. 1st DCA 1996) (Florida statute which prohibited in person or telephonic canvassing by a hearing aid specialist for the purpose of selling a hearing aid did not directly advance the state's interest in preventing intimidation, harassment, or coercion where there was no evidentiary support for the department's assertion that person to person contact greatly enhanced the possibility for intimidation and overreaching); *Mason, supra*, (Florida Bar rule and order requiring disclaimer of Martindale-Hubbell rating unconstitutionally infringes First Amendment right to engage in non-misleading commercial speech).

3. Section 817.234(8), Florida Statutes, is Not Properly Tailored to the State's Asserted Interest in Preventing Insurance Fraud.

Even assuming that §817.234 (8), directly advances the state's interest in preventing insurance fraud, the statute is unconstitutional if intent to defraud is not an element because the statute is not "narrowly tailored to achieve the desired objective." *Went for It, Inc.*, 515 U.S. at 632. As the United States Supreme Court has stated, "The free flow of commercial information is valuable enough to justify imposing

on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful.” *Shapiro v. Kentucky Bar Assn.*, 486 U.S. 466, 478 (1988). Section 817.234(8), makes no attempt to distinguish that which is harmful from that which is not, instead banning all solicitation of accident victims regardless of time, place, manner, or fraudulent intent.

Restrictions on commercial speech less expansive than those challenged here have been stricken as unconstitutional because they were not reasonably tailored to achieve the state’s asserted interest. In *Bailey v. Morales*, 190 F.3d 320 (5th Cir. 1999), the restriction at issue was a Texas statute which prohibited chiropractors and other professionals from soliciting employment, if the solicitation was by telephone or in person, and if the individuals solicited were known by the chiropractors to have a special need for chiropractic services such as having been in an accident or having suffered from arthritis. Although the Texas statute was, obviously, more narrowly tailored than the blanket ban at issue here, the court held that the Texas statute was unconstitutional because it was not reasonably tailored to the state’s interest. *Bailey*, 190 F.3d at 324. Significant to the court’s analysis was the fact that the statute prohibited a great deal of conduct not imbued with any threat of abuse (such as speaking to seniors at a senior citizen center about the benefits of chiropractic treatment). *Bailey*, 190 F.3d at 324. In addressing another part of the statute which,

like § 817.234(8), prohibited all forms of solicitation, the court held that the statute was “neither reasonably tailored nor reasonably proportional to the harm the State [sought] to prevent.” *Bailey*, 190 F.3d at 325. The court specifically noted the lack of a time boundary or a target group in support of its holding. *Bailey*, 190 F.3d at 325.

Numerous other cases have stricken restrictions more narrowly tailored than § 817.234(8). *See, e.g., Shapero*, 486 U.S. at 476 (in which the court struck down a ban on targeted, direct-mail solicitation by lawyers because the mere opportunity “for isolated abuses or mistakes does not justify a total ban on that mode of protected commercial speech”); *44 Liquormart*, 517 U.S. 484, 507 (holding that complete ban on price advertising of alcoholic beverages was not properly tailored where “it [was] perfectly obvious that alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the state’s goal of promoting temperance”); *Central Hudson*, 447 U.S. at 570 (holding that a restriction which prohibited all promotional advertising by an electric utility regardless of the impact on overall energy use was not constitutionally tailored to the state’s interest in energy conservation); *Statewide Detective Agency v. Miller*, 115 F.3d 904 (11th Cir. 1997) (holding that a Georgia statute which made it a misdemeanor to request an accident or investigative report “for commercial solicitation purposes,” probably violated the First Amendment); *Silverman v. Walkup*, 21 F.Supp.2d 775 (E.D. Tenn. 1998) (holding

that Tennessee statute which constituted a blanket ban on both in person and telephone solicitation by chiropractors but which purported to exempt other forms of advertising was not narrowly tailored to achieve the desired objective, particularly in light of the availability of other, less restrictive alternatives); *Rampell*, 621 So.2d 426, 429 (stating that “the total prohibition of price competition is not a means narrowly tailored to achieve the desired result of quality audits”); *State v. McCarthy*, 615 So.2d 784 (Fla. 2d DCA 1993) (holding that Florida statute which prohibited misrepresentation of chances of success of business opportunities violated the First Amendment because the statute could easily be applied to prohibit protected communications).

Unlike the Texas statute at issue in *Bailey*, Florida’s statute has no limitations as to the time, place, or manner of the solicitation, or as to the individuals to whom the statute applies. Like the Texas statute, the Florida statute’s blanket ban prohibits a great deal of conduct that has no association with insurance fraud. Thus, §817.234(8), Florida Statutes, which is far broader than the Texas statute struck down in *Bailey*, is unconstitutional, for it is not reasonably tailored to the state’s interest in preventing insurance fraud.

For the forgoing reasons, §817.234(8), unconstitutionally restricts commercial speech protected by the First and Fourteenth Amendments to the United States

Constitution and Article I, Section 4 of the Florida Constitution unless, as in *Bradford* and *Hershkowitz*, interpreted as requiring intent to defraud as an element of the offense.

If the Court rejects the Fourth District's construction of the statute in favor of that advocated by the State, *see* Petitioner's Initial Brief on the Merits at 12-18, §817.234(8) must be stricken as an unconstitutional infringement of commercial free speech.

II.

THE BRADFORD AND HERSHKOWITZ COURTS CORRECTLY INTERPRETED SECTION 817.234(8), FLORIDA STATUTES, AS REQUIRING AN INTENT TO DEFRAUD.

Assuming, *arguendo*, that §817.234(8) is capable of surviving constitutional challenge, that result is possible only by applying the narrowing construction of the Fourth District in *Bradford* and the Third District in *Hershkowitz*, that the statute applies only to solicitations made with an intent to defraud. The State's arguments overlook principles of statutory construction that must be applied by courts faced with statutes presenting certain constitutional infirmities.

The State argues that the Fourth District's decision in this case should be reversed because the plain language of the statute is unambiguous and contains no

explicit reference to an intent to defraud. The State argues that, therefore, an intent to defraud should not be engrafted onto the statute. With all due respect, the State overlooks the legal standard applicable under the circumstances. Although the plain language of a statute normally controls its interpretation, the Florida courts have a duty to construe problematic state statutes in favor of their constitutionality, if possible, consistent with the federal and state constitutions and the legislative intent.

State v. Stalder, 630 So.2d 1072 (Fla. 1994); *see also Doe v. Mortham*, 708 So.2d 929 (Fla. 1998).³ As this Court noted in *Doe*,

³In *Stalder*, the Court addressed the constitutionality of the Florida “Hate Crime” Statute, § 775.085, Florida Statutes (1989). The plain language of the statute required the enhancement of criminal penalties for any offense which evidenced racial, ethnic, or similar bias, including constitutionally protected expressive conduct. In order to save the statute from being a constitutionally invalid restriction on speech, the court adopted a narrowing construction of the statute. The Court held that the statute must be read as applying only to crimes in which the perpetrator selects his victim because of the victim’s race, color, ethnicity, religion, or national origin and as not applying to constitutionally protected expressions of such bias. *Bradford* and *Hershkowitz* do precisely the same thing with respect to § 817.234(8), Florida Statutes.

[T]his Court is eminently qualified to give Florida statutes a narrowing construction to comply with our state and federal constitutions. In fact, it is our *duty* to save Florida statutes from the constitutional dustbin whenever possible.

708 So.2d at 934 (emphasis in original, footnotes omitted).

Section 817.234(8), Florida Statutes, unconstitutionally restricts commercial speech absent the narrowing construction of *Bradford* and *Hershkowitz*.⁴ Therefore, this Court must determine whether a legislative intent exists that is not fully expressed in plain language of the statute. A review of available indicators demonstrates that § 817.234(8) was intended to apply only to situations in which the solicitor acts with an intent to defraud an insurer. Such an interpretation is supported by the legislative history, and is both logical and constitutional. The offense at issue should, therefore, if possible, be interpreted as requiring an intent to defraud.

A. The Legislative History of § 817.234(8), Florida Statutes, Supports the *Bradford/Hershkowitz* Interpretation.

1. *Enactment of Subsection (8) in Same Session as Subsection (1)(a).*

⁴See Section I, *supra*.

As the Fourth District noted in *Bradford*, statutes enacted during the same legislative session and dealing with the same subject matter must be considered *in pari materia*, if possible, in order to harmonize them and give effect to the legislative intent. *Bradford*, 740 So.2d at 571, citing *Singleton v. Larson*, 46 So.2d 186, 189 (Fla. 1950); §1.04, Fla. Stat. In *Bradford*, the court, reading subsection (8) in *pari materia* with subsection (1)(a) of the statute,⁵ determined that the legislature’s intent was to punish only solicitations made for the sole purpose of defrauding a patient’s PIP insurer. *Bradford*, 740 So.2d at 571; *see also*, *Hershkowitz*, 744 So.2d 1268. The court also noted that the title of § 817.234, “False and Fraudulent Insurance Claims,” provided persuasive evidence of the legislature’s intent to punish only insurance solicitations done with an intent to defraud an insurer. *Bradford*, 740 So.2d at 571; *see also*, *Hershkowitz*, 744 So.2d 1268.

⁵“A person commits insurance fraud punishable as provided in subsection (11) if that person, with the **intent to injure, defraud, or deceive** any insurer [commit any of the enumerated acts].” § 817.234(1)(a), Fla. Stat. (emphasis added).

The court below properly read subsections (8) and (1)(a) *in pari materia* because subsection (8) was added in the same legislative session in which subsection (1)(a) was amended, and both subsections deal with the same subject matter. § 1.04, Fla. Stat.⁶; see *Pierre v. Handi Van, Inc.*, 717 So.2d 1115, 1116 (Fla. 1st DCA 1998). Laws of Florida, Chapter 77-468, Section 36, substantially amended § 627.7375(1), Florida Statutes, and added new subsections, including subsection (8).⁷

The amendment to then-Section 627.7375(1) substantially changed the scope of that subsection. Prior to the amendment, § 627.7375(1) applied only to insureds, insurers, and adjusters, whereas the amended subsection (1)(a) applied to “any person.” In addition, the statute was changed from dealing generally with any violations of the insurance code to dealing, more specifically, with the presentation of oral or written statements in support of an insurance claim. The amendment to subsection (1) by Chapter 77-468, Section 36, Laws of Florida, was accomplished by the same legislative

⁶“Acts passed during this same legislative session and **amending** the same statutory provision are *in pari materia*, and full effect should be given to each, if that is possible. Language carried forward unchanged in one amendatory act, pursuant to s. 6, Art. III of the State Constitution, should not be read as conflicting with changed language contained in another act passed during the same session. Amendments enacted during the same session are in conflict with each other only to the extent they cannot be given effect simultaneously.” § 1.04, Fla. Stat. (emphasis added).

⁷Section 627.7375, Florida Statutes was the predecessor to § 817.234, Florida Statutes.

enactment which added subsection (8). The two subsections, therefore, should be read *in pari materia*.

As the *Bradford* court stated, reading the two subsections *in pari materia* is necessary to ascertain how the statute directly advances the state's asserted interest in preventing fraud and leads to the obvious conclusion that the legislature's intent in subsection (8) was "to punish only solicitations made for the sole purpose of defrauding [a] patient's PIP insurer." *Bradford*, 740 So.2d at 571.

The State's disfavor of *Bradford* is confusing in light of the State's endorsement of *Barr v. State*, 731 So.2d 126 (4th DCA 1999). See Petitioner's Initial Brief on the Merits at 27-29. The *Barr* court found §817.234(8) constitutional by imposing a narrowing construction, holding that "the statute is not a blanket ban on all solicitation of business by a chiropractor, but rather, targets only those persons who solicit business for the **sole** purpose of making... PIP benefits claims." *Barr*, 731 So.2d 129 (emphasis added). The plain language of §817.234(8) does not indicate the "sole purpose" limitation read into the statute by the *Barr* court. Rather, the *Barr* court construed the statute narrowly to avoid constitutional invalidity, concluding that the intent element is satisfied only by a showing that the sole purpose of a solicitation is to make a PIP or tort claim, eliminating from the statute's ambit those persons who may solicit intending to file a claim but also intending to render appropriate treatment of patients' legitimate

medical needs. *Barr* and *Bradford* consistently applied the same statutory narrowing construction directed by such decision as *Doe v. Morthem, supra*. See *supra* at 14-15. *Barr*, therefore, is in harmony with its clarification in *Bradford* by precluding the subsection from punishing non-fraudulent conduct. *Bradford's* consistency with *Barr* was also recognized by the Third District. *Hershkowitz v. State*, 744 So.2d 1268, 1269 (Fla. 3d DCA 1999) (adopting the reasoning and analysis of *Barr* and *Bradford* and providing further support of that analysis).

2. *The Dade County Grand Jury Report*

Other legislative history regarding § 817.234 also suggests that the legislative intent behind the enactment of subsection (8) was to prohibit solicitations made with an intent to defraud. In this case, that of the *amici* and many other §817.234(8) prosecutions, the state has relied on a Dade County Grand Jury Report, Fall Term 1974, filed August 11, 1975, as the definitive word on the legislature's intent with respect to subsection (8). See Petitioner's Initial Brief on the Merits at 18-24. See *also, Barr*, 731 So.2d at 129. As an initial matter, it should be noted that the grand jury report has, at best, a tenuous relationship to subsection (8).⁸

⁸The grand jury report is attached to the legislative history of S.B. 598, a similar bill to several House bills which eventually were incorporated into C.S./H.B. 2825, which was passed as Chapter 76-266, Section 7, Laws of Florida, and which became Section 627.7375, Florida Statutes, the predecessor to Section 817.234. S.B. 598 died in the

Even assuming that the grand jury report is persuasive on the issue of the legislative intent of subsection (8), a careful reading of the report leads to the conclusion that **fraudulent** practices were the only concern of the grand jury. So-called “runners” who would solicit accident victims were only referred to in passing, and only in the context of their use in fraud schemes. See Section I.C.2, *supra*.

The grand jury report deals exclusively with outright fraud by doctors and lawyers in the form of unnecessary referrals by lawyers to medical providers, and unnecessary hospitalizations and treatments by medical personnel for the purpose of piercing the \$1,000.00 PIP threshold which previously existed under §637.737, Florida Statutes. Notably, the grand jury’s recommendations omit any reference to “runners” or insurance solicitation.

House Commerce Committee on June 4, 1976. Neither S.B. 598 nor Chapter 76-266, Section 7, Laws of Florida, included any provision dealing with runners or insurance solicitation. In 1977, the legislature passed Chapter 77-468, Section 36, Laws of Florida, which substantially altered Section 627.7375, Florida Statutes, including the addition of subsection (8) in essentially its present form. No reference to the Grand Jury Report appears in the legislative history of Chapter 77-468.

The grand jury report is about **fraudulent** practices by doctors and lawyers, including their incidental use of runners to further their **fraudulent** conduct. There is no reasonable way to read the grand jury report as authority for the state's proposition that subsection (8) was "designed to target another problem - runners and professionals using runners for solicitation [in the absence of fraud or fraudulent intent]." Petitioner's Initial Brief on the Merits at 23. The grand jury report, which by the state's own assertion is the only meaningful legislative backdrop for the statute, indicates nothing more than the grand jury's recognition of a pervasive problem of insurance **fraud**. Thus, if the legislature's intent in enacting subsection (8) was derived from the grand jury report, that intent must have been to prohibit insurance solicitation done with an intent to defraud an insurer.

3. *Subsection (8) is Meaningful if Intent to Defraud is Required.*

Interpreting subsection (8) as requiring an intent to defraud does not lead, as the state asserts, to an absurd result or render the legislative enactment meaningless. Petitioner's Initial Brief on the Merits at 20-24. The state argues that subsections (1) through (4) of §817.234 render subsection (8) unnecessary, redundant, and meaningless if a fraudulent intent requirement is added. Petitioner's Initial Brief on the Merits at 23-24. A close reading of subsections (1) through (4) brings to light the weakness in the state's argument.

Subsection (1) (and each of its subdivisions) makes it criminal for any person to prepare, present, or cause to be presented written or oral statements or other information to an insurer knowing that the statement or information is false, incomplete or misleading. § 817.234(1), Fla. Stat. Subsections (2), (3), and (4) make it criminal for a physician or other licensed practitioner, an attorney, or any administrator or employee of any hospital or similar facility to knowingly and willfully assist, conspire with, or urge any insured party to fraudulently violate § 817.234 or Part XI of Chapter 627. § 817.234(2)-(4), Fla. Stat. Nothing in subsections (1)-(4) makes solicitation of business, with intent to commit insurance fraud, a crime. Thus, subsection (8), assuming an intent to defraud requirement, is not unnecessary, redundant, or meaningless, because it criminalizes conduct not addressed elsewhere in the statute.

In light of the foregoing, it is apparent that the Fourth District in *Bradford*, and the Third District in *Hershkowitz*, interpret §817.234(8), Florida Statutes, properly. The Legislature's intent in enacting subsection (8) was to punish only those solicitations done with an intent to defraud. Thus,

[A] chiropractor may solicit any prospective patient even if that chiropractor happens to get paid for his services by the patient's PIP insurance, as long as he does not solicit with the intent to defraud the insurer.

Bradford, 740 So.2d at 571. The legislative history of the statute, including the 1975 Dade County Grand Jury Report and the 1977 amendments to the statute, also establishes that the legislation was intended to fight the evils of **fraudulent** activity. Finally, the Fourth and Third District courts' interpretation does not yield an absurd result, as subsection (8) punishes conduct not covered by any other subsection of §817.234, Florida Statutes. Therefore, the court below properly interpreted the statute as requiring an intent to defraud as the only means by which to find the statute constitutional.

CONCLUSION

The Fourth District below properly endeavored to construe §817.234(8) to be constitutional. The statute, if it can be saved “from the constitutional dustbin,” must include an essential element of intent to defraud. The plain language of §817.234(8) renders the provision an unconstitutional infringement of commercial free speech. Accordingly, the decision of the Fourth District should be affirmed or §817.234(8) held unconstitutional.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to **Celia Terenzo, Esquire** and **Robert R. Wheeler, Esquire**, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Suite 300, West Palm Beach, Florida 33401; and to **Michael Edward Dutko, Esquire**, 600 S. Andrews Avenue, Suite 500, Fort Lauderdale, Florida 33301, by United States Mail, this _____ day of May, 2000.

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