

IN THE SUPREME COURT OF FLORIDA

CASE NO. 96,910

STATE OF FLORIDA,

Petitioner,

vs.

CHARLES BRADFORD,

Respondent.

**On Discretionary Review From the
Fourth District Court of Appeal**

RESPONDENT'S ANSWER BRIEF

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CASE NO. 96,910
STATE OF FLORIDA v. CHARLES BRADFORD

CERTIFICATE OF INTERESTED PERSONS

Counsel for the Respondent, Charles Bradford, certifies that the following persons and entities have or may have an interest in the outcome of this case.

1. The Honorable Joyce A. Julian, Circuit Court Judge,
Seventeenth Judicial Circuit, in and for Broward County, FL
2. Robert R. Wheeler, Esquire, Assistant Attorney General
Office of the Attorney General, State of Florida
The Honorable Robert Butterworth, Attorney General
(Appellate Counsel for the State of Florida, Petitioner)
3. Melanie Ann Hines, Statewide Prosecutor
Cynthia G. Imperato, Assistant Statewide Prosecutor
(Prosecuting Attorney)
4. Michael E. Dutko, Esquire
(Trial Counsel for Respondent)
(Appellate Counsel for Respondent)
5. Charles Bradford
(Respondent)

CERTIFICATE OF TYPE SIZE AND STYLE

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 Respondent, Charles Bradford, hereby certifies that the instant brief has been prepared with 14 point, Times Roman, a font that is proportionately spaced.

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PRELIMINARY STATEMENT

Respondent, Charles Bradford, was the Defendant in the trial court, Appellant before the Fourth District Court of Appeal, and will be referred to herein as “Respondent” or “Charles Bradford.” Petitioner was the Plaintiff in the trial court, Appellee on appeal to the Fourth District Court of Appeal, and will be referred to herein as “Petitioner” or “Plaintiff.”

Reference to the record on appeal will be by the symbol “R.” Reference to transcripts from the trial court will be by the symbol “Tr.” Reference to the Joint Brief Amicus Curiae filed in this matter will be referred to by the symbol “Br.” Reference to appellate documents will be by their title. All references will be followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

Respondent, Charles Bradford, is a licensed Chiropractor. In May, 1996, the Office of the Statewide Prosecutor in Fort Lauderdale, Florida issued a Subpoena Duces Tecum (R. 71,72) to Charles Bradford, D.C., P.A. calling for the production of All Health Insurance Claim (HICF) Forms, and other correspondence filed with All Insurance Companies related to chiropractic services rendered to five patients listed by name therein. (R. 71,72).

On May 16, 1996, undersigned counsel directed a letter to the prosecutor acknowledging Respondent's intention to comply with the Subpoena, but seeking additional time for such compliance. (R. 73,74). On May 23, 1996, undersigned counsel submitted the requested HICF Forms for patients, Sean Morris and Randall Adams, to the statewide prosecutor. (R. 75,76). As indicated in the accompanying cover letter, although there were limited notations to indicate that two of the other three people whose names were listed in the Subpoena were referred to Dr. Bradford's office, no chiropractic services were provided; therefore, no insurance claims were submitted for services rendered on behalf of these other patients. (R. 75).

In January, 1997, a Two-Count Criminal Information was filed against Respondent, Bradford, alleging separate Counts of Unlawful Insurance Solicitation, contrary to § 817.234(8), Florida Statutes. (R. 4,5). Count I included patient, Sean Morse, and Count II included patient, Randall Adams. (R. 4). In September, 1997, Respondent, through counsel, filed a Motion to Dismiss premised on the theory that the criminal prosecution was barred due to a conferral of immunity pursuant to § 914.04, Florida Statutes, resulting from Respondent's compliance with the Subpoena. (R. 65-76). After receiving the State's written

response (R. 77-89), the Trial Court conducted a hearing on October 15, 1997, (Tr. 1-15). Thereafter, the Trial Court entered a written Order rejecting Respondent's claim of immunity and denying Respondent's Motion to Dismiss. (R. 82-89).¹

After conducting pretrial discovery, in March, 1998, Respondent, Bradford, filed a Sworn Motion to Dismiss setting forth undisputed material facts and alleging that the undisputed facts failed to set forth a prima facie case of guilt against Respondent for a violation of § 817.234(8), Florida Statutes. (R. 94-99). In the several responsive pleadings that followed, the gravamen of the Sworn Motion to Dismiss was that Respondent had not had direct dealings with the Prebecks, and, more importantly, Respondent had not provided any unnecessary treatment or improper insurance billing. There was no fraud. (Tr. 25-26,30).

Thereafter, Respondent filed a Motion to Dismiss and Incorporated Memorandum of Law asserting the unconstitutionality of § 817.234(8), Florida Statutes, on five grounds (R. 100-127). After a somewhat abbreviated hearing before the Trial Court on April 23, 1998, (Tr. 16-48), the Trial Court entered written Orders denying both the Sworn Motion To Dismiss (R. 241-252) and the Motion to Dismiss for Unconstitutionality (R. 282-293). The essence of the discussion between the State and the defense and the analysis of the Trial Court is best illustrated by the following record excerpt:

¹The statutory immunity issue was not presented as a point on appeal in the court below and is not at issue, *sub judice*. It is only addressed herein to provide a thorough background and chronological perspective.

(Mr. Dutko - defense counsel): And most important, at no point is it a (sic) issue or disputed that either of those two people, Randall Adams or Sean Morse, were anything other than legitimately injured patients that received legitimate chiropractic care, and legitimate health claim forms were submitted. So we are not dealing with fraud.

(The Court): No. I get it.

(Tr. 25,26).

* * * * *

(Ms. Imperato - prosecutor): The fact that there is no fraud, there is no fraud requirement by statute for there to be fraud to violate the statute.

(Tr. 30).

The position of the prosecution in the Trial Court then was consistent with the position being advanced by Petitioner now before this Court. That is, the element of fraud is not contained within the statute and should not be judicially engrafted into Subsection (8).

Ultimately, by written Order entered on June 25, 1998, (R. 283-293) the Trial Court found § 817.234(8), Florida Statutes, constitutional both as drafted and as applied to Respondent, Bradford. Respondent entered a Plea of No Contest to two lesser included misdemeanor offenses of Conspiracy to Commit Unlawful Insurance Solicitation in violation of §§ 817.234(8) and 777.04, Florida Statutes. Respondent reserved his right to appeal the Trial Court's Order denying his various Motions to Dismiss.

Respondent timely filed his appeal. The Fourth District Court of Appeal issued its Opinion in this case on June 30, 1999, *Bradford v. State*, 740 So.2d 569 (Fla. 4th DCA 1999). The Court cited with favor its (then) recently published Opinion of *Barr v. State*, 731 So. 2d

126 (Fla. 4th DCA 1999) wherein it initially upheld the constitutionality of § 817.233(8), Florida Statutes.²

Citing error in both the analysis and result in the *Bradford* Opinion , both the State (Petitioner herein) and Respondent, Bradford (Appellant below), sought Rehearing and Rehearing En Banc in the Fourth DCA which were denied. Thereafter, both sought discretionary review before this Honorable Court which was granted.

²In *Hershkowitz v. State*, 744 So. 2d 1268 (Fla. 3rd DCA 1999), the Third District Court of Appeals affirmed a criminal conviction and adopted the rationale and holding of *Bradford* and *Barr*.

SUMMARY OF ARGUMENT

Despite its noble efforts, the Appellate Court erred in its attempt to salvage § 817.234(8), Florida Statutes, from constitutional infirmity by simply engrafting fraud as a necessary element of this statute. Therefore, § 817.234(8), Florida Statutes, is unconstitutional as drafted and as applied to Respondent, Bradford.

However, were this Honorable Court to uphold the decision of the Appellate Court and find § 817.234(8), Florida Statutes, to be constitutional as modified and narrowed by the inclusion of the fraud element, Respondent, Bradford's, conviction from the Trial Court must still be reversed since there existed no evidence of fraud on Respondent, Bradford's, part and the State's theory of prosecution, which was endorsed and adopted by the Trial Court, was that fraud was not an element of the offense. (Tr. 26, 30).

ARGUMENT

POINT I

**AS DRAFTED, § 817.234(8), FLORIDA STATUTES,
IS UNCONSTITUTIONAL AS IT IMPERMISSIBLY
RESTRICTS AND CRIMINALIZES LEGITIMATE
COMMERCIAL SPEECH.**

As drafted, the plain language of the statute at issue criminalizes all solicitation of business where the solicitor knows that payment for the services rendered may come as a result of a motor vehicle tort claim or personal injury protection benefits as required by § 627.736, Florida Statutes.

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.

Section 817.234(8), Florida Statutes.

The statute seemingly applies regardless of legitimate and bona fide circumstance and despite the solicitor's lawful intent to provide only appropriate services in exchange for reasonable compensation. In fact, the statute would appear to criminalize even a "free consultation" where no future services or treatments are provided, or, where the solicitor

knows that if future services or treatments are indicated or are to be provided, payment may come in the form of recovery from a motor vehicle tort claim or personal injury protection benefits.

CONSTITUTIONAL TEST

It appears that the appropriate test for reviewing restrictions on commercial speech as challenged in the case at bar is the four-prong intermediate test enunciated in *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*, 447 U.S. 557, 100 S. Ct. 2343, 65 L.Ed. 2d 341 (1980). Although commercial speech is afforded less protection than other constitutionally protected forms of speech, nevertheless the First Amendment, applied to the States through the Fourteenth Amendment, protects commercial speech from unwarranted governmental regulation. *Virginia Pharmacy Board*, 425 U.S. at 761,762; *Central Hudson*, at 561. For commercial speech to come within the First Amendment it, at least, must concern lawful activity and not be misleading. Commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers societal interest in the fullest possible dissemination of information. *Central Hudson*, at 561,562. Next, it must be determined whether the asserted governmental interest to be served by the restriction on commercial speech is substantial. *Central Hudson*, at 564. If both inquiries yield positive answers, it must then be decided whether the regulation directly advances the governmental interest asserted and whether it is not more extensive than is necessary to serve that interest. *Id.* at 566.

Respondent's alleged conduct meets the first prong of the *Central Hudson* test because any solicitation in which he was alleged to have engaged, directly or otherwise, was lawful and

not misleading. In fact, only when passed through the prism of § 817.234(8), Florida Statutes does Respondent's activity take on a hue of criminality. If at all, Respondent's conduct was unlawful only because it violated § 817.234(8), Florida Statutes, and not for any other reason. *Bradford*, at 571; *Barr*, at 129.

The second prong of the *Central Hudson* test requires a determination whether the asserted governmental interest to be served by the restriction on the commercial speech is substantial. Unquestionably, the state has a substantial interest in protecting the public and preventing fraud. This goes without saying. However, rather than serving to save the statute as drafted, this prong of the *Central Hudson* test underscores the constitutional infirmity of Subsection (8). Petitioner (State) wishes to exclude fraud as an element of the offense but repeatedly cites the state's obligation to combat fraud as the primary reason for the statute's existence. This proposition is simply absurd and illogical.³

The third prong of *Central Hudson* examines whether the regulation directly advances the governmental interest asserted. In *Barr*, the Court analyzed why Subsection (8) advances the State's interest in preventing insurance fraud:

As the [Grand Jury] report suggests, there was a serious problem in the industry of "runners" soliciting automobile accident victims with little or no injuries to undergo unnecessary medical treatment so that they could exhaust the victims' PIP benefits before the victim sued in tort for damages. From an objective standpoint, we believe the statute's prohibition against this type of

³For a scholarly and insightful discussion of inclusion of "intent to defraud" as a required element of § 817.234(8), the reader is urged to consult the Joint Brief Amicus Curiae filed in this matter by Henry M. Coxe, III, D. Gray Thomas, and Robert Stuart Willis. The Amicus Brief analyzes the Dade Grand Jury Report (Br. 19,20), as well as the requirement of reading Subsection (8) in pari materia with Subsection (1)(a) as amended.

solicitation provides a direct link to the state's interest in preventing harm to such victims and the insurance industry.

Barr, at 129.

It is obvious that the theoretical State interest being advanced is the prevention of insurance fraud. That is noble and obvious. It is also misleading and disingenuous. The exclusion or omission of any reference to "fraud" in § 817.234(8), Florida Statutes, renders it vague, overbroad, and subject to arbitrary and capricious application. One may well argue that the statute in question, as drafted, prevents or deters fraud, however it also subjects legitimate and otherwise lawful conduct to criminal prosecution thereby deterring legitimate health claims. Therefore, under the guise of limiting or preventing fraudulent insurance claims, Subsection (8) simply discourages insurance claims, legitimate and fraudulent. This would seem to run contrary to yet another state interest which is to encourage appropriate health care. Nowhere could there be a better example of this unconstitutional and inequitable application than in the case at bar. The prosecutor in the Trial Court acknowledged that there was no evidence of fraud *sub judice*, yet the prosecution proceeded forward because the Trial Court agreed in the analysis that proof of fraud was not necessary. (Tr. 25,26-30).

Although the foregoing concept advanced by the State may well serve to deter fraud, thereby seemingly advancing a governmental interest, it clearly has an adverse impact on legitimate commercial speech. Therefore, the restriction contained in Subsection (8) is more extensive than is necessary to

serve that governmental interest. Thus, as to the fourth prong of the *Central Hudson* test, once again the statute fails constitutional scrutiny, even under the lower standard of intermediate review for commercial speech.

Contrary to the position advanced by Petitioner, Subsection (8), as drafted, does create a chilling effect regarding the solicitation of anyone potentially in need of services, especially chiropractic services. It's axiomatic that the purpose of advertising or soliciting new patients or clients is to expand business. The purpose of expanding business is to generate more revenue. Advertising or soliciting business is not intrinsically illegal. Since Florida law requires PIP insurance coverage of all motorists, it's reasonable to expect that the majority of potential patients or clients over the age of sixteen carry PIP insurance. Once the professional (Chiropractor) determines that the patient or client has PIP coverage, § 817.234(8), Florida Statutes, as drafted, would seem to preclude submission of an insurance claim regardless of the legitimacy of the services provided. Either the patient pays cash or the provider declines to submit the necessary (HCIF) Form for payment. To submit a claim after having solicited the patient/client violates the statute. If the solicitation is the crime, the only certain way to avoid prosecution under the statute, as drafted, is to refrain from soliciting. In the end, business suffers and the dissemination of information to the consumer is repressed.

AS DRAFTED, SUBSECTION (8) IS
VOID FOR VAGUENESS

As drafted, the statutory subsection at issue is unconstitutionally vague. The vagueness doctrine has a broad application as it was developed to ensure compliance with due process. For example, nowhere does Chapter 817 define “solicit” so as to put the average person on notice as to what conduct is prohibited. If one were to suppose that a treatable malady was discovered during a free chiropractic demonstration, does the offer of follow-up office treatments constitute solicitation? Does it matter if the follow-up treatment is an “offer” or is an “invitation?” Does a billboard advertising chiropractic services at a busy highway intersection constitute a solicitation of potential accident victims? Do these matters change when there is no initial mention, discussion or even thought of insurance coverage? Does it matter if the prospective patient submits to a free demonstration and is thereafter discovered to have sustained an injury as the result of an automobile accident? Vague laws may trap the innocent by not providing fair warning. *Grayned v. City of Rockford*, 408 U.S. 108, 92 S.Ct. 2294, 33 L.Ed. 2d 222 (1972).

In 1995, the Fourth District Court of Appeals held § 817.234(1), Florida Statutes, to be unconstitutionally vague as applied to attorneys and their submission of “incomplete claims.” *State v. Mark Marks, P.A.*, 684 So.2d 1184 (Fla. 4th DCA 1995). That decision was later approved by this Honorable Court in *State v. Mark Marks, P.A.*, 698 So. 2d 533 (Fla. 1997). Subsection (1) did not make definite which acts were proscribed. A similar rationale applies to the

analysis of Subsection (8) and the failure to define the term “solicit.” For instance, it is not clear from a reading of the statute if the sole purpose of the solicitation must be for the patient to make a motor vehicle or PIP claim to constitute illegal conduct, or, if solicitation is proscribed even if the main purpose is to afford legitimate treatment to injured patients, while incidently intending that the patients avail themselves, in a lawful manner, of legal remedies under applicable insurance policies and Florida law.

Contrary to the argument advanced by Petitioner, the language of Subsection (8), as drafted is not clear and unambiguous. As long as a Chiropractor complies with the statutory and administrative rules regulating his/her profession,⁴ some solicitation and advertising for chiropractic services is legal, legitimate and common. What’s unclear is how one distinguishes advertisements from solicitations. Does it matter under Subsection (8)? Similarly, submission of insurance claim forms after providing legitimate chiropractic services is legal and legitimate. To create a singular criminal offense, as Subsection (8) does, by joining individual component acts that are neither illegal nor immoral generates vagueness and uncertainty. As drafted, Subsection (8) contains no specific, readily identifiable scienter requirement nor does it prohibit or forbid a clear and definite act. “A scienter requirement may save a statute from the [challenge or] objection that it punishes without warning an offense of which the accused was aware, *Screws v. United States*, 325

U.S. 91, 102, 65 S.Ct. 1031, 1036, 89 L. Ed. 1495 (1945) it will save the statute from this objection; however, only where the statute forbids a clear and definite act". *Id.* at 105., *Marks*, at 538. *Sub judice*, Subsection (8), as written, suffers from the same constitutional affliction as Subsection (1) in *Marks*, *Id.*

POINT II.

IN *BRADFORD*, THE APPELLATE COURT'S INTERPRETATION OF SUBSECTION (8) ENGRAFTING FRAUD AS AN ELEMENT IS LOGICALLY CORRECT.

REVIEW OF BRADFORD OPINION

In its Opinion in *Bradford v. State*, 740 So.2d 569, (Fla. 4th DCA 1999), the Appellate Court has engrafted an element of fraud into Subsection (8) which was not specifically included by the legislature. "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*, at 571. The analysis of the appellate court seemingly reflects the legitimacy of the issue first raised by Respondent in the trial court and on appeal, which was/is that the statute, as drafted, was/is unconstitutionally vague. The *Bradford* Opinion is a logical attempt to salvage Subsection (8) from the constitutional dustbin. *Doe v. Mortham*, 708 So. 2d. 929 (Fla. 1998). As pointed out by Respondent, Subsection (8) is contained within twenty pages of Chapter 817 which is generally entitled "Fraudulent Practices". In fact, the specific statutory heading for § 817.234, Florida Statutes, is entitled "False and Fraudulent Insurance Claims". All subsections preceding

⁴ Chapter 460, Florida Statutes, and Rule 64B2, Florida Administrative Code.

Subsection (8) require an intent to either “injure, defraud, or deceive,” or require proof of intent to “fraudulently violate” some other subsection. Suddenly Subsection (8) appears, lacking completely any reference to fraudulent practices, false and fraudulent insurance claims, or the intent to either injure, defraud, deceive or fraudulently violate. There is absolutely no distinction within the subsection, as written, between a legitimate claim made with the lawful intention of simply making a tort victim whole or with the criminal intent of defrauding an insurer or an alleged tort feaser. It stands to reason then that if Subsection (8) is going to survive even minimal constitutional scrutiny, fraud must be included as a necessary element. Relying on the authority of *Barr v. State*, 731 So. 2d. 126 (Fla. 4th DCA 1999) the appellate court upheld the constitutionality of Subsection (8) but wrote to “clarify why Subsection (8) does not punish purely innocent activity”. *Bradford*, at 570. Thus, the only logically sound interpretation of Subsection (8) is the one articulated by the appellate court in *Bradford*. The question then, to be resolved by this Honorable Court, is whether the inclusion of the fraud element is sufficient to cure the constitutional infirmity of Subsection (8).

APPLICATION OF THE LAW TO
THE FACTS IN *BRADFORD*

Without splitting legal hairs, Respondent urges this Honorable Court to examine the minimal contact Respondent had with the Prebeck group in conjunction with the undisputed fact that Respondent only submitted HCIF claim forms for two of five patients referred to his office by the Prebeck group. Both patients, Morse and Adams, received bona fide chiropractic treatment and legitimate insurance claims were filed. Yet each (Morse and Adams) was included in a separate count of the criminal Information *sub judice*. This, despite

the fact that it was stipulated at the trial court that no fraud occurred. (Tr. 25,26-30). The Appellate Court's assessment in the first paragraph of its Opinion suggesting that *Bradford* contains "the same factual scenario" as *Barr* is troublesome and confusing. *Bradford*, at 570.

Respondent is without knowledge as to the total number of patients seen by Barr that were referred by Prebeck and whether or not false or fraudulent insurance claims were submitted.

What can be said is, that by volume and sheer numbers, Respondent, Bradford's, involvement with the Prebeck group was de minimis. Moreover, in the Trial Court, both the prosecutor and the trial judge acknowledged and stipulated that there was no evidence of fraud as it related to Respondent, Bradford. (Tr. 25,26-30). Respondent avers, albeit without empirical data or statistics, that *Bradford* did not involve quite the "same factual scenario" as *Barr*. The disturbing paradox then is that on the authority of the *Bradford* Opinion, which engrafted and incorporated fraud as an element of Subsection (8), since there was no proof or evidence of fraud by Respondent, Bradford, his conviction should have been reversed, not affirmed.

By glossing over and blending the *Bradford* facts with *Barr*, and by failing to consider the acknowledgment from the Trial Court that no fraud was alleged in Respondent, Bradford's case, the Appellate Court misapplied the holding of its own opinion to the unique facts of the instant case. Accordingly, whether this Honorable Court declares Subsection (8) to be unconstitutional, or, whether this Court adopts the rationale of the lower court, Respondent's conviction should be vacated and set aside.

CONCLUSION

Section 817.234(8), Florida Statutes, is unconstitutionally vague and overbroad as written and as applied to Respondent, Charles Bradford. Failure of the legislature to define solicitation renders the statute vague and leads to arbitrary and capricious application. If Subsection (8) is constitutionally salvageable, the only logical reading is that articulated by the Fourth District Court of Appeals in *Bradford*. In either event, since there was no question of fraud in the trial court, whether this Honorable Court declares Subsection (8) to be unconstitutional, or whether this Court adopts the reading engrafted by the Appellate Court including fraud as an element, Respondent, Bradford's, conviction must be vacated and set aside.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Respondent's Answer Brief has been furnished by U.S. Mail this 9th day of May, 2000, to: CELIA TERENZIO, Assistant Attorney General, Bureau Chief, and ROBERT R. WHEELER, Assistant Attorney General, Office of the Attorney General, 1655 Palm Beach Lakes Boulevard, Suite 300, West Palm Beach, FL 33401; and, D. GRAY THOMAS, Esquire, 215 Washington Street, Jacksonville, FL 32202.

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