IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-1322

RANDOLPH HANSBROUGH,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

****

ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL

****

RESPONDENT'S ANSWER BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

MICHAEL J. NEIMAND
Assistant Attorney General
Bureau Chief
Florida Bar No. 0239437

FRANK J. INGRASSIA
Assistant Attorney General
Florida Bar No. 0116180
110 SE 6th Street-9th Floor
Fort Lauderdale, FL 33301
Telephone: (954)-712-4600
Facsimile: (954)-712-4761

Counsel for Respondent

CASE NO. SC00-1322

RANDOLPH HANSBROUGH v. STATE OF FLORIDA

CERTIFICATE OF INTERESTED PERSONS

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

1. **The Honorable Howard A. Zeidwig and Victor Tobin**, Circuit Court Judges, Seventeenth Judicial Circuit in and for Broward County, Florida

2. **Frank J. Ingrassia, Esq., Assistant Attorney General**
   Office of the Attorney General, State of Florida
   The Honorable Robert Butterworth, Attorney General
   (Appellate counsel for the State of Florida, Respondent)

3. **Melanie Ann Hines, Statewide Prosecutor**
   Cynthia G. Imperato, Assistant Statewide Prosecutor
   (Prosecuting Attorney)

4. **Robert A. Ader, Esq. and Elizabeth B. Hitt, Esq.**
   (Trial and Appellate counsel for Petitioner)

5. **Randolph Hansbrough**
   (Petitioner)

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 the State of Florida, Respondent herein, hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATUTES

MISCELLANEOUS

PRELIMINARY STATEMENT

Respondent, the State of Florida, was the prosecution in the trial court, Appellee before the Fourth District Court of Appeal, and will be referred to herein as the “State”. Petitioner was the defendant in the trial court, Appellant on appeal to the Fourth District Court of Appeal, and will be referred to herein as or “Defendant”. Reference to the record on appeal will be by the symbol “R” followed by the appropriate page number. References to appellate documents will be by their title followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

By Amended Information dated January 23, 1997, the State charged Defendant with two counts of unlawful insurance solicitation in violation of Florida Statute §817.234(8) (R 93-95). On September 3, 1996, Defendant filed an unsworn Motion to Dismiss challenging the constitutionality of the subject statute. (R32-44). The State filed a Response to the Motion to Dismiss on or about November 13, 1996. (R57-80). The trial court denied the Motion to Dismiss on December 18, 1996 with the ruling rendered by Circuit Court Judge Zeidwig. (R81-87).

After the filing of the Amended Information, Defendant filed a second Motion to Dismiss, challenging the constitutionality of the subject statute, on or about April 1, 1997. (R157-161). Defendant further submitted his own sworn affidavit in support of the motion, dated October 28, 1997. (R193-201). Defendant's Second Motion to Dismiss also contained affidavits executed by William Ponsoldt and Casey Martin, both of whom Defendant was charged with unlawfully soliciting under the statute. (R202-205). The State filed a Traverse to the Motion to Dismiss on or about October 30, 1997. (R169-171).

For the purpose of the second Motion to Dismiss, the following relevant facts set forth in the State's Traverse are not disputed for this appeal. (R169-171). Glenn and Susan Prebeck owned and operated a company (Prebeck Consulting Co., hereinafter referred to

as Prebeck) that obtained traffic accident reports from local and state law enforcement agencies throughout South Florida, the Tampa Bay area, and the Panhandle of Florida. Prebeck contracted with chiropractors to contact persons named in those accident reports and refer them to these chiropractors. (R169).

The State's Traverse further averred that, according to Susan Prebeck and business records, the chiropractors usually paid the Prebeck corporate entity between $275.00 and $300.00 per patient referred. Susan Prebeck stated that the agreement between Prebeck and the chiropractors would be that every person referred would be covered by insurance and symptomatic. (R169-170). The purpose of the referrals was to provide new patients for the chiropractors, who could then bill the patient's or the other covered person's automobile insurance under their Personal Injury Protection (PIP) policy for treatment rendered by the chiropractors. (R170).

On or about February 10, 1994, an employee of Prebeck contacted William Ponsoldt, of Martin County, Florida, in order to solicit Ponsoldt to make an appointment with Defendant at his office for a medical consultation and evaluation. Defendant, whose office was located in Martin County, paid Prebeck a fee to refer Ponsoldt to him. Defendant's business thereafter filed claims with Progressive Insurance Company for PIP benefits in order to be paid for treatment rendered to Ponsoldt. (R170).

Defendant admitted to paying Prebeck for the referral of

patients. (R170). Specifically, Defendant stated that he paid Prebeck a "monthly fee" for Prebeck's consulting and referral services. (R190). Ponsoldt and Martin were accident victims, both of whom were solicited as such and PIP claims were filed on their behalf. (R170). No patients were provided by Prebeck unless the patient had insurance coverage and accident victims were specifically asked by Prebeck telemarketers who their insurance carriers were. (R170). Patients were specifically referred to Defendant by Prebeck, including Ponsoldt and Martin. (R171).

The trial court, by order of Circuit Court Judge Tobin, denied the Second Motion to Dismiss on January 13, 1998. (R206). Defendant thereafter entered a no contest plea to a lesser included offense, conspiracy to commit unlawful insurance solicitation, but reserved his right to appeal " motion to dismiss order denying same." (R207).

Defendant timely appealed the trial court's order denying his motion to dismiss based on the claim that §817.234(8), Fla. Stat., is unconstitutional. On appeal, Defendant challenged the statute as unconstitutional on two grounds: that the statute was unconstitutional as applied; and not sufficiently narrow to justify legitimate restriction of commercial free speech in contravention to the First Amendment to the United States Constitution.

The Fourth District Court of Appeal issued its opinion in this case on May 31, 2000: Hansbrough v. State, ___ So.2d ____, 25 Fla.

L. Weekly D1329 (Fla. 4th DCA May 31, 2000). The court acknowledged that this same issue of the constitutionality of §817.234(8) had previously been addressed in Barr v. State, 731 So. 2d 126 (Fla. 4th DCA 1999) and is constitutional. Id. The court further noted that Bradford v. State, 740 So.2d 569 rev granted, No. SC 96,910 (Fla. February 25, 2000) followed Barr, but noted that certain language in Bradford explaining that an "intent to defraud" was required under the statute, was dicta and not controlling. Hansbrough v. State, supra.

The Fourth District Court of Appeal did, however, certify the following two questions to this Court for review as follows:

(1) WHETHER SECTION 817.234(8), FLORIDA STATUTES, INCLUDES A REQUIREMENT OF SPECIFIC INTENT TO DEFRAUD THE INSURER; AND IF NOT,

(2) WHETHER THE STATUTE ADVANCES THE GOVERNMENT INTEREST IN PREVENTING INSURANCE FRAUD AND IS NOT MORE EXTENSIVE THAN IS NECESSARY TO SERVE THAT INTEREST.

Judge Stone filed a special concurring opinion and noted that the statute is a strict liability crime and called for receding from the holding in Bradford, but concurred in the certified questions posed. This appeal ensued.

STATEMENT OF THE ISSUES

I. WHETHER FRAUDULENT INTENT IS AN ELEMENT OF SECTION 817.234(8), FLORIDA STATUTES (1997)?

II. WHETHER THE AFORESAID STATUTE IS AN UNCONSTITUTIONAL RESTRICTION OF COMMERCIAL SPEECH UNDER THE FIRST AMENDMENT?

SUMMARY OF THE ARGUMENT

Fraud is not an element of Florida's anti-solicitation statute, §817.234(8) Fla. Stat. (1997). Fraud is not an element of this section based on the plain language of the statute, the statutory construction, and the legislative history. Additionally, the lack of a fraudulent intent element does not run afoul of due process.

Absent the fraud element, the statute is a constitutional restriction of commercial speech and does not violate First Amendment protections. It is narrowly drawn and satisfies the test articulated by the United States Supreme Court relating to restrictions on commercial speech.

ARGUMENT

POINT I

INTENT TO DEFRAUD IS NOT AN ELEMENT OF FLORIDA'S ANTI-SOLICITATION STATUTE, §817.234(8) FLA. STAT. (1997).

In the underlying opinion to this case, the Fourth District Court of Appeal retreated from its dicta in Bradford and noted that an intent to defraud was not an element of the anti-solicitation crime created by the legislature in §817.234(8). The court below noted that Bradford was an attempt to clarify why subsection (8) did not punish purely innocent activity, but further noted that the "clarification" was dicta and not controlling. Hansbrough v. State, supra. Because Bradford is currently pending before this Court, and relied upon by Defendant in his Initial Brief, the State will discuss why Bradford should not be controlling. It must be noted, of course, that the Fourth District Court of Appeal in Hansbrough has already implicitly receded from Bradford.

The Fourth District Court of Appeal improperly construed §817.234(8) Fla. Stat. (1997) in Bradford by inserting an element of fraud that is not required by the plain meaning of the statute. Even if the statute is ambiguous, any reasonable construction of the statute does not require a fraud element. Additionally, a review of the legislative history clearly indicates that the legislature did not intend for the crimes created in this section to contain any element of fraud.

§ 817.234 Fla. Stat. (1997) provides:

817.234. False and fraudulent insurance claims

(1)(a) Any person who, with the intent to injure, defraud, or deceive any insurer:

1. Presents or causes to be presented any written or oral statement as part of, or in support of, a claim for payment or other benefit pursuant to an insurance policy, knowing that such statement contains any false, incomplete, or misleading information concerning any fact or thing material to such claim;

2. Prepares or makes any written or oral statement that is intended to be presented to any insurer in connection with, or in support of, any claim for payment or other benefit pursuant to an insurance policy, knowing that such statement contains any false, incomplete, or misleading information concerning any fact or thing material to such claim; or

3. Knowingly presents, causes to be presented, or prepares or makes with knowledge or belief that it will be presented to any insurer, purported insurer, servicing corporation, insurance broker, or insurance agent, or any employee or agent thereof, any false, incomplete, or misleading information or written or oral statement as part of, or in support of, an application for the issuance of, or the rating of, any insurance policy, or who conceals information concerning any fact material to such application commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(b) All claims and application forms shall contain a statement that is approved by the Department of Insurance that clearly states in substance the following: "Any person who knowingly and with intent to injure, defraud, or deceive any insurer files a statement of claim or an application containing any false, incomplete, or misleading information is guilty of a felony of the third degree." The changes in this paragraph relating to applications shall take effect on March 1, 1996.

(2) Any physician licensed under chapter 458,

osteopathic physician licensed under chapter 459, chiropractic physician licensed under chapter 460, or other practitioner licensed under the laws of this state who knowingly and willfully assists, conspires with, or urges any insured party to fraudulently violate any of the provisions of this section or part XI of chapter 627, or any person who, due to such assistance, conspiracy, or urging by said physician, osteopathic physician, chiropractic physician, or practitioner, knowingly and willfully benefits from the proceeds derived from the use of such fraud, is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. In the event that a physician, osteopathic physician, chiropractic physician, or practitioner is adjudicated guilty of a violation of this section, the Board of Medicine as set forth in chapter 458, the Board of Osteopathic Medicine as set forth in chapter 459, the Board of Chiropractic Medicine as set forth in chapter 460, or other appropriate licensing authority shall hold an administrative hearing to consider the imposition of administrative sanctions as provided by law against said physician, osteopathic physician, chiropractic physician, or practitioner.

(3) Any attorney who knowingly and willfully assists, conspires with, or urges any claimant to fraudulently violate any of the provisions of this section or part XI of chapter 627, or any person who, due to such assistance, conspiracy, or urging on such attorney's part, knowingly and willfully benefits from the proceeds derived from the use of such fraud, commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(4) No person or governmental unit licensed under chapter 395 to maintain or operate a hospital, and no administrator or employee of any such hospital, shall knowingly and willfully allow the use of the facilities of said hospital by an insured party in a scheme or conspiracy to fraudulently violate any of the provisions of this section or part XI of chapter 627. Any hospital administrator or employee who violates this subsection commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. Any adjudication of guilt for a violation of this subsection, or the use of business practices demonstrating a pattern indicating that the spirit of the law set forth in this section or part XI of chapter 627 is not being followed,

shall be grounds for suspension or revocation of the license to operate the hospital or the imposition of an administrative penalty of up to $5,000 by the licensing agency, as set forth in chapter 395.

(5) Any insurer damaged as a result of a violation of any provision of this section when there has been a criminal adjudication of guilt shall have a cause of action to recover compensatory damages, plus all reasonable investigation and litigation expenses, including attorneys' fees, at the trial and appellate courts.

(6) For the purposes of this section, "statement" includes, but is not limited to, any notice, statement, proof of loss, bill of lading, invoice, account, estimate of property damages, bill for services, diagnosis, prescription, hospital or doctor records, X ray, test result, or other evidence of loss, injury, or expense.

(7) The provisions of this section shall also apply as to any insurer or adjusting firm or its agents or representatives who, with intent, injure, defraud, or deceive any claimant with regard to any claim. The claimant shall have the right to recover the damages provided in this section.

(8) 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.

(9) It is unlawful for any attorney to solicit any business relating to the representation of persons injured in a motor vehicle accident for the purpose of filing a motor vehicle tort claim or a claim for personal

> injury protection benefits required by s. 627.736. The solicitation by advertising of any business by an attorney relating to the representation of a person injured in a specific motor vehicle accident is prohibited by this section. Any attorney 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. Whenever any circuit or special grievance committee acting under the jurisdiction of the Supreme Court finds probable cause to believe that an attorney is guilty of a violation of this section, such committee shall forward to the appropriate state attorney a copy of the finding of probable cause and the report being filed in the matter. This section shall not be interpreted to prohibit advertising by attorneys which does not entail a solicitation as described in this subsection and which is permitted by the rules regulating The Florida Bar as promulgated by the Florida Supreme Court.
>
> (10) As used in this section, the term "insurer" means any insurer, self-insurer, self-insurance fund, or other similar entity or person regulated under chapter 440 or by the Department of Insurance under the Florida Insurance Code.

§ 817.234, Fla. Stat. (1997), False and fraudulent insurance claims.

Only a few decisions have interpreted this statute. See State v. Marks, P.A. 698 So.2d 533, 540 (Fla. 1997); Hershkowitz v. State, ____So.2d____, 24 Fla. Law Weekly D 2706d (Fla. 3rd DCA Dec. 8, 1999); Hansbrough v. State, supra; Bradford v. State, 740 So.2d 569 (Fla. 4th DCA 1999); Barr v. State, 731 So.2d 126 (Fla. 4th DCA 1999); and State v. Falk, 724 So.2d 146 (Fla. 3rd DCA 1998). In each of these cases, the statute has been challenged on various grounds and held to be constitutional.[1]

[1] In Marks one small portion of statute was declared vague but the statute as a whole was held constitutional.

A. PLAIN MEANING

As a general proposition, the legislature has the prerogative to determine what is a crime and to define or redefine the elements of the crime. See Perkins v. State, 682 So. 2d 1083 (Fla. 1996); State v. Hamilton, 660 So. 2d 1038 (Fla. 1995); Chapman v. Lake, 112 Fla. 746, 151 So. 399 (1933). Statutes are to be construed to effectuate legislative intent. In order to ensure legislative intent will be followed, the rule is that when a court entertains a challenge to a statute, the polestar for the court's construction of the statute is the plain meaning of the statutory language. If a statute is clear on its face the courts must apply the plain meaning without resorting to other rules of construction. State v. Egan, 287 So.2d 1 (Fla. 1973); see also McLaughlin v. State, 721 So.2d 1170 (Fla. 1998).

"[T]he plain meaning of statutory language is the first consideration of statutory construction." Capers v. State, 678 So. 2d 330, 332 (Fla. 1996). There is no room for alternative construction if the meaning of a statute is plain on its face. State v. Harvey, 693 So. 2d 1009, 1010 (Fla. 4th DCA 1997). "When the language of a statute is clear and unambiguous, . . . the language should be given effect without resort to extrinsic guides to construction." State v. Marks, 698 SO. 2d at 540.

A clear and unambiguous statute precludes an examination of legislative history or intent. Streeter v. Sullivan, 509 So. 2d

268, 271 (Fla. 1987). "When the language of a statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation to alter the plain meaning." Mancini v. Personalized Air Conditioning & Heating, Inc, 702 So. 2d 1376, 1378 (Fla. 4th DCA 1997) quoting Ross v. Gore, 48 So. 2d 412, 415 (Fla. 1950); State v. Cohen, 696 So. 2d 435, 438 (Fla. 4th DCA 1997). "Where the language of the statute is plain and unambiguous, there is no need for judicial interpretation." T.R. v. State, 677 So. 2d 270, 271 (Fla. 1996). See Pardo v. State, 596 So. 2d 665 (Fla. 1992)(fundamental principle of statutory construction: where language of statute is plain and unambiguous, no occasion for judicial interpretation). Because the Act's language is unambiguous, an examination of the legislative history is not warranted.

The plain meaning of §817.234(8) Fla. Stat. (1997) is clear on its face. It provides that:

> (8) 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 ..... for the purpose of making motor vehicle tort claims or claims for personal injury protection benefits required by s. 627.736.

The statute criminalizes solicitation for the purpose of filing certain types of claims - namely motor vehicle tort claims or claims for personal injury protection (PIP) benefits. This language requires no clarification or interpretation. The meaning of the

statute could not be made any plainer. This statutory section does not require that an intent to defraud be alleged or proven. To the contrary, the section is plain and simple - all solicitation with the intent to file PIP or motor vehicle tort claims is a criminal act. Any intent to defraud is irrelevant to the crime.

The law requires a court to give the language of the statute its plain meaning. A court is not allowed to judicially modify a statute by adding words not included by the legislature. Such judicial legislating violates Florida's Constitutionally required separation of powers. See B.H. v. State, 645 So.2d 987, 991 (Fla. 1994); Smith v. State, 537 So.2d 982 (Fla. 1989).

This Court recently reiterated the same principle when it addressed and rejected attempts to rewrite other portions of this statute. In the case of State v. Marks, P.A. 698 So.2d 533, 540 (Fla. 1997), this Court addressed this statute and found that the respondents were attempting to limit the express terms of an unambiguous statute. It rejected this attempt as beyond the Court's power. Id. at 540. Likewise, in State v. Copher, 396 So.2d 635 (Fla.2nd DCA 1981), the court rejected an attempt to add a fraud element to a statutory section which did not contain fraud language. In Bradford, the Fourth District erred by noting, in its now proclaimed dicta, that the intent to defraud is an element of this section of the statute.

B. STATUTORY CONSTRUCTION

Although this Court needs to look no further than the plain meaning of the statute, if this Court determines that the language is not clear and must construe it, a reasonable construction of the statute clearly indicates that the intent to defraud is not an element of this section of the statute.

A recent decision from this Court, State v. Hubbard, 24 Fla. L. Weekly S575b (Fla. December 16, 1999), lends guidance as to how to construe a statute. In that case, this Court construed the DUI manslaughter statute after appellate courts were holding that the crime contained an element of negligence. This Court examined the statute and held that the legislature did not intend to make negligence an element of the crime of DUI manslaughter.

> While the statute clearly has a causation element, it does not explicitly contain a negligence element, in contrast to a related statute such as section 322.34(3), which does include such an element. Thus, at least three principles of statutory construction support a conclusion that simple negligence is not an element of DUI manslaughter. See Florida State Racing Comm'n v. Bourquardez, 42 So. 2d 87, 88 (Fla. 1949) (observing that "[t]he legislature is presumed to know the meaning of words and the rules of grammar, and the only way the court is advised of what the legislature intends is by giving the [statutory language its] generally accepted construction"); Department of Health & Rehabilitative Servs. v. M.B., 701 So. 2d 1155, 1160 (Fla. 1997) (finding no "consistency" requirement attached to child victim hearsay exception, as opposed to statute defining nonhearsay, thus "demonstrat[ing] that the legislature knew how to impose a 'consistency' requirement if desired"); Federal Ins. Co. v. Southwest Fla. Retirement Ctr. Inc., 707 So. 2d 1119, 1122

> (Fla. 1998) (concluding that absence of express language establishing discovery rule for latent defects is "clear evidence that the legislature did not intend to provide a discovery rule" in limitations statute).

Id. at S578.

In the case at hand, fraud is not mentioned in section (8) of the statute. However, fraud is an element in five other sections of the statute, clearly indicating that if the legislature intended to have fraud as an element, it certainly knew how to include it. See §817.234 Fla. Stat. sections (1), (2), (3), (4), and (7). "The legislative use of different terms in different portions of the same statute is strong evidence that different meanings were intended." State v. Marks, 698 So. 2d at 541. Because the legislature knew how to make fraud an element of this crime as evidenced by its inclusion in related sections of the same statute, it must be presumed that it intended to omit the fraud element from section (8).

Moreover, inclusion of fraud as an element of section (8) would render this section of the statute meaningless, in violation of another cardinal principle of construction. See Ellis v. State, 622 So. 2d 991, 1001 (Fla. 1993); State v. Summerlot, 711 So. 2d 589 (Fla. 3d DCA 1998). Sections (1) through (4) present a comprehensive scheme that makes illegal any type of fraud. Section (8), added a year after sections (1) - (4), would be unnecessary, redundant, and meaningless if the element of fraudulent intent was added.

Finally, the Bradford court's reliance on a general principle of statutory construction in an effort to explain why it was imposing this additional element of fraud on section (8) was patently wrong. The Bradford court noted, inter alia:

> It is a general principle of statutory construction that statutes enacted during the same session of the legislature dealing with the same subject matter must be considered in pari materia in order to harmonize them and, at the same time, to give effect to the legislative intent. When reading subsection (8) in pari materia with subsection (1)(a), it becomes obvious that the legislature in enacting subsection (8) intended to punish only solicitations made for the sole purpose of defrauding that patient's PIP insurer.

Bradford v. State, supra, 740 So. 2d at 571.

The Bradford court incorrectly assumed that all subsections of Florida Statute §817.234 were enacted by the Legislature during the same session. The legislative history is clear that subsections (8) and (9) were enacted in 1977 as anti-solicitation provisions in Chapter 77-468 Laws of Florida. The fraud sections of (1)-(4) were passed in 1976 under the automobile and tort revision of 1976, Chapter 76-266 Laws of Florida. Clearly, these sections of the statute were not "enacted during the same session of the legislature" to be considered "in pari materia". This "general principle of statutory construction" that the appellate court relies upon to "harmonize" the sections of the statute by requiring a fraud element for every section is inapplicable.

The Bradford court violated fundamental principles of statutory

construction by adding the element of fraud to section (8). This fraud element was specifically not included by the legislature and not suggested by the rules of construction. Additionally, the appellate court incorrectly relied upon a principle of statutory construction that was inapplicable. The inclusion of a fraud element to section (8) was error.

C. LEGISLATIVE HISTORY

Besides violating the plain meaning of the statute and a myriad of statutory construction principles, the Bradford court overlooked the legislative intent by including a fraud element to section (8) of the statute. A review of the legislative history clearly proves that the legislature did not intend to require the element of intent to defraud in section (8) of this statute.

Florida is a no fault state, with a $10,000 personal injury protection benefit threshold that must be exceeded, related to medical expenses, before an injured insured can recover for excess medical expenses, pain, and suffering in tort by filing a personal injury action.[2] Florida Statute §817.234 was created (as Florida Statute 627.7375) in 1976 by Section 7 of Chapter 76-266. The Legislature acted in response to concerns that "fraud" in piercing the no fault threshold was documented in a Dade County Grand Jury Report, Fall Term 1974 and dated August 11, 1975, " . . . concerning the practice of a small group of lawyers, physicians, osteopaths,

[2] See §627.736 Fla. Stat (1997).

chiropractors and hospitals who work together to inflate or outright falsify personal injury claims." Unscrupulous practitioners (doctors and lawyers) were soliciting individuals involved in car accidents in an attempt to pad their pockets. The result of such fraud was to effectively increase the number of tort recoveries for pain and suffering in personal injury actions, resulting in higher insurance rates. This was disrupting the protective insurance mandated by the State of Florida, driving up insurance rates, increasing litigation based on fraudulent claims, and spiraling rates even higher. See Robert W. Emerson, Insurance Claims Fraud Problems and Remedies, 46 U. MIAMI L. REV. 907 (1992). In other words, persons with "little or no injuries[3]" were solicited by runners for medical treatments that became the basis for making claims of personal injury protection benefits, and when the medical expenses exceeded that threshold, motor vehicle tort claims were filed. The net effect was an increase in both the number and dollar value of recoveries for pain and suffering in personal injury actions, ultimately paid by insurance companies and passed on as a cost of doing business to the citizens of the State of Florida by virtue of insurance rate increases.

[3] 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.

In April 1976, Senator Kenneth McKay, Jr. introduced Senate Bill (SB) 598 in the Florida Senate in an effort to make changes that would stabilize the automobile insurance industry. SB 598 included a section that addressed fraud in piercing the no-fault threshold. According to the records on SB 598 that are housed in the Florida State Archives, the fraud section of the bill, Section 6, was included as a direct result of the Dade County Grand Jury Report filed August 11, 1975. The summary of the bill included a description of Section 6, "fraudulent conduct in piercing the tort threshold will be unlawful and persons convicted will be guilty of a felony of the third degree." SB 598 was reviewed by the Senate Commerce Committee and they passed a Committee Substitute (CS) of SB 598 which included Section 6 on fraud. SB 598 was eventually passed by the full Senate and sent to the House of Representatives.

Several similar bills were introduced in the House of Representatives in April 1976, House Bill (HB) 2825, 3042, 3043, 3044, and 3155, that addressed the same issues of insurance industry reform as SB 598. These bills eventually were included in one bill CS/HB 2825 which passed out of the House of Representatives and ended up in Conference Committee with CS/SB 598. Both CS/HB 2825 and CS/SB 598 had similar language addressing the issue of fraud in piercing the no fault threshold. The bill that was agreed upon by the Conference Committee was called CS/HB 2825 and was enrolled as law. The result was General Laws Chapter 76-266, Section 7 which

became Florida Statute 627.7375 *Fraud*, and provided:

> (1) Any insured party or insurer or insurance adjuster who, with intent knowing and willfully conspires to fraudulently violate any of the provisions of this part, or who, due to fraud...is guilty of a felony of third degree...
>
> (2) Any physician..., osteopath..., chiropractor... [or other licensed practitioner]... who knowingly and willfully assists, conspires with, or urges any insured party to fraudulently violate any of the provisions of this part...is guilty of a felony of the third degree.
>
> (3) Any attorney who knowingly and willfully assists, conspires with, or urges any claimant to fraudulently violate any of the provisions of this part...is guilty of a felony of the third degree.
>
> (4) No person or governmental unit licensed...to maintain or operate a hospital, and no administrator or employee of any such hospital, shall knowingly and willfully allow the use of the facilities of said hospital by an insured party in a scheme or conspiracy to fraudulently violate any of the provision of this part...is guilty of a felony of the third degree.

The following year as part of a comprehensive reform, Section 36 of Chapter 77-468 (originally Senate Bill 1181) reworded the above and was retitled, 627.7375 False and Fraudulent Claims. The new statue added subsections (8) and (9), targeting unlawful insurance solicitation, and not making any mention of fraud. The subsections as originally enacted made it a crime for any person or attorney to solicit business “for the purpose of making motor vehicle tort claims”.

> (8) It is unlawful for any persons, 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.**
>
> (9) It is unlawful for any attorney to solicit any business relating to the representation of persons injured in a motor vehicle accident **for the purpose of filing a motor vehicle tort claim.** The solicitation by advertising of any business by an attorney relating to the representation of a person injured in a specific motor vehicle accident is prohibited by this section. Any attorney 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 36 of the Senate Staff Analysis for SB 1181 states:

Section 36 This section rewrites s.627.7375 in the following manner:

(1) Fraudulent claims-expanded to all persons involved in the auto claims process.

(2) Creates a civil case of action for violation of section.

(3) More inclusive definition of statement.

(4) Provides that acting as a runner is a third degree felony.

(5) Special prohibition against an attorney soliciting motor vehicle tort claims (third degree felony and a report to the state attorney for action).

SB 1181 Staff Analysis, Section 36.

The following year subsections (8)and (9) were amended to read **"for the purpose of making motor vehicle tort claims or a claim for personal injury protection benefits required by Section 627.736".**

Laws of Florida Chapter 78-258 Section 3. (emphasis added). Finally, in 1979, Section 627.7375 Florida Statues was renumbered to Section 817.234 Florida Statutes. See Laws of Florida Chapter 79-81, Section 1. Subsections (8) and (9) have since remained unchanged.

In 1979, the Legislature passed a reviser's bill, c. 79-400, to conform the sections of Florida Statutes 1977 to additions, substitutions and deletions editorially supplied therein in order to remove inconsistencies, redundancies, unnecessary repetition and otherwise clarify the statutes and facilitate their correct interpretation. The Legislature, during this clarification exercise, did not add any language of intent to defraud in subsections (8) or (9).

There is no indication that the legislature intended for the crimes created in sections (8) and (9) to contain any element of fraud. These provisions were designed to target another problem - runners and professionals using runners for solicitation. It would be illogical to require fraudulent intent when the evil addressed was specifically solicitation in and of itself. If a doctor, lawyer, individual, or business enterprise hires runners to contact accident victims and solicit their business, they violate the statute. This is precisely what was being accomplished here because Defendant paid Prebeck to solicit for him. No fraudulent intent is necessary.

In sum, Florida Statute §817.234 was created and passed in 1976 (as Florida Statute §627.7375) with only subsections (1)-(4). These subsections each specifically contained language of intent to commit fraud -- "who knowingly and willfully . . . fraudulently violate . . ." In 1977, subsections (1)-(4) were reworded, and subsections (8) and (9) were added. The legislature intentionally did not place any fraudulent intent language in that subsection or in subsection (9). In 1978, the statute was renumbered to §817.234, and the legislature did not add any fraudulent intent language to subsections (8) or (9). Subsection (8) proscribes conduct separate from the conduct proscribed in subsections (1)-(4). Certainly, the legislature did not intend for subsection (8) to contain any element of fraud.

D. DUE PROCESS PARAMETERS

Defendant further argues that the challenged statute must be interpreted to include a fraudulent intent element because, to hold otherwise, would run afoul of due process analysis. Defendant's argument is without merit.

Section 817.234(8) is not a specific intent criminal statute because the statute does not contain or expressly require knowledge or intent to defraud as an element of the crime. At common law, all crimes consisted of an act or omission coupled with a requisite mental element or mens rea. See, Morissette v. United States, 342 U.S. 246 (1952). Notwithstanding this common law requirement of an

act and an accompanying mental state, it has long been recognized that the legislature has the power to dispense with the mental element of intent and punish the actor without regard to the mental state of the offender. See, State v. Oxx, 417 So.2d 287,289 (Fla. 2d DCA 1982) The common law crimes were commonly referred to as a crime that was malum in se in that intent was so inherent in the offense that it was deemed to be included as an element of the crime even if the statute codifying the offense failed to specify intent as an element. See, e.g., Morissette v. United States, supra (Federal codification of crimes of theft did not dispense with intent element); Bell v. State, 394 So.2d 979 (Fla. 1991) (Legislature did not intend to eradicate specific intent in defining crime of robbery).

In contrast to the common law crime of malum in se, a latter category of crimes developed where the performance of the act itself was considered as punishable, regardless of intent. A crime in this fashion is designated as malum prohibitum. State v. Oxx, supra, p. 289. These crimes are generally regulatory in nature and are enacted to protect the public health, safety and welfare. A crime that is designated as malum prohibitum is, however, restricted by constitutional parameters such as when the enactment imposes an affirmative duty to act and then penalizes the failure to comply. Under some circumstances, the failure to act might amount to purely innocent conduct. Under these circumstances, the failure of a

statute to require some specific intent might violate due process. See, State v. Gruen, 586 So.2d 1280,1282 (Fla. 3d DCA 1991) rev denied, 593 So.2d 1051 (Fla. 1991); see also Lambert v. California, 355 U.S. 225 (1957) (Ordinance stricken that required convicted felons who remained in Los Angeles in excess of five days to register with the police, since the ordinance punished a failure to act without requiring a showing of knowledge of a duty to act). A second restriction on this legislative power and, applicable to this appeal, is when the statute might tend to chill First Amendment rights if intent were not required. See, Smith v. California, 361 U.S. 147 (1959) (Statute making it illegal to possess any obscene or indecent writing, without requiring a mens rea, was unconstitutional in that it inhibited the exercise of First Amendment freedoms). Moreover, scienter can be read into the statute to save it from constitutional attack. State v. Oxx, supra at p. 289 n.5; Cohen v. State, 125 So.2d 560 (Fla. 1960).

Defendant has seized upon his First Amendment commercial speech argument in support of a contention that without application of a fraudulent intent element engrafted on section 817.234(8), his free speech rights are chilled. This contention is meritless. As the State will demonstrate infra, section 817.234(8) does not chill Defendant's commercial speech because the statute does not completely ban all forms of solicitation. In fact, only the solicitation of persons for the purpose of filing motor vehicle tort

or PIP claims is banned. As such, the ban is far from an outright total one and this fact alone demonstrates that there is no chilling First Amendment interest impeded by resort to a malum prohibitum application of the statute.

It should be noted that the case of State v. Olson, 586 So.2d 1239 (Fla. 1st DCA 1991) provides highly persuasive authority to defeat application of a chilling First Amendment argument to defeat the malum prohibitum application. In Olson, the Defendant was a newspaper reporter charged with violating a statute prohibiting the receipt of written materials from a jail inmate while the reporter was visiting the jail in connection with her duties as a reporter. The trial court dismissed the information ruling that the statute was unconstitutional both on its face and as applied to the Defendant. On appeal, the First District Court of Appeal reversed the trial court and upheld the constitutionality of the statute and noted that the reporter's receipt of an unauthorized communication by a prison inmate was not protected by the First Amendment. State v. Olson, supra, p. 1244. As such, the charge of receipt of written materials from a jail inmate, a malum prohibitum offense, was reinstated notwithstanding Defendant's First Amendment protestations.

The same result should be reached on this record. There is simply no chilling of First Amendment rights by banning the solicitation of motor vehicle and PIP tort claims. In fact,

Defendant can still solicit all non-motor vehicle claims and any other type of injury related claims not involving motor vehicle accident or PIP claims. Given the lack of an outright ban, the State submits that this Court should not encroach upon the malum prohibitum designation that the legislature has seen fit to enact in this respect. The legislature has broad discretion to determine the necessary measures for the protection of the public health, safety and welfare. Once the legislature has acted in these areas, the courts should not substitute their judgment for that of the legislature concerning the wisdom of the acts. See, State v. Thomas, 428 So.2d 327,331 (Fla. 1st DCA 1983). The legislature has determined that solicitation of motor vehicle tort and PIP claims needs to be regulated to combat the filing of fraudulent claims. Having come to that conclusion, this Court should not encroach upon the legislature's judgment especially where, as here, the legislature has come to a rational solution to attack the problem.

The State recognizes that Defendant argues that a fraudulent intent element must be read into the statute to survive due process analysis. See, e.g., Staples v. United States, ____U.S.____, 114 S.Ct. 1793, 1796-1797 (1994); Chicone v. State, 684 So.2d 736, 742 (Fla. 1996). Defendant's analysis simply misses the point. The statute does not run afoul of due process because the statute still requires a general intent to perform the prohibited act; that is, engaging in solicitation. As such, Defendant is not unaware or

ignorant of the fact that the act of engaging in solicitation of patients for the purpose of filing motor vehicle tort or PIP claims is prohibited. Indeed, the fact that he hired Prebeck to solicit for him only underscores the point, and it is this very problem that the legislature was seeking to prevent by enacting the statute. As such, there is no due process impediment underlying the enactment at issue.

POINT II

ABSENT THE FRAUD ELEMENT, FLORIDA STATUTE §817.234(8) IS A CONSTITUTIONAL RESTRICTION OF COMMERCIAL SPEECH.

With respect to the First Amendment issue, analysis must begin with an examination of Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of NY, 447 U.S. 557 (1980).[5] Under Central Hudson, the government is entitled to regulate commercial speech that relates to unlawful activity or is misleading. See, Florida Bar v. Went For It, Inc., 515 U.S. 618, 623-624 (1995). Commercial speech that falls into neither the unlawful nor misleading category may be regulated if (1) the government asserts a substantial interest in support of its regulation; (2) the restriction on commercial speech directly and materially advances that interest; and (3) the regulation is narrowly drawn, meaning not necessarily the least restrictive means, but one tailored to achieve the desired result. Florida Bar v. Went For It, Inc., supra, 515 U.S. at pp. 623-624,632.

Measured against this criteria, the State submits that section 817.234(8) withstands constitutional scrutiny. As the Fourth District Court of Appeal noted in Barr v. State, supra 731 So.2d at 129, section 817.234 (8) was enacted to combat insurance fraud and

---

[5]Contrary to the interesting innuendo contained at page 8, footnote 2 of Defendant's Initial Brief, the Central Hudson test remains the test employed when assessing restrictions on commercial speech.

the corresponding harm that such conduct caused the public at large by way of increased premiums. There was a serious problem in the industry of runners soliciting automobile accident victims with little or no injury to undergo unnecessary medical treatment so that the victims' PIP benefits could be exhausted before suit was brought in tort for damages. The Barr court ruled that the battle against insurance fraud reflected a substantial State interest to regulate the commercial speech. Additionally, by seeking to ban the solicitation, section 817.234(8) directly advances the State's interest in curbing insurance fraud. The ban is also reasonably tailored to achieve the State's purpose of preventing insurance fraud and raised premiums resulting from such claims.

Defendant seeks to avoid the pitfalls of the ruling in Barr by arguing that the statute is not narrowly drawn to achieve the State's objectives and that, in any event, he did not intentionally solicit with the purpose of filing a fraudulent motor vehicle or PIP claim. Neither of these contentions have merit. With respect to the former, Defendant relies primarily on Edenfield v. Fane, 507 U.S. 761 (1993) to support his contention that the statute is not narrowly drawn. In Edenfield, the Supreme Court ruled that a total ban on the professional solicitation applicable to certified public accountants ran afoul of the First Amendment. A total ban, of course, is not narrowly drawn in scope or purpose. Section 817.234(8), on the other hand, by limiting its scope to the

solicitation of filing motor vehicle tort claims or PIP benefit claims, is reasonably limited in both scope and purpose and tailored to achieve the State's interest in curbing insurance fraud and rising premiums. In light of these critical facts, the statute does not run afoul of the First Amendment.

With respect to the latter argument relating to the purported lack of a mens rea to commit the crime, the State has already addressed the point that the statute requires a general intent to engage in solicitation that satisfies due process analysis. What Defendant is really saying is that he disagrees with the solution that the legislature enacted by banning solicitation within the context of tort motor vehicle and PIP claims.

The Fourth District Court of Appeal in this case correctly applied the test developed by the Supreme Court in Central Hudson Gas & Electric Corp. v. Public Service Comm'n of NY, supra, to determine whether the statute violated First Amendment protections.

The Fourth District Court of Appeal concluded in Barr, that the statute passed constitutional muster under the Central Hudson test. The statute is constitutional under the Central Hudson test without the inclusion of any fraud element.

The first prong of the test is satisfied because the challenge to the solicitation was not misleading - it was unlawful only because it violated section 817.234(8), and not for any other reason. Bradford v. State, supra, 740 So.2d at 571; Barr v. State,

supra, 731 So.2d at 129.

The second prong of the test was satisfied because substantial State interests were involved - to combat insurance fraud and a resulting increase in insurance premiums borne by the public. Barr v. State, supra, 731 So.2d at 129. The following State interests are clearly substantial to satisfy this prong:

> (1) The State has a substantial interest in protecting the public from unnecessarily inflated insurance rates for personal injury protection and liability insurance.
>
> (2) The State has a substantial interest in preventing fraud and misrepresentations by professionals.
>
> (3) The State has a substantial interest in protecting the privacy of its citizens involved in motor vehicle accidents.
>
> (4) The State has a substantial interest in promoting the ethical standards of professionals, consistent with the laws of Florida, who make claims for personal injury protection benefits and motor vehicle tort claims, related to the motor vehicle accidents of its citizens. (R69).

The third prong of the test is satisfied. It is not necessary to establish that each of the State's interests will be or are advanced by the regulation. If the evidence shows that even one substantial interest is directly advanced, the statute will be preserved. See Sciarrino v. City of Key West, Fla., 83 F. 3d 364, 369 (11th Cir. 1996) citing Florida Bar v. Went For It, Inc., 115 S.Ct. 2371, fn. 1 (1995), cert. denied, 117 S.Ct. 768 (1997). While the State may not rely on speculation or conjecture,

> [w]e do not read our case law to require that empirical data come to us accompanied by a surfeit of background information. Indeed, in other First Amendment contexts, we have permitted litigants to justify speech restrictions by references to studies and anecdotes pertaining to different locales altogether, (citations omitted) , or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and 'simple common sense.' (citation omitted).

Florida Bar v. Went For It, Inc., 115 S.Ct. at 2378.

The Barr court correctly analyzed why subsection (8) directly 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 solicitation provides a direct link to the state's interest in preventing harm to such victims and the insurance industry.

Barr v. State, supra, 731 So.2d at 129.

There can be no dispute that the harms sought to be alleviated were quite real. Florida is a no fault insurance state, with a $10,000 personal injury protection benefit medical expense threshold that must be exceeded before an injured person can recover for medical expenses or pain and suffering in tort, by filing a personal injury action. The Grand Jury report documented fraud in piercing Florida's no fault threshold. The fraud, or "harm feared," was that

persons with "little or no injuries" were solicited for medical treatments that became the basis for making claims of personal injury protection benefits, and when the medicals exceeded that threshold, motor vehicle tort claims. The effect was an increase in both the number of recoveries and dollar value of recoveries for pain and suffering in personal injury actions. These claims were paid by defendant insurance companies and passed on as a cost of doing business to Florida citizens through unnecessary insurance rate increases.

The statute, by making it a crime to solicit specifically for the purpose of filing a motor vehicle tort claim or claim for personal injury protection benefits, obviously materially advances that substantial interest. Common sense dictates that criminalizing a particular action deters that action.

Finally, the fourth prong of the test is satisfied because subsection (8) is narrowly drawn.

> 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 motor vehicle tort or PIP benefits claims. Although not the least restrictive means available to achieve the state's purpose, we hold the ban on such solicitation is reasonably tailored to the state's interest in preventing insurance fraud and raised premiums.

Barr v. State, supra, 731 So.2d at 129; Bradford v. State, supra, 740 So.2d at 571.

The statute does not ban all solicitation under any

circumstances resulting in an impermissible restriction of commercial speech. The statute merely restricts the solicitation for chiropractic business **for the purpose of making a claim for PIP benefits**. A chiropractor could hire hundreds of telemarketers to solicit new patients full time and not be in violation of Florida's criminal statute, so long as the chiropractors are not soliciting persons for the purpose of filing a motor vehicle tort claim or claim for personal injury protection benefits -- the limited restrictions imposed by the statute.[6]

Clearly, absent the fraud element as advanced by Defendant on this appeal, subsection (8) passes constitutional muster and satisfies the Central Hudson test. It is narrowly drawn. The imposition of the fraud element is not necessary for the statute to be constitutional. In sum, the challenged statute here clearly survives constitutional scrutiny. Accordingly, the ruling of the court below was proper.

CONCLUSION

Wherefore, based upon the foregoing arguments and the authorities cited therein, the State respectfully requests that this

[6]There is no merit to Defendant's argument that the State is restricting consumers from seeking chiropractic care. Certainly, any such consumer patient can seek medical or chiropractic treatment if they so desire. They might even find the Defendant through commercial advertisements. Defendant's commercial speech interests under this statute are not chilled in this respect. The only conduct prohibited is solicitation of patients for the purpose of filing PIP or motor vehicle tort claims.

Court approve the ruling of the District Court of Appeal and answer the first certified question as to whether the statute requires a specific intent to defraud element in the negative; and the second question, as to whether the statute advances the governmental interest in preventing insurance fraud in the affirmative.

Respectfully submitted,
ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

MICHAEL J. NEIMAND
Assistant Attorney General
Bureau Chief
Florida Bar No. 0239437

FRANK J. INGRASSIA
Assistant Attorney General
Florida Bar No. 0116180
110 SE 6th Street-9th Floor
Ft. Lauderdale, FL., 33301
Telephone(954)-712-4600
Facsimile(954)-712-4761

Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Respondent's Answer Brief on the Merits" has been furnished by U.S. Mail to: LAW OFFICES OF ROBERT ADER, Attorney for Petitioner, NationsBank Tower, Suite 3550, Miami, FL 33131 on this ___ day of August, 2000.

_____
FRANK J. INGRASSIA
Assistant Attorney General