OA 08-29-00

46

ORIGINAL

FILED
THOMAS D. HALL
MAY 12 2000
CLERK, SUPREME COURT
BY

IN THE SUPREME COURT OF FLORIDA

Case No. 96, 910
DCA-4 No. 98-2480

STATE OF FLORIDA,
Petitioner,

v.

CHARLES BRADFORD,
Respondent.

On Appeal from the District Court of Appeal
of the State of Florida, Fourth District

BRIEF OF AMICUS CURIAE, DR. RANDOLPH HANSBROUGH (In Support of Respondent)

LAW OFFICES OF ROBERT ADER
NationsBank Tower, Suite 3550
100 S.E. 2nd Street
Miami, Florida 33131
(305) 371-6060 / Fax (305) 358-5917

Robert A. Ader
Fla. Bar No. 335126
Elizabeth B. Hitt
Fla. Bar No. 0176850

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS (Cont.)

TABLE OF CITATIONS (Cont.)

TABLE OF CITATIONS (cont.)

INTRODUCTION

This Amicus Curiae, Dr. Randolph Hansbrough, will be referred to herein as Amicus or Amicus Hansbrough. Petitioner will be referred to as State or Petitioner. Respondent, Dr. Charles Bradford, will be referred to by proper name or by Respondent. For ease and convenience, Petitioner's Initial Brief will be referenced "SB-1", with the number denoting the corresponding page.

I

STATEMENT OF THE CASE AND FACTS

This Amicus accepts Petitioner's Statement of the Case and Facts, to the extent that it is accurate and non-argumentative. However, Amicus Hansbrough writes further in an attempt to elucidate the gravity of the situation before this Court.

This case stems from a sweeping state-wide investigation into an alleged insurance-fraud scheme between Florida chiropractors and certain consulting businesses established to aid chiropractors improve their practices, from patient procedures, to doctor referral networking. The consulting companies routinely obtained names of individuals from motor vehicle accident reports (items of public record) and subsequently telephoned the individuals, offering to schedule free chiropractic consultations and examinations to determine whether they received any possible injuries from their accidents.[1] Some of the solicited individuals ultimately began treatment with the chiropractors, and a portion of those patients submitted claims to their PIP carriers.

The advent of the insurers being billed set off the imposition of criminal charges against the consulting companies and their chiropractor clients. In a relatively short period, numerous chiropractors, including Respondent Bradford,

were arrested and charged with unlawful insurance solicitation in violation of §817.234(8), Fla. Stat., carrying with it the penalty of a third degree felony. This sting was commonly referred to as "Operation Chiro-Sweep."

At no time were allegations made that these chiropractors, including Dr. Bradford, submitted any fraudulent claims or had any intent to defraud the insurers. The wrongful act alleged is solely the solicitation of prospective patients who later file PIP claims.

[1] *See* State v. Hansbrough, Order Denying Motion to Dismiss, attached hereto.

II

SUMMARY OF THE ARGUMENT

In order to justify a restriction on truthful, nonmisleading commercial speech, the State has the burden of establishing that it not only has a substantial interest at stake, but that the means it employs directly and materially advances its asserted interest, a contention which requires evidentiary support. The State must also show, in light of less burdensome alternatives, that the restriction on commercial speech is narrowly tailored, limited in scope and proportionate to the state interest to be served.

While the precise wording of Florida Statute §817.234(8) makes it a felony to solicit "for the purposes of making . . . claims for personal injury protection benefits," the objective, as evidenced by legislative history, is not to prevent the filing of meritorious PIP claims, but solely the filing of *fraudulent* PIP claims. Interpreting the statute in accordance with the framers' intent furthers legislative purpose while allowing §817.234(8) to facially survive constitutional scrutiny. To that end, §817.234(8) should allow the solicitation of prospective patients and the subsequent filing of legitimate PIP claims, *so long as* the solicitation is not made with the *intent to defraud* the insurer. The substantial government interest at stake is, therefore, not the purposeful filing of a PIP claim stemming from a solicited patient, but rather the prevention of intentional insurance fraud.

Criminalizing solicitation, without requiring that there be fraudulent intent on the solicitor's part, does not materially advance the State's goal of preventing insurance fraud. The goal is certainly not advanced through the application of an anti-fraud statute to one who was never charged with fraud, nor purported to have any fraudulent intent. Sacrificing such innocents may, arguably, work to lower insurance claims across the board, but to the detriment of forthright claimants and solicitors. In order to justify the imposition of criminal sanctions, there must be an undeniable premise that the vast majority of solicitors of motor vehicle accident victims act with fraudulent intent. The State has not and cannot prove such a preposterous and presumptive argument.

Further, while there are alternative devices less burdensome to First Amendment rights, the sacrifice of innocent speech in an effort to punish a small segment of illegal behavior serves to demonstrate that the statute is neither narrowly tailored nor proportionate to the asserted goal of preventing fraudulent insurance claims. Because the statute was enacted to target only those who solicit with the intent to defraud the insurer, criminalizing innocuous solicitation works to create and punish victims of statutory fallout. As applied by the State in an overreaching manner, §817.234(8) hinders the filing of legitimate claims, ultimately harming, instead of aiding, the general public.

As the State cannot reach its burden of showing how its restriction on commercial speech directly and materially advances the prevention of intentional insurance fraud, it cannot constitutionally suppress such speech. Further, because the restriction, on its face, is neither narrowly drawn, nor proportionate to the State's goal, it is an unconstitutional ban on a protected fundamental right.

III

ARGUMENT

A

IT IS WITHIN THE PROVINCE OF THIS COURT TO PRESERVE A STATUTE'S CONSTITUTIONAL VALIDITY BY REQUIRING A LIMITED INTERPRETATION OR CONSTRUCTION OF §817.234(8)

In its Initial Brief, the State spends much time arguing that the "plain meaning" of the statute should be enforced as the statute is clear and unambiguous. (SB-11-18). Amicus Hansbrough certainly concedes, for purposes of this argument, that the subject statute is neither vague nor ambiguous.

Unfortunately, the State missed its mark. The statute at issue is claimed to be overly-broad as it touches innocent, constitutionally-protected activity (i.e., commercial speech). As will be seen in more detail below, "[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." NAACP v. Burton, 83 S.Ct. 328, 338 (1963); *accord*, Spears v. State, 337 So.2d 977 (Fla. 1976).

The State commits another fallacy in confidently asserting that "[a] court is not allowed to judicially modify a statute by adding words not included by the legislature." (SB-14). Far from violating the Separation of Powers Doctrine,

courts are *required* to review and interpret statutes to prevent constitutional abuses.[2]

It remains a fundamental principal of constitutional law that, whenever possible, a statute should be construed so as not to conflict with the constitution. Doe v. Mortham, 708 So.2d 929, 939 (Fla. 1998). In accordance with this duty, courts are required to interpret a statutory provision so as to render it immune from constitutional attack, including claims of overbreadth. Broadrick v. Oklahoma, 93 S.Ct. 2908 (1973).

A statute is properly challenged on overbreadth grounds if it seeks to control activities properly subject to regulation by means that sweep too broadly into areas of constitutionally protected freedoms. State v. Gray, 435 So.2d 816 (Fla. 1983). Even "[a] clear and precise enactment may . . . be 'overbroad' if in its reach it prohibits constitutionally protected conduct." Grayned v. City of Rockford, 92 S.Ct. 2294, 2302 (1972). Thus, where a statute takes overly-broad measures to control an activity, the operative overbroad language should be excised so to save the entire statute from being declared facially invalid. Brown v.

---

[2] The Separation of Powers Doctrine requires courts to find unconstitutional statutes which usurp rights granted by the United States and Florida Constitutions, where, upon challenge, the government has not met its prescribed burden of proving the statute's constitutionality. The judiciary branch retains the power of judicial review over legislative acts—this power is not discretionary, but constitutionally mandated.

State, 358 So.2d 16, 20-21 (Fla. 1978). The statute should be given a limiting construction, which requires that the act forbidden only in general terms be performed with criminal intent. State v. Allen, 362 So.2d 10 (Fla. 1978).

Upon numerous occasions, this Court has chosen to preserve the constitutionality of a statute by adopting a narrowing construction in order to save the statute from being rendered overbroad. *See, e.g.,* State v. Stalder, 630 So.2d 1072, 1077 (Fla. 1994); Firestone v. News-Press Publishing Co., 538 So.2d 457, 459-60 (Fla. 1989). In particular, in an effort to free innocent activity from a criminal statute's reach, this Court has properly required a certain element of intent to be engrafted into the statute, *see* State v. Allen, *supra;* Zalla v. State, 61 So.2d 649, 651 (Fla. 1952), and accorded common law definitions to otherwise overbroad statutes, in order to remove objections of unconstitutionality. Mobley v. State, 409 So.2d 1031 (Fla. 1982); State v. Simpson, 347 So.2d 414 (Fla. 1977).

With an eye toward legislative intent, we are able to afford a narrowing construction to Section §817.234(8), Fla. Stat., so that it may escape claims of overbreadth and, accordingly, be found constitutional. Legislative history shows that the simple requirement that there be intent to commit fraud is certainly in conformity with the legislature's aim in enacting the statute, and may be utilized to save the statute from facial invalidity.

B

ABSENT A REQUIRED ELEMENT OF FRAUDULENT INTENT, §817.234(8) IMPERMISSIBLY ABRIDGES THE RIGHT OF COMMERCIAL FREE SPEECH AS GUARANTEED BY THE FIRST AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE 1, SECTIONS 2 & 3 OF THE FLORIDA CONSTITUTION

Solicitation has long been recognized as a valuable form of communication and product dissemination between a seller and a buyer, enabling a seller to educate a prospective market on his product or service. Moreover, solicitation provides the means in which a seller can direct his product or services toward those consumers whom he has reason to believe would be most interested in what he has to offer. As such, solicitation "is a recognized form of speech protected by the First Amendment." United States v. Kokinda, 110 S.Ct. 3115, 3118 (1990).

Because of the inherent value in truthful and relevant information, commercial speech may only be banned where it is false, deceptive or misleading. Ibanez v. Florida Dep't of Bus. & Prof'l Regulation, 114 S.Ct. 2084 (1994). Where commercial speech concerns lawful activity and is not misleading, the speech is constitutionally protected and may *only* be restricted under prescribed circumstances. To that end, the U.S. Supreme Court has stated that courts must engage in intermediate scrutiny to determine if a restriction on commercial speech

is constitutionally prohibited, by employing the Central Hudson analysis.[3] Florida Bar v. Went For It, Inc., 115 S.Ct. 2371, 2375-76 (1995).

In this manner, a government may only curb legitimate commercial speech where the regulation at issue satisfies three criteria: (1) the government's interest at the base of the restriction must be substantial; (2) the restriction must directly and materially advance the asserted governmental interest; and (3) the restriction must be narrowly tailored to the governmental interest involved. Central Hudson Gas & Elec. Corp. v. Public Com'n of N.Y., 100 S.Ct. 2343, 2351 (1980).

In the case at bar, the State of Florida seeks to enforce a statutory ban on solicitation of motor vehicle accident victims where the solicitation leads to the filing of personal injury benefit insurance ("PIP") claims.[4] As the State would have it, the statutory ban, in effect, makes it a criminal act for chiropractors to publicly or privately provide medical information to those persons whom they feel may need it most.

---

[3] While the Central Hudson analysis is argued herein, it should be noted that the U.S. Supreme Court, as of late, has expressed its discomfort with the Central Hudson test and a possible willingness to abandon its strictures, in favor of a more straightforward and stringent test to assess the validity of governmental restrictions on commercial speech. *See*, Greater New Orleans Broadcasting Ass'n, Inc. v. United States, 119 S.Ct. 1923 (1999); 44 Liquormart, Inc. v. Rhode Island, 116 S.Ct. 1495 (1996).

[4] In order to keep the argument brief, any reference to PIP claims should be read to include motor vehicle tort claim.

Since 1979 Florida Statute §817.234(8) has remained unchallenged and unenforced,[5] providing in pertinent part:

> It is unlawful for any person, in his individual capacity or in his capacity as a public or private employee, or for any firm, corporation, partnership, or association, to solicit any business . . . in any public institution; in any public place; upon any public street or highway . . . 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.

§817.234(8), Fla. Stat. (1995).[6] Any person who violates the above provision commits a felony of the third degree, id., thereby subjecting himself to criminal sanctions for commercial speech activities.

Assuming, for brevity's sake, that any "solicitation" on the part of Respondent Bradford was completely lawful (apart from the alleged violation of the subject statute itself) and assuming such was not misleading,[7] we turn our focus to the three prongs of the Central Hudson test, keeping in mind one caveat:

> The four parts of the Central Hudson test are not entirely discrete. All are important and, to a certain extent, interrelated: Each raises a relevant question that may not be dispositive to the

---

[5] While the Petitioner herein makes much ado of the fact that no language has been added to clarify the statute to include language of intent to defraud (SB-23), it bears repeating that this statute has never before been enforced so to call for constitutional analysis or legislative clarification.

[6] Emphasis added herein, unless otherwise stated.

[7] This appears to be a logical assumption, as the State has not advanced any allegation that Dr. Bradford's actions were otherwise unlawful or misleading.

> First Amendment inquiry, but the answer to which may inform a judgment concerning the other three.

Greater New Orleans Broad. Ass'n, Inc. v. United States, 119 S.Ct. 1923, 1930 (1999).

1. The prevention of willful and intentional insurance fraud is the substantial governmental interest afforded protection by §817.234(8).

Utilizing an overly simplistic and literal reading to jar Fla. Stat. §817.234(8), the State has brought criminal charges against numerous persons, alleging guilt ensued upon the filing of a PIP claim by a solicited patient. The State has never shown that these individuals solicited prospective patients with the specific purpose of filing a PIP claim,[8] that the claim filed was fraudulent or, much less, that the solicitation was made with any fraudulent intent. The State is simply not interested in determining whether any defendant acted with a criminal mind.

The State takes the position that subsection (8) of §817.234 requires no fraudulent intent on the part of its violators. According to the State, it is "illogical to require fraudulent intent when the evil addressed [is] specifically solicitation in and of itself." (SB-23). Yet, the State never explains why the legislature would implement such a broad ban on solicitation itself, but rather engages in a lengthy

[8] That the doctors solicited for the purpose of filing a PIP claim may readily be inferred by showing only that the solicitation was geared towards victims of automobile accidents, thereby requiring the State to prove nothing while leaving the defendant with the burden of proving a negative.

evolutionary rendition concerning the predecessor statute and other subsections of §817.234, noting that only *they* require an element of fraud.

Interestingly, the State credits a Dade County Grand Jury Report, dated August 11, 1975, for spawning a Senate Bill which apparently directly led to §817.234. This Report is credited for divulging how "unscrupulous practitioners (doctors and lawyers) were soliciting individuals involved in car accidents" in an apparent attempt to submit fraudulent insurance claims for "persons with little or no injuries." (SB-18-19). *Now* the State asks us to believe that the solicitation sought proscribed by §817.234(8) and referred to in this Grand Jury Report, has nothing to do with the fraud sought curbed by the other subsections of the same statute.

If "solicitation in and of itself" is the "evil" feared by the legislature, the statute remains a blatant attempt to prohibit a constitutionally protected activity. It is doubtful that the legislature would place an unmitigated ban on solicitation, or that it recklessly assumed this to be within its power. Perhaps the State should have suggested that the "evil" feared by the legislature was the solicitation of victims of motor vehicle accidents and the PIP claims which will *assuredly* follow.

And so the State claims individuals may not solicit with the intent to file a PIP claim. Question remains—why? What was the harm sought eliminated? As

far as this writer is aware, the act of solicitation is not considered inherently evil. Nor is the act of filing a PIP claim considered nefarious.

In order to justify a restriction on commercial speech, there must be a *certain* and *identifiable* harm sought to be remedied by the restriction. Unsubstantiated fear of potential harm is not sufficient to justify the chilling effect on first amendment rights. *See* Tinker v. Des Moines Independent School Dist., 89 S.Ct. 733 (1969).

While fraudulent activity is certainly an identifiable, tangible and bona fide harm, activity which has only the potential to become fraudulent is certainly not. A state simply cannot satisfy its burden to demonstrate that the harm it purportedly strives to protect against is real or substantial by rote invocation of prospective misconduct or by hypothetical argument. *See* Ibanez, 114 S.Ct. at 2090 (striking down a disclaimer requirement because the state failed "to back up its alleged concern that the [speech] would mislead rather than inform"); Edenfield v. Fane, 113 S.Ct. 1792, 1800 (1993) (rejecting the state's asserted harm because the state had presented no studies, nor anecdotal evidence to support its position); Zaunderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 105 S.Ct. 2265 (1985) (striking down restrictions on attorney advertising where "[t]he State's arguments amount to little more than unsupported assertions").

The State's own rendition of legislative history supports the proposition that the subject statute was enacted in an effort to curb the filing of fraudulent insurance claims where these claims resulted from solicitors purposefully seeking to perpetrate fraud. The subject statute's predecessor, Fla. Stat. §627.7375,[9] makes clear that the legislature proceeded in an initial effort to eradicate ***intentional*** collusion and falsification of insurance claims, or ***willful*** insurance fraud. By its express language, the statute requires there to be intent on the violator's part—not merely an inferred type of negligence[10] or inadvertent disobedience, but a distinct and specified level of guilty mind culminating into criminal culpability.

---

[9] Fla. Stat. §627.7375 was enacted in 1976 in response to the then-current "practice" of certain professionals collaborating together to solicit patients for the specific purpose of exaggerating or falsifying personal injury claims. The original statute provided, *inter alia,*:

> Any insured party, insurer, insurance adjuster, osteopath, chiropractor, any other practitioner licensed under the laws of this state, attorney, person licensed to maintain or operate a hospital, hospital administrator or employee who, ***with intent, knowingly and willfully*** conspires to fraudulently violate any of the provisions of this part or who, ***due to fraud*** on such person's part, does ***knowingly and willfully*** violate any of the provisions of this part ***knowingly or willfully*** benefits from the proceeds derived from the use of such fraud is guilty of a felony of the third degree.

[10] Fraud, as distinguished from negligence, "is always positive, intentional". BLACK'S LAW DICTIONARY 712 (6th ed. 1990).

Although §817.234(8), in its present form, does not allude to intentional or willful fraud per se, the statute was enacted, like its predecessor, to prevent fraudulent insurance claims. Indeed, §817.234 is entitled "False and Fraudulent Insurance Claims." Further, subsections (1)-(7) are, in essence, the same original statute, stating more specifically the objective of penalizing any person who, with the *intent* to injure, defraud, or deceive any insurer files a false claim or conspires to file a false claim. In order to avoid innocent persons from being swept up in the statutory net, subsection (8) must be read *in pari materia* so as not to risk being deemed unconstitutionally overbroad.

Indeed, fraudulent intent is at the very core of §817.234(8), and it is that *intent to defraud* that allows the statute to survive constitutional scrutiny. The lower court in the case at bar appeared to have understood this where it expressly found that in enacting §817.234(8), the legislature *obviously* "intended to punish only solicitations made for the sole purpose of defrauding that patient's PIP insurer." Bradford v. State, 740 So.2d 569, 571 (Fla. 4th DCA 1999). Bradford then drew an important conclusion, stating quite clearly, "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.*" Id. Courts wrestling with the constitutionality of this particular statute, both before and after Bradford, have recognized that the

government interest, allegedly served by the statute's restraint on solicitation, is specifically the State's asserted interest in preventing insurance fraud. Hershkowitz v. State, 744 So.2d 1268, 1269-70 (Fla. 3d DCA 1999); Barr v. State, 731 So.2d 126, 129 (Fla. 4th DCA 1999).[11]

In sum, the prevention of intentional and willful insurance fraud is inarguably a substantial governmental interest, suffice for purposes of meeting the first prong of Central Hudson, and in keeping with the legislative purpose behind §817.234(8). This restrictive interpretation of §817.234(8) saves the statute from overbreadth arguments while remaining in full accord with legislative intent, as it is highly doubtful that our legislators would have wished to make criminals of innocents.

2. Banning solicitation which leads to the filing of any PIP claim does not directly or materially advance the State's interest in preventing willful insurance fraud.

The penultimate prong of the Central Hudson test requires the restriction on speech to *target* the identifiable harm, and mandates that the restriction directly and effectively *alleviate* that harm. Ibanez, 114 S.Ct. at 2090; Edenfield, 113 S.Ct.

---

[11] As seen in the attached opinions, trial courts have ruled accordingly, finding that the governmental interest at stake is the prevention of willful insurance fraud. (*see* opinions of lower tribunals in State v. Cronin (Order Granting Motion to Dismiss) and State v. Hansbrough (Order Denying Motion to Dismiss), attached hereto). Additionally, it should be noted that the Central Hudson standard does not permit

at 1800. Thus, a regulation touching commercial speech activities "may not be sustained if it provides only ineffective or remote support for the government's purpose." Central Hudson, 100 S.Ct. at 2343.

To be sure, "[t]he party seeking to uphold a restriction on commercial speech carries the burden of justifying it." Bolger v. Youngs Drug Prods. Corp., 103 S.Ct. 2875, 2883 n.20 (1983). The State's burden is not slight; the burden "is not satisfied by mere speculation and conjecture," but requires the presentation of some type of demonstrative evidence, i.e., statistical or anecdotal, in order to sustain a restriction on commercial speech. Edenfield, 113 S.Ct. at 1800; *see also*, Went For It, 115 S.Ct. at 2377. "[T]his requirement is critical; otherwise, 'a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression.'" Rubin v. Coors Brewing Co., 115 S.Ct. 1585 (1995) (quoting Edenfield, 113 S.Ct. at 1800).

Hence, the State cannot merely hypothesize, but must actually demonstrate, that the prohibition promulgated by §817.234(8) will significantly reduce the filing of fraudulent insurance claims. The State has produced no evidence of such. In a feigned attempt to show necessity of implementing a statute geared toward bridling solicitors or their agents, the State offers only a broad hypothesis,

---

the Court to supplant the precise interests put forward by the State with other suppositions. Edenfield, 113 S.Ct. at 1798.

reasoning that if the information highway is shut down, fewer fraudulent claims will run through. As the State suggests:

> Common sense dictates that a person injured in a motor vehicle accident will seek medical attention, if and when they need it. By seeking to pass a law prohibiting unlawful insurance solicitation, the legislature sought to proscribe persons from seeking out accident victims with a suggestion of medical attention necessity, thereby planting the seed for the harm feared herein.

(SB-19 n.3). What common sense dictates is that the State has wholly failed to show how combating insurance fraud is materially advanced by targeting the mere act of solicitation through §817.234(8).

In truth, the prevention of intentional fraud in the insurance industry is simply not directly or materially advanced by restricting innocuous speech where the speaker has never, even remotely, been found to engage in fraudulent activity arising therefrom. Argument could be made that the statute prevents insurance fraud by forbidding all solicitation that could possibly lead to the filing of a fraudulent insurance claim; in other words, the filing of fewer fraudulent claims necessarily follows the foreclosure of all solicited PIP claims. Such an assumption rests on shaky premises. In order to justify such a broad restriction on solicitation, it must be a foregone conclusion that the vast majority of solicitors act with a mind toward defrauding insurance companies, a rather presumptive, and certainly unevidenced, claim. Further, logically concluding that persons who actively seek

to defraud insurance companies will be dissuaded by impeding solicitation, is nothing more than foolish reasoning, as most will merely find other avenues to promote the activity.

Without any findings of fact or evidentiary support, the Court cannot conclude that the State has met its burden of showing, beyond mere speculation, how suppressing solicitation under the terms of §817.234(8) directly advances its interest in preventing insurance fraud. The State may not restrict this type of commercial speech in the manner it has chosen, as the second prong of the Central Hudson test has not been met.

3. **In light of other less intrusive alternatives, a restriction that is applied in a manner in which solicitors are disproportionately punished for their innocuous activity is neither limited in scope nor narrowly tailored to the State's objective of preventing intentional insurance fraud.**

The regulation of commercial speech "may extend only as far as the interest it serves" Central Hudson, 100 S.Ct. at 2343. Assuming, *arguendo*, that the State's action has thus far survived the first two prongs of Central Hudson, it cannot be said that the regulation prohibiting solicitation is narrowly drawn for purposes of the final prong. Where no fraud on a defendant's part is alleged to have occurred, the defendant's entanglement in a statute designed to prevent fraud is, in itself, conclusive evidence that the regulation is neither limited in scope, nor proportionate to the State interest served.

A governmental restriction on commercial speech must be narrowly tailored to achieve the government's desired objective. Went For It, 115 S.Ct. at 2380. While the very least restrictive means need not be utilized, there must be, at minimum, a reasonable fit between the means and the ends, a fit that is "in proportion to the interest served." Id. In essence, "the challenged regulation should indicate that its proponent carefully calculated the costs and benefits associated with the burden on speech imposed by its prohibition." Greater New Orleans Broadcasting, 119 S.Ct. at 1932 (citations omitted).

It comes as no surprise that the State's argument with regard to the final prong of the Central Hudson test is crammed into three small paragraphs, citing only Barr v. State, *supra*, as authority for the proposition that §817.234(8) is narrowly tailored to the State's asserted interest. (SB-28-29).[12] The State's scurry to sidestep fundamental principles of constitutional law is nowhere more evident than in its final argument which stands devoid of applicable law. Not even a cursory glance is given to the directive that the restriction on solicitation be *in proportion to* the fraud sought dissuaded.

The only conclusion to be drawn from the State's failure to reach its burden, is that the State *cannot* show that §817.234(8) is narrowly tailored to the goal of

[12] While the Bradford opinion is also cited, as this Court will notice, Bradford was quoting the cited Barr opinion.

the prevention of fraudulent insurance claims. The State essentially proposes an all-inclusive ban-- to the extent that the ban forbids solicitation which results in the filing of any PIP claim[13]-- in an effort to discourage the filing of fraudulent insurance claims. Yet, interestingly enough, out of the entire "Operation Chiro-Sweep," none of the defendants were specifically charged with filing a *fraudulent* insurance claim. Thus, innocuous solicitation was sacrificed in a remote and unavailing attempt to capture corrupt solicitors, the statute disproportionately applied to impose criminal liability for filing meritorious claims.

Reducing the number of claims filed by shutting off chiropractic solicitation which results in a PIP claim does not work to *proportionately* reduce the filing of fraudulent claims. There is no reason to believe that professionals are more likely to commit insurance fraud than other members of the general public. Professionals should not be foreclosed from filing otherwise meritorious insurance claims simply because they have procured their client base through general solicitation. Admittedly, the State need not find the least restrictive means to achieve its goal of preventing insurance fraud; however, is it reasonable that the

[13] The restriction here is treated as if it were a complete ban, as it does not leave open satisfactory alternate channels of solicitation. *See*, Linmark Associates, Inc. v. Willingboro, 97 S.Ct. 1614, 1618-19 (1977). The State's "ban" casts a legislative blanket over all public or private solicitation which leads to any filing of PIP claims. This type of overreaching stands incongruous to any assertion that the statute is narrowly tailored.

State employ the *most* restrictive means available[14] as a abstract prophylactic measure?

The use of extensive preventative measures simply may not be used to suppress legitimate commercial speech. "Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." Edenfield, 113 S.Ct. at 1803-04, *citing* NAACP v. Burton, 83 S.Ct. at 340. As the Supreme Court has warned:

> The text of the First Amendment makes clear that the Constitution presumes that attempts to regulate speech are more dangerous than attempts to regulate conduct. The presumption accords with the essential role that the free flow of information plays in a democratic society. As a result, the First Amendment directs that government may not suppress speech as easily as it may suppress conduct, and that speech restrictions cannot be treated as simply another means that the government may use to achieve its ends.

44 Liquormart, Inc. v. Rhode Island, 116 S.Ct. 1495, 1152 (1996).

---

[14] What could be more restrictive and onerous than being charged with a felony wherein the defendant faces five years imprisonment and forfeiture of professional license and where fraudulent activity was never alleged? Moreover, charges brought under §817.234(8) can be utilized as a stepping stone to form the predicate act for imposition of further Criminal RICO charges where defendants then face upwards of thirty (30) years of incarceration for merely soliciting prospective patients. *See* State v. Cronin, Order Granting Defendants' Motion to Dismiss, attached hereto.

Many alternative devices exist to detect and deter insurance fraud, which are practical means of controlling illegal conduct, while unobtrusive to First Amendment rights.[15] Initially, insurance companies routinely investigate suspicious claims, and deny those which even boarder on deceit. Further, our legal system punishes fraudulent activities by subjecting perpetrators to criminal and civil liability; professionals engaging in fraudulent practices risk loss of licensing as well. "The availability of less burdensome alternatives to reach the stated goal signals that the fit between the legislature's ends and the means chosen to accomplish those ends may be too imprecise to withstand First Amendment scrutiny." Id. at 1521 (O'Connor, J., concurring, joined by Renquist, C.J., Souter, and Breyer, J.J.); *see also,* Cincinnati v. Discovery Network, Inc., 113 S.Ct. 1505, 1510 n. 13 (1993) (noting that "numerous and obvious less-burdensome alternatives to the restriction on commercial speech . . . is certainly a relevant

[15] As an analogy, when the Florida Supreme Court abolished the doctrine of interspousal tort immunity, it considered the argument that couples would be more likely to engage in fraudulent conduct against insurers than others, by scheming together to dupe insurance companies. Rejecting that argument, the Court pointed to existing alternative devices which adequately precluded the collusion of insurance fraud by married couples, ruling that otherwise meritorious claims "should not be foreclosed simply because a person is married to a wrongdoer." Waite v. Waite, 618 So.2d 1360, 1361 (Fla. 1993). Similarly, where there is no reason to believe that solicitors are any more likely to engage in insurance fraud, commercial speech which ends in the filing of an insurance claim should not be foreclosed simply because the speaker has engaged in solicitation.

consideration in determining whether the 'fit' between the ends and means is reasonable").

With such readily available alternatives, question remains as to how the government can completely shut off commercial speech directed toward a specific group of consumers potentially in need of chiropractic services and unaware of their insurance rights. The real First Amendment danger in cases involving truthful advertising is the public's right to receive information. Should this social value be obstructed in an effort to prevent the remote filing of fraudulent claims?

Routinely patting down all exiting patrons at retail stores works the same type of logic. The temptation to steal may be only in the minds of a few, but why not frisk them all in an effort to prevent the crime altogether? Would petty larceny really come to a standstill, and if so, at what cost?

IV

CONCLUSION

By disregarding the mental state required by §817.234(8), the State, in effect, made it a strict liability offense for chiropractors to solicit prospective patients who later filed insurance claims, regardless of criminal intent. In taking the plain meaning of a clearly overbroad statute, the State has acrimoniously allowed innocent persons to get swept up in the plain language of the statutory net and suffer vexatious felony charges.

Reducing the filing of fraudulent insurance claims is surely a substantial state interest. However, absent a requirement that the State prove intent to defraud, §817.234(8) will continue to sacrifice an insupportable amount of innocent speech when compared to the minor amount of insurance fraud the statute actually *may* curtail. As the State has not shown how criminally charging solicitors for filing legitimate PIP claims either materially advances or is narrowly tailored to the prevention of fraud, the statute cannot pass constitutional muster.

Based on the foregoing, it is respectfully requested that this Court enter an Order either: (1) ruling that Florida Statute §817.234(8) must include an element of intent, to be alleged and proven by the state, or (2) declaring §817.234(8), Fla. Stat., unconstitutional as an overbroad restriction of commercial speech.

Respectfully submitted,

LAW OFFICES OF ROBERT ADER
Attorneys for Amicus Hansbrough
NationsBank Building
100 S.E. 2nd Street, Suite 3550
Miami, Florida 33131
Telephone: (305) 371-6060

By: Elizabeth B Hitt

ROBERT ADER, ESQ.
Fla. Bar. No. 335126
ELIZABETH B. HITT, ESQ.
Fla. Bar. No. 0176850

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by U.S. Mail on May 11, 2000, to: Michael E. Dutko, Esq., Attorney for Respondent, Colonial Bank Building, Suite 500, 600 South Andrews Avenue, Fort Lauderdale, Florida 33301; and to Celia Terenzio and Robert R. Wheeler, Assistant Attorneys General, 1655 Palm Beach Lakes Boulevard, Suite 300, West Palm Beach, Florida 33401-2299.

By: _____
Robert A. Ader
Elizabeth B. Hitt

INDEX TO APPENDIX

IN THE CIRCUIT COURT,
FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY,
FLORIDA

CASE NO.: 98-13214-CF-(A-I)

DIVISION: CR-E

STATE OF FLORIDA,
Petitioner,

vs.

NASH CRONIN, et al.,
Defendants.
_____/

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

This matter came before the Court on the joint Motion to Dismiss filed by Defendants pursuant to Florida Rule of Criminal Procedure 3.140. Defendants are charged with one count of violating §895.02(3), Florida Statutes, Participation in a Corrupt Enterprise. The charge is based on twenty-two (22) separate counts of Insurance Solicitation, in violation of §817.234(8), Florida Statutes.

Defendants are chiropractors and affiliated corporations charged with soliciting patients with the intent of filing insurance claims to be paid by the patient's Personal Injury Protection ("PIP") insurance carrier. Defendants assert that the Information charging them in the instant case fails to allege a material element of the crime of Insurance Solicitation. Specifically, they contend that since the Information does not allege that Defendants committed their acts with an intent to defraud insurance carriers or file fraudulent insurance claims, it fails to allege all material elements required for a violation of §817.234(8), Florida Statutes. In support of their position, Defendants have submitted the case of Bradford v. State, 1999 WL 436823 (Fla. 4th DCA June 30, 1999).

EXHIBIT "A"

In Bradford, the Fourth District Court of Appeal held that the statute in question prohibits ". . .only solicitations made for the sole purpose of defrauding that patient's PIP insurer. . . [i]n other words. 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." Accordingly, the Court held, §817.234(8), Florida Statutes did not unconstitutionally punish only lawful activity (and thus was not overbroad) because that section of the statute was required to be read *in pari materia* with §817.234(1), Florida Statutes, which contains a requirement that false insurance representations be made ". . . with the intent to injure, defraud, or deceive any insurer." The Court noted that subsection (8), however, "does not speak directly to the state's interest in preventing insurance fraud."

The Bradford Court was purporting to clarify its earlier opinion in Barr v. State, 731 So.2d 126 (Fla. 4th DCA 1999). In Barr, the Court held that the statute was constitutional and that it "targets only those persons who solicit business for the sole purpose of making motor vehicle tort or PIP benefits claims." Id. at 129. According to the Barr opinion, ". . .it only prohibits the chiropractor from soliciting a prospective patient for the purpose of receiving payment from that patient's PIP insurance." Id. at 130. Nowhere does Barr mention or set forth the requirement, discussed in Bradford, that subsection (8) be read *in pari materia* with subsection (1) or that subsection (8) requires *not* simply that a defendant solicit business with the intent to file a claim for or be paid from PIP benefits, but that a defendant intends to file a *fraudulent* PIP claim.[1]

---

[1] The Barr Court noted that the solicitation made by Barr was ". . .unlawful only because it violated section 817.234(8), and not for any other reason." Barr, *supra*, at 129. The court further recognized that the purposes behind the statute were at least twofold: to combat insurance fraud and to prevent the costs of paying fraudulent claims from being passed on to the consumer. The Court recognized that, while subsection (8) was ". . .not the least restrictive means available"

Nonetheless, Bradford engrafts this additional requirement onto the Barr analysis. According to Defendants herein, the State has failed to allege a violation of subsection (1), and has failed to allege that the actions of the Defendants were undertaken with the intention of filing *fraudulent* PIP claims. During argument on this issue, the State all but conceded that it could not establish intent to defraud on the part of these Defendants; the State's position was, rather, that it was not required to do so, and should merely be required to show that Defendants acted with the intent to file claims for PIP benefits, regardless of the validity of those PIP claims.

While Barr would seemingly support the State's position, the opinion in Bradford appears to mandate a different result. By requiring subsections (1) and (8) to be read *in pari materia*, and by further stating that as long as solicitation is not made with the intent to file a fraudulent claim, the Bradford opinion indicates that fraudulent intent is indeed a necessary element of a crime charged under subsection (8).

This Court recognizes that:

> As a general rule, an information must allege each of the essential elements of a crime to be valid. However, because the legislature has the primary authority for defining crimes, it will be the rare instance that an information tracking the language of the statute defining the crime will be found to be insufficient to put the accused on notice of the misconduct charged. Further. . . an information will not be dismissed on account of any defect in the information unless the court shall be of the opinion that the indictment or information is so vague, indistinct, and indefinite as to mislead the accused and embarrass him or her in the preparation of a defense or expose the accused after conviction or acquittal to substantial danger of a new prosecution for the same offense.

Chicone v. State, 684 So.2d 736 (Fla. 1996) (citations omitted). However, it is equally clear that the

---

to achieve these purposes, since it banned *all* solicitation, it was nonetheless constitutional. The Court further held that the statute did not violate due process because it ". . .only prohibits the chiropractor from soliciting a prospective patient for the purpose of receiving payment from that patient's PIP insurance." Id. at 130.

elements of an offense cannot be established by mere inference. State v. VonDeck, 607 So.2d 1388 (Fla. 1992). An information failing to allege an essential element of a crime does not charge an offense. Akins v. State, 691 So.2d 587 (Fla. 1st DCA 1997). Here, the Court is bound to accept the Bradford Court's pronouncement that subsection (8) requires an element of fraudulent intent. Since that element has not been alleged, and may not merely be inferred without significant prejudice to Defendants' ability to prepare their defense or insulate themselves from future prosecution for the same behavior, the Court is constrained to grant Defendants' Motion.

Based on the above, it is:

ORDERED AND ADJUDGED that Defendants' Joint Motion to Dismiss is hereby **GRANTED.**

DONE AND ORDERED in Chambers, at Jacksonville, Duval County, Florida, on this 13th day of August, 1999.

CIRCUIT COURT JUDGE

IN THE CIRCUIT COURT OF THE
17TH JUDICIAL CIRCUIT, IN AND
FOR BROWARD COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

v.

RANDOLPH HANSBROUGH,
Defendant.

CASE NO.: 96-8037CF10

JUDGE: ZEIDWIG

ORDER DENYING MOTION TO DISMISS

THIS CAUSE comes before the Court upon Defendant's Motion to Dismiss pursuant to Rule 3.190(b), Florida Rules of Criminal Procedure. The Court having considered same, the State's Response thereto, having heard argument of counsel, and being fully advised in the premises, finds and decides as follows:

The Defendant is one of twelve chiropractors charged with Unlawful Insurance Solicitation, in violation of Section 817.234(8), Florida Statutes (Statute). The applicable section of the Statute states:

> (8) It is unlawful for any person, in his individual capacity or in his capacity as a public or private employee, or for any firm, corporation, partnership, or association, to **solicit** any business . . . 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 Sec. 627.736. Any person who violates the provisions of this subsection commits a felony of the third degree . . . .

Id. (Emphasis added).

The undisputed facts are as follows: A representative of Prebeck Consultants, Inc.

(Prebeck), a Florida Corporation composed of a chiropractor and his wife, purchased a mot vehicle accident report from a public agency. The report contained the name and phone numb of Gregory Ronzolt, an individual who had been involved in the traffic accident. Consequentl Prebeck representatives telephoned Mr. Ronzolt, and offered to schedule a free consultation an examination with the Defendant, Dr. Hansbrough, for the stated purpose of determining whethe chiropractic treatment would be appropriate for any accident-related injuries. Mr. Ronzo ultimately availed himself of Dr. Hansbrough's services. The Defendant then made a claim fc personal injury protection (PIP) benefits with the patient's insurance carrier. All bills submitted b the Defendant were paid by the carrier. Thereafter, the Defendant was charged with unlawfull soliciting a patient for the purpose of making either a motor vehicle tort claim or a claim for PI benefits.

In response, the Defendant filed the instant Motion to Dismiss in which he alleges that the subject Statute is unconstitutional on its face and/or as applied to the facts of this case because (1) the Statute is too vague; (2) the Statute impermissibly curtails the right of commercial free speech as guaranteed by both the United States and Florida Constitutions, and (3) the Statute violates the Equal Protection Clauses of both the United States and Florida Constitutions.

To begin, the Defendant contends that the Statute fails to define the term "solicit;" therefore, it should be declared unconstitutionally vague. Under Florida law, a statute is considered vague if it fails to notify a person of ordinary intelligence of what constitutes forbidden conduct. Brown v. State, 629 So. 2d 841 (Fla. 1994). "Because of its imprecision, a vague statute may invite arbitrary or discriminatory enforcement." Id. (Citations omitted). Further, "when there is doubt about a statute in a vagueness challenge, the doubt should be resolved 'in

favor of the citizen and against the state.' " Id. (Citations omitted).

Although the legislature failed to define the term "solicit" in the subject Statute, that lac of definition is insufficient to render the statute unconstitutionally vague. Id. Moreover, the ter "solicit" has been defined under other relevant Florida law as "initiat[ing] contact with a purchase for the purpose of attempting to sell consumer goods or services, where such purchaser ha expressed no previous interest in purchasing, investing in, or obtaining information regarding th property, goods or services attempted to be sold." FLA. STAT. §501.603(11)(entitled the Florid Telemarketing Act). "Solicit" is also a term defined in Webster's Collegiate Dictionary and Black' Law Dictionary, as well as a term that is commonly used in everyday language. Hence, the Cour rejects Defendant's argument that the term "solicit" in the subject Statute is so vague that a person of ordinary intelligence would not have been given fair notice of the proscribed conduct

Second, the Defendant asserts that the Statute impermissibly impinges upon his rights o commercial free speech guaranteed by the United States and Florida Constitutions. Commercia speech has been defined as "an expression related solely to the economic interest of the speaker and its audience." Central Hudson Gas & Electric Corp. v. Public Service Com'n of New York, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980). There is no dispute that the Statute regulates commercial speech. Clearly, solicitation of prospective patients by a chiropractor falls squarely within that definition. However, the protection afforded commercial speech under the First Amendment of the United States Constitution is limited, "commensurate with its subordinate position in the scale of First Amendment values, and is subject to modes of regulation that might be impermissible in the realm of non-commercial expression." Florida Bar v. Went For it, Inc., 115 S. Ct. 2371 (1995).

Initially, commercial speech must concern lawful activity and not be misleading. Cent Hudson, 447 U.S. at 564. In addition, any government regulation seeking to restrict commerc speech must meet these three criteria: (1) the government must assert a substantial state intere supporting its regulation; (2) the asserted restriction must directly and materially advance the sta interest involved; and (3) the regulation must be narrowly tailored to the asserted interest. Id. 566. Since the subject Statute clearly restricts commercial speech, it must be measured by t Central Hudson three-prong test to determine its constitutionality.

First, the State must demonstrate that its restriction on solicitation is supported by substantial governmental interest.[1] As far back as 1974, a grand jury heard testimony concernir the practice of certain lawyers, physicians, osteopaths, chiropractors and hospitals who we apparently working together to solicit clients and/or patients for the purpose of either exaggeratin or falsifying personal injury claims. See Final Report of the Grand Jury of the Eleventh Judici Circuit, dated August 11, 1975 (Exhibit 2).

In response to this problem, the legislature enacted Section 627. 7375(8), Florida Statutes making it illegal for anyone to solicit patients and/or clients for the purpose of generating a moto vehicle tort claim. That statute was amended in 1979 to also prohibit solicitation for the purpos of filing claims for PIP benefits. Thereafter, Section 627.7375, Florida Statutes was renumbere as Section 817. 234(8), Florida Statutes, and is still in force at the present time.

The State sets forth the following, as substantial interests served by the restriction o solicitation: (1) protecting the public from unnecessarily inflated insurance rates for personal injur

[1] To that end, the State has attached several exhibits incorporated by reference in its Response to the Defendant's Motion, which will be cited throughout this Order.

protection and liability insurance; (2) preventing fraud and misrepresentation by professionals; (3 protecting the privacy of its citizens involved in motor vehicle accidents; and (4) promoting th ethical standards of professionals who make claims for personal injury protection benefits an motor vehicle tort claims consistent with the laws of Florida. See Final Report of the Grand Jur of the Eleventh Judicial Circuit, dated August 11, 1975 (Exhibit 2); Memorandum Regarding the No-Fault Bill (Chapter 77-468) dated April 5, 1976 (Exhibits 3 and 3A); Bill Summary (Chapter 77-468) dated June 6, 1977 (Exhibit 4); Sample of Solicitation Cases by the Division of Insurance Fraud (Exhibit 6) and the Empirical Data presented to the United States Supreme Court in Florida Bar v. Went For It, Inc., 115 S. Ct. 2317 (1995). After reviewing the documentation, the Court finds that the Statute was enacted for the purpose of combatting insurance fraud, clearly a substantial governmental interest. Thus, the first element of the Central Hudson test has been satisfied.

Second, the State must show that the restriction on solicitation directly and materially advances its asserted interest of preventing a particular type of insurance fraud. In order to fulfill this requirement, the restriction "must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." Central Hudson, 447 U.S. at 569. In the instant case, the Court finds that, although the harms advanced by the State are real, they may not directly and materially be served as applied to the Defendant, who has not been charged with insurance fraud. However, because the power to enact laws is expressly granted to the legislature, this Court declines the invitation to pronounce the Statute unconstitutional either on its face or as applied. FLA. CONST. art. II, § 3.

As for the third element, the State must prove that the regulation prohibiting solicitation is

"narrowly drawn." That language has been construed by the United States Supreme Court t mean a restriction which is "narrowly tailored to achieve the desired objective." Florida Bar v Went For It, Inc., 115 S. Ct. 2371, 2376 (1995). The Court finds once again that, as applied t the instant Defendant, the Statute may not achieve the goal of preventing insurance frauc however, the Court will not declare this portion of the Statute unconstitutional out of deferenc to the Separation of Powers Doctrine espoused by both the United States and Florid Constitutions.

Finally, Defendant contends that the subject Statute violates the Equal Protection Clause of both the United States and Florida Constitutions. The Court disagrees. In order to perform ar equal protection analysis, there must be similarly situated individuals who are being treated in a disparate fashion. It is clear that attorneys and chiropractors are not similarly situated classes of professionals. Among other things, they perform different functions, qualify differently for licensing, and are regulated by different authorities.

However, assuming *arguendo* that, for the purposes of this Motion, attorneys and chiropractors were similarly situated, it is undisputed that no forms of solicitation are permissible under the subject Statute. Neither chiropractors nor attorneys, nor anyone else seeking to file either a motor vehicle tort claim or apply for PIP benefits is allowed to telephonically solicit patients and/or clients. That is the offense with which the Defendant has been charged. Thus, Defendant's equal protection argument must fail.

In sum, the Court finds that it must deny the Motion to Dismiss because: (1) Section 817.234(8), Florida Statutes is not unconstitutionally vague; (2) the legislature is the proper governmental body to amend any problematic portions of the Statute; and (3) the disputed section

of the Statute does not violate the Equal Protection Clauses of either the United States Constitutic or the Florida Constitution.

Accordingly, it is hereby

ORDERED AND ADJUDGED the Defendant's Motion to Dismiss is DENIED.

DONE AND ORDERED in Chambers, Fort Lauderdale, Florida, on this 18 day c December, 1996.

TRUE COPY
...UIT COURT JUDGE HOWARD M. ZEIDWIG

HOWARD M. ZEIDWIG
CIRCUIT COURT JUDGE

Copies to:
Joseph J. Pappacoda, Assistant Statewide Prosecutor
Robert Ader, Attorney for Defendant