IN THE SUPREME COURT OF FLORIDA

Case No. SC00-1322

RANDOLPH HANSBROUGH,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

On Appeal from the District Court of Appeal
of the State of Florida, Fourth District
DCA-4 No. 99-00169

PETITIONER'S INITIAL BRIEF ON THE MERITS

LAW OFFICES OF ROBERT ADER
Counsel for Petitioner

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

CERTIFICATE OF INTERESTED PERSONS

Counsel for the Petitioner, Randolph Hansbrough, hereby certifies that the following persons and/or entities have or may have an interest in the outcome of this case:

1. Robert A. Ader, Esq., co-counsel for Petitioner

2. The Honorable Robert A. Butterworth, Attorney General, counsel for Respondent, State of Florida

3. Dr. Randolph Hansbrough, Petitioner

4. Elizabeth B. Hitt, Esq., co-counsel for Petitioner

5. Cynthia Imperato, Esq., Assistant Statewide Prosecutor

6. Frank J. Ingrassia, Esq., Assistant Attorney General, counsel for Respondent, State of Florida

7. The Honorable Victor Tobin, Circuit Court Judge, Seventeenth Judicial Circuit in and for Broward County, Florida

8. The Honorable Howard M. Zeidwig, Circuit Court Judge, Seventeenth Judicial Circuit in and for Broward County, Florida

By: _____
Counsel for Petitioner

CERTIFICATE OF TYPE AND SIZE

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 Petitioner, Randolph Hansbrough, hereby certifies that the instant brief has been prepared with 14 point New Times Roman type, a font that is not spaced proportionately.

By: _____
Counsel for Petitioner

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INTRODUCTION

The Petitioner herein, Dr. Randolph Hansbrough, was the Defendant at the trial level and the Appellant in the action on appeal to the Fourth District Court of Appeals. The Respondent, State of Florida, was the prosecution at the trial level and the Appellee in the action on appeal. The parties will be referred to by proper name or by their designation. The record on appeal will be referred to as "R-1," etc., and references to a hearing held on December 2, 1996, will be cited as "TR-1," etc. The opinion of Fourth District Court, in the action directly below, will be noted by proper case citation.

STATEMENT OF THE ISSUES

Whether the Circuit Court and the District Court below erred as a matter of law in declining to declare §817.234(8) unconstitutional on its face or as applied to Petitioner Randolph Hansbrough.

I STATEMENT OF THE CASE AND FACTS

Petitioner, Dr. Randolph Hansbrough, a chiropractor licensed in Florida, was charged, along with twelve other chiropractors throughout the State, with Unlawful Insurance Solicitation in violation of §817.234(8), Fla. Stat. (R-57). Dr. Hansbrough's charge stems from his relationship with a chiropractic consulting company and the events surrounding a patient's referral (R-33-34).

Prebeck Consultants, Inc. ("Prebeck"), a Florida Corporation, was a consulting business established to aid chiropractors with regard to improvement of their practices, from patient procedures, to accounting and advertising (R-33). Prebeck additionally maintained a doctor referral network to advise prospective patients of the participating doctor nearest their home or office (R-33). Dr. Hansbrough was a participating doctor listed with Prebeck.

The Prebeck Company 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 (R-61). After acquiring William Ponsoldt's name from an accident report, Prebeck contacted Mr. Ponsoldt, offering to schedule a free consultation and examination with Dr. Hansbrough for the purpose of determining whether he was injured and whether treatment was necessary and/or desired for any accident-related injuries (R-61).

Mr. Ponsoldt appeared for his initial consultation and thereafter began treatment with Dr.

Hansbrough (R-33). The patient's PIP insurance carrier was ultimately billed,[1] and the insurance carrier paid these bills without dispute (TR-36). Thereafter, Dr. Hansbrough was charged with the unlawful solicitation of a patient for the purpose of making a motor vehicle tort claim or a claim for personal injury protection benefits. At no time have allegations been made that Dr. Hansbrough submitted any fraudulent claims (R-70). It is undisputed that Dr. Hansbrough never acted with any fraudulent intent (R-195-96). The wrongful solicitation alleged was the phone call made by Prebeck to Mr. Ponsoldt asking if he would like to schedule a free chiropractic consultation (TR-59).

Prosecution commenced and, after the trial court denied two motions to dismiss and a sworn motion, Dr. Hansbrough entered into a negotiated plea with the State wherein Dr. Hansbrough pled no contest to the reduced charge of conspiracy to solicit, a first-degree misdemeanor. Dr. Hansbrough was placed on a one-year period of probation and paid approximately Seven Thousand Dollars ($7,000) in fines and costs of prosecution. In the plea negotiation, Dr. Hansbrough specifically reserved his right to appeal the denial of all filed motions to dismiss based on the unconstitutionality of Florida Statute §817.234(8) (R-212-13). The plea agreement was entered into on December 15, 1998, and appeal to the Fourth District ensued in accordance with the terms of the agreement.

The Fourth District Court of Appeals subsequently rejected the Appellant's argument that the statute at issue was an unconstitutional restriction on Dr. Hansbrough's first amendment right to commercial free speech, and upheld the statute both on its face, and as applied to the facts before it. However, the Fourth District Court certified for this Court's decision the following as questions of great public importance:

WHETHER SECTION 817.234(8), FLORIDA STATUTES, INCLUDES A REQUIREMENT OF SPECIFIC INTENT TO DEFRAUD THE INSURER.

and, if not

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

Petitioner argues that Section 817.234(8) does include an element of intent to defraud, without which the statute fails to advance the government's interest in preventing fraud, and remains unconstitutionally overbroad.

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 substantial interests at stake, but that the means it employs directly and materially advance its asserted interest, a contention that requires evidentiary support. The State must also show that, in light of less burdensome alternatives, the restriction on commercial speech is narrowly tailored, limited in scope and proportionate to the state interest to be served.

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[1] Prior to any involvement with Dr. Hansbrough, Mr. Ponsoldt had made application for personal injury protection ("PIP") benefits for his ambulance ride and hospital emergency room visit (R-197).

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 purpose is not to prevent the filing of meritorious PIP claims, but solely the prevention of fraudulent claims, as evidenced by legislative history. Interpreting the statute in accordance with the framers' intent furthers legislative purpose while allowing §817.234(8) to 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.

In the case at bar, the State overlooked legislative intent, utilized a more literal reading of the statute, and criminally charged Petitioner Hansbrough with unlawful solicitation merely because the solicitation resulted in the filing of a PIP claim. There was absolutely no evidence of intent to defraud, nor was there any assertion that the treatment sought to be covered was not medically necessary.

Criminalizing solicitation as felonious merely because a legitimate PIP claim follows, 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 solicitors of motor vehicle accident victims invariably act with fraudulent intent. The State has not and cannot prove such a preposterous and presumptive argument.

Innocent speech cannot be sacrificed by utilizing a statute that is neither narrowly tailored nor proportionate to the asserted goal of preventing fraudulent insurance claims, particularly in the light of less burdensome alternative devices. 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 mere 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.

The Judicial Branch retains the power of judicial review over legislative acts and holds a duty to construe an otherwise unconstitutional statute in accordance with constitutional guarantees. To that end, courts are required to resort to the rules of statutory construction in order to save the statute from constitutional attack. Where a *malum prohibitum* statute entrenches on first amendment freedoms or subjects individuals to severe penalties for statutory infractions, an element of intent must be impliedly included, or the statute must be deemed unconstitutional. As our Legislature enacted §817.234(8) with the purpose of preventing insurance fraud, the statute impliedly requires that violators act with the intent to defraud. It is only by requiring the state to allege and prove a violator's intent to defraud, that the statute can survive constitutional challenge.

III
ARGUMENT
A

ABSENT A REQUIRED ELEMENT OF INTENT TO DEFRAUD, §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).

In the case at bar, the State of Florida seeks to enforce a statutory ban on chiropractic solicitation of motor vehicle accident victims where the solicitation leads to the filing of personal injury benefit insurance claims. In effect, the statutory ban makes it a criminal act for chiropractors to publicly or privately provide medical information to those persons whom they feel would be most interested in their services.

Since 1979 Florida Statute §817.234(8) has remained unchallenged and unenforced, 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) (emphasis added). Any person who violates the above provisions commits a felony of the third degree, id., thereby subjecting persons to criminal sanctions for commercial speech activities.

First Amendment protections are afforded commercial speech to the extent that courts shall engage in intermediate scrutiny to determine if a restriction on commercial speech is constitutionally prohibited, by employing the Central Hudson analysis below.[2] Florida Bar v. Went For It, Inc., 115 S.Ct. 2371, 2375-76 (1995).

As a preliminary matter, in order to be constitutionally protected, commercial speech must concern lawful activity and not be misleading. Central Hudson Gas & Elec. Corp. v. Public Com'n of N.Y., 100 S.Ct. 2343, 2350 (1980). Once commercial speech is found to be neither misleading nor unlawful, the government may *only* restrict the speech *provided* the regulation at issue satisfies three criteria: (1) the government's interest at the base of the restriction must be

[2] While Petitioner argues the Central Hudson analysis, it should be noted that the U.S. Supreme Court has, as of late, expressed its discomfort with the Central Hudson test and a possible willingness to abandon the strictures of the test, in favor of a more straightforward 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).

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. Id. at 2351.

As any "solicitation" on the part of Dr. Hansbrough was completely lawful, apart from the alleged violation of the subject statute itself, and because such was not misleading, 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 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).

Preventing willful and intentional insurance fraud is the substantial governmental interest sought to be protected by §817.234(8).

In the action below, the State asserted the prevention of insurance fraud as a substantial interest served by the restraint on chiropractic solicitation (R-69). While the trial court considered other governmental interests advanced by the State, it properly concluded that the statute was enacted "for the purpose of combating insurance fraud, clearly a substantial governmental interest", and therefore found that the first element of the Central Hudson test had been met (R-85).

Likewise, on appeal, the Fourth District Court found that the prevention of insurance fraud was the substantial government interest at issue. Hansbrough v. State, 757 So.2d 1282, 1283 (Fla. 4th DCA 2000). *See also* Hershkowitz v. State, 744 So.2d 1268, 1269-70 (Fla. 3d DCA 1999) (addressing §817.234(8) and specifically recognizing the state's asserted interest in preventing insurance fraud); Barr v. State, 731 So.2d 126, 129 (Fla. 4th DCA 1999) (same).[3] Indeed, §817.234 is *entitled* "False and Fraudulent Insurance Claims." Further, subsections (1)-(7) state, in essence, the legislature's 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 unconstitutional as applied to individuals acting with no fraudulent purpose or intent.

Recognizing that fraudulent intent is at the very core of §817.234(8), the court in Bradford v. State, 740 So.2d 569 (Fla. 4th DCA 1999), *rev. granted*, No. SC96910 (Fla. Feb. 25, 2000), found that it is that *intent to defraud* that allows the statute to survive constitutional scrutiny. Specifically, the Bradford Court held, "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. at 571 (emphasis added). Thus, the operative and limiting language of §817.234(8) appears to be "intent to defraud," ***not*** merely the intent to file a PIP claim.

But in addressing Dr. Hansbrough's case, the Fourth District retreats from its former logic

[3] Both Petitioner and the State have previously set forth a lengthy rendition of legislative intent, culminating in the agreed proposition that §817.234(8) was enacted for the purpose of preventing insurance fraud.

in Bradford, discarding the well-reasoned *holding* that §817.234(8) requires an intent to defraud, while adopting its prior opinion in Barr v. State, *supra*, and stating that the statute, as written, facially satisfies the state's interest in preventing fraud. Hansbrough, 757 So.2d at 1283. Yet in simply dismissing, as mere *dicta*,[4] the Bradford analysis, the Court fails to appreciate its own admission that Bradford was written in an effort "to clarify why subsection (8) does not punish innocent activity." Bradford, 740 So.2d at 570. No attempt at reconciliation is made, and no analysis offered.[5] Additionally, and quite surprisingly, the Court did not recede from the Bradford language it now deems *dicta*.

The Fourth District's ruling abruptly let stand a conviction of an altogether innocent individual merely exercising his free speech rights. As was recognized by the District Court below, the State has neither alleged nor shown that Dr. Hansbrough acted with the specific purpose of filing a PIP claim, that the claim filed was fraudulent, or, much less, that the solicitation was made with any fraudulent intent. Hansbrough, 757 So.2d at 1282-83. As the State concedes, "there is no allegation that the Defendant Randolph Hansbrough was involved in fraud" (R-70). In fact, there was *never* any criminal mind on the part of Dr. Hansbrough (R-195-96).[6]

By disregarding the mental state legislatively required by §817.234(8), the State, in effect, makes it a strict liability offense for chiropractors to solicit prospective patients who later filed insurance claims, even where the solicitation was not made with the intent to defraud the insurer. Requiring only a statutory infraction to effectuate the prescribed criminal penalty serves to discount the full legislative purpose behind §817.234(8), a statute specifically designed to punish only willful and intentional perpetrators of fraud. Hence, with an overly broad interpretation of the statute, the State and, subsequently, the courts below have acrimoniously allowed an innocent person to get swept up in the plain language of the statutory net and suffer felony charges. Petitioner would agree that the prevention of insurance fraud is certainly 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). The problem at hand is thus an issue of statutory interpretation. There appears to be no way to constitutionally harmonize the legislative purpose behind §817.234(8) with its application to an individual soliciting with absolutely no illicit intent.

Banning solicitation that leads to the filing of honest PIP claims does not directly or

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[4] Petitioner vehemently contends that what the Fourth District now describes as "*dicta*" is actually the holding in Bradford, and is analytically sound. Bradford's analysis logically led to its *conclusion*: "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."

[5] Petitioner confessed to the District Court his own inability to reconcile the Court's holding in Barr with that of Bradford. The former opinion allows §817.234(8) to target persons who solicit for the sole purpose of making motor vehicle tort or PIP benefit claims, while the latter appears to permit solicitation resulting in the filing of PIP claims, just not solicitation made with the intent to defraud. Petitioner is not the only one unable to reconcile Bradford with Barr. In an opinion handed down shortly after the decision in Bradford, a county court ruled that, based on Bradford, dismissed the Information charging the defendant with solicitation in violation of §817.234(8), as the state had failed to allege intent to defraud. *See* State of Florida v. Nash Cronin, et al., No. 98-13214 (Fla. 4th Cir. Ct., Duval County), Order Granting Defendants' Motion to Dismiss (attached hereto as Exhibit "A").

[6] William Ponzoldt stated in sworn affidavit that he never discussed insurance with Dr. Hansbrough, filed his own PIP claim and received beneficial care and treatment for his injuries (R-202-203).

materially advance the State's interest in preventing willful insurance fraud.

Commercial speech may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest. Zaunderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 105 S.Ct. 2265, 2275 (1985). The regulation of commercial speech "may extend only as far as the interest it serves" and "may not be sustained if it provides only ineffective or remote support for the government's purpose." Central Hudson, 100 S.Ct. at 2351 & 2343 (respectively).

It is well understood that "[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; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." Edenfield v. Fane, 113 S.Ct. 1792, 1800 (1993). In meeting its burden, the State is required to present some form of statistical or anecdotal evidence in support of its position. *See*, 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 rest on mere speculation, but must confirm, through some type of empirical data, 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, and the court neglected to compel the State to reach its burden.[7]

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. In order to justify such a broad restriction on solicitation, it must be a foregone conclusion that the vast majority of solicitors act with the specific intent to defraud insurance companies, a rather presumptive, and certainly unevidenced, claim. As the State itself admits, "more often than not solicitations are not for

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[7] In declining to rule on the constitutionality of §817.234(8) (facially or as applied), the trial court stated simply:

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.

(R-85) (emphasis added). The State was therefore absolved of its burden to present evidence suggesting that applying §817.234(8) in the chosen manner will significantly reduce insurance fraud. More poignantly, in considering the final prong of the Central Hudson test, the trial court explicitly stated that "as applied to the instant Defendant, the Statute may not achieve the goal of preventing insurance fraud," yet, out of deference to the legislature, refused to find the statute unconstitutional, either on its face or as applied to the facts of this case (R-86).

fraudulent purposes." (TR-45).

Absent findings of fact or evidentiary support, the Court cannot conclude that the State has met its burden of showing, beyond mere speculation, how suppressing chiropractic 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.

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 Ass'n v. United States, 119 S.Ct. 1923, 1932 (1999) (citations omitted).

At no time has the State presented viable argument that a regulation making unlawful the solicitation of a huge and specific group of consumers (those which have PIP insurance) who, arguably, may be in the most need of chiropractic services, is narrowly drawn to the state's interest in preventing fraud. Reducing the number of PIP claims filed does not work to proportionately reduce the filing of fraudulent claims. Admittedly, the State need not find the least restrictive means to achieve its goal of preventing insurance fraud; however, is it reasonable that the State employ the most restrictive means available as a prophylactic measure? [8] The use of broad prophylactic 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. 328, 340 (1963).

[8] What could be more 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? Perhaps the utilization of an anti-solicitation statute to form the predicate act for a Criminal RICO charge wherein the defendant then faces up to thirty (30) years imprisonment for a first degree felony (see Exhibit "A").

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).

Many alternative devices exist to detect and deter insurance fraud, which are practical means of controlling illegal conduct, while unobtrusive to First Amendment rights.[9] Initially, insurance companies routinely investigate suspicious claims, and deny those that 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 consideration in determining whether the 'fit' between the ends and means is reasonable").

With the ready availability of other fraud deterrents, 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?

The State essentially proposes an all-inclusive ban-- to the extent that the ban forbids solicitation that results in the filing of *any* PIP claim[10]-- in an effort to discourage the filing of fraudulent insurance claims. Yet, interestingly enough, out of the entire "Operation Chiro-Sweep," none of

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[9] As an analogy, when this 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.

[10] 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 that leads to any filing of PIP claims.

the defendants were specifically charged with filing a *fraudulent* insurance claim. Thus, innocuous solicitation was sacrificed in an unavailing attempt to capture corrupt solicitors, the statute disproportionately applied to impose criminal liability for filing meritorious claims.

B

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

The District Court's majority opinion offers little explanation with regard to its prior Bradford opinion that found §817.234(8) applicable only where a actor intends to defraud an insurance carrier. Dismissing the language as mere "*dicta* and not controlling", and without mention of the Bradford analysis, the Court ruled that §817.234(8) "satisfied the state's interest in preventing insurance fraud." Hansbrough, 757 So.2d at 1283. As if to clarify the matter, the Majority offers, enigmatically, "[w]hile the state has not alleged intent to defraud in Hansbrough's case, *dicta* in Bradford does not require reversal in this case." Id. As the majority opinion is virtually devoid of analysis, it fails to adequately explain just how the imposition of felony charges upon Dr. Hansbrough for soliciting individuals for free chiropractic examinations works to satisfy the state's interest in preventing insurance fraud.

In his concurring opinion, Judge Stone, likewise finding the language at issue mere *dicta*, writes that he would recede from Bradford's statutory interpretation that §817.234(8) requires an intent to defraud. Id. At 1284 (Stone, J., specially concurring). Judge Stone offers a bit more insight, albeit inaccurate, and argues that: (1) because the statutory language is clear and unambiguous, it is "unnecessary" to resort to the rules of statutory construction, and (2) that "*mala prohibita* crimes are punishable regardless of intent."[11] With the utmost respect to Judge Stone, even where a statute is clear and unambiguous, the rules of statutory construction do come into play where it is necessary to save a statute from constitutional attack. Moreover, constitutional scrutiny cannot be avoided on the mere basis of *malum prohibitum* characterization.

Courts have a duty to resort to the rules of statutory construction in an effort to construe statutes in conformance with constitutional guarantees and legislative purpose.

It remains a fundamental principle of constitutional law that, whenever possible, a statute should be construed so as not to conflict with constitutional rights. 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). Far from an unconstitutional entrenchment on the legislature's domain, courts must, where possible, construe statutes so to conform with constitutional

[11] Id. at 1283-84. Judge Stone surmised that, with regard to intent, the "only intent required to be proven is general intent to commit the act prohibited. The lack of specific intent to defraud does not run afoul of this principle, as the statute requires a general intent to do the act prohibited; that is, engaging in the solicitation." Id. (citations omitted). But the inherent problem with malum prohibitum, or general intent, statutes is that intent to do the act prohibited may be readily inferred, leaving no burden of proof on the state, while forcing the defendant to prove a negative. Thus any solicitation that results in the filing of a PIP claim would be considered punishable.

guarantees and legislative purpose. State v. Hoag, 419 So.2d 416, 417 (Fla. 3d DCA 1982) ("trial court rationally interpreted the [statute] to harmonize with the Constitution and legislative purpose—as was its duty").

The principles of statutory construction are not, therefore, limited to use where a statute is unclear or ambiguous, but must be resorted to in order to determine constitutionality. Simply because a statute remains clear with no prescribed element of intent, does not automatically make the conduct proscribed a strict liability offense, nor does it negate a court's duty to look to legislative purpose while determining the statute's constitutionality. Chicone v. State, 684 So.2d 736, 743, n.11 (Fla. 1996).

Where a malum prohibitum statute tends to chill First Amendment freedoms, scienter is impliedly included so to save the statue from constitutional attack.

To begin, "statutes defining crimes are to be strictly construed against the State and most favorably to the accused." Chicone, 684 So.2d at 741. "The existence of a mens rea is the rule of, rather that the exception to, the principles of Anglo-American criminal jurisprudence." Dennis v. United States, 71 S.Ct. 857, 862 (1951). Thus, offenses that have no mens rea requirements are generally disfavored. Chicone, 684 So.2d at 743.

While it is true that the legislature has the power to enact malum prohibitum statutes that punish violators without regard to their state of mind, the legislature may not dispose of the element of intent where a statute tends to chill the exercise of first amendment rights. State v. Oxx, 417 So.2d 287, 289 (Fla. 5th DCA 1982). *See also* Smith v. California, 80 S.Ct. 215 (1959) (statute prohibiting possession of obscene or indecent writings, without regard to intent, held unconstitutional as inhibiting first amendment freedoms); Cohen v. State, 125 So.2d 560 (Fla. 1960) (holding scienter impliedly included in statute making illegal the sale or distribution of obscene periodicals, irrespective of intent, and remanding with orders to require State to charge and prove this element).

"Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." NAACP v. Burton, 83 S.Ct. at 338; *accord* Spears v. State, 337 So.2d 977 (Fla. 1976). 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. State, 358 So.2d 16, 20-21 (Fla. 1978), or be given a limited 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).

On 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. Mobely v. State, 409 So.2d 1031 (Fla. 1982); State v. Simpson, 347 So.2d 414 (Fla. 1977).

Clearly, Petitioner's first amendment rights are at issue here, namely, his right to commercial speech activities. Whereas Dr. Hansbrough contends that §8917.234(8) can, and should, be construed to prohibit the filing of *fraudulent* PIP claims, if not found unconstitutional altogether, the State takes a broader approach, claiming that the statute bans all solicitation which results in the filing of *any* PIP claim. With an inferred element of specific intent, the statute can be construed, consistent with legislative purpose, as an anti-fraud statute, which tramples on no fundamental right, for there is no inherent right to perpetrate fraud. The State's reading effectuates an anti-solicitation statute, which plainly impinges on first amendment freedoms of commercial speech. Simply put, absent an implied savings provision, the statute works to chill commercial free speech by prohibiting innocuous solicitation.

Where a statute subjects individuals to severe penalties, intent must be read into the statute.

In determining whether scienter is a necessary element of a statutory crime, we look beyond the plain and unambiguous language of the statute to legislative intent. Staples v. United States, 114 S.Ct. 1793, 1796-97 (1994); Morissette v. United States, 72 S.Ct. 240, 247 (1952).[12] In the absence of express contrary legislative intent, courts will presume a scienter requirement, particularly where the statute at issue imposes a substantial criminal sanction. Chicone, 684 So.2d at 742-43 (finding penalties imposed for violations of statutes prohibiting possession of drugs, five years imprisonment and up to $5,000 fine, "incongruous with crimes that require no mens rea").[13] The reason for this is simple:

In rehearsing the characteristics of the public welfare offense, we, too, have included in our consideration the punishments imposed and have noted that "penalties commonly are relatively small, and conviction does no grave damage to an offender's reputation." We have even recognized that it was "[u]nder such considerations" that courts have construed statutes to dispense with mens rea.

Our characterization of the public welfare offense in Morissette hardly seems apt, however, for a crime that is a felony. . . . After all, "felony" is, 'as bad a word as you can give to man or thing.'"

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[12] "If a statute is to make sense, it must be read in light of some assumed purpose. A Statute merely declaring a rule, with no purpose or objective, is nonsense." State v. Hoag, 419 So.2d 416, 417 (Fla. 3d DCA 1982) *quoting* K. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed*, 3 VAND. L. REV. 395, 400 (1950)). Moreover, a statute can serve no public purpose by imposing harsh and inflexible penalties on harmless conduct. Id. at 417.

[13] In Chicone v. State, this Court rejected the distinction between statutes codifying crimes recognized at common law and those that proscribe conduct beyond that prohibited at common law, a.k.a., public welfare offenses, finding "this method of statutory analysis is of little help." 684 So.2d at 741-42.

Close adherence to the early cases described above might suggest that punishing a violation as a felony is simply incompatible with the theory of the public welfare offense. In this view, absent a clear statement from Congress that mens rea is not required, we should not apply the public welfare offense rationale to interpret any statute defining a felony offense as dispensing with mens rea.

Staples, 114 S.Ct. at 1803-04 (citations and footnotes omitted).

There is no indication that the Florida Legislature intended to dispense with a mens rea element in §817.234(8). To the contrary, as stated in Section III, A-1, *supra*, even a cursory review of legislative history reveals that the statute was implemented for the purpose of preventing fraud; consequently, the State must allege and prove *intent to defraud* prior to imposing harsh incarceration penalties and substantial fines for statutory infractions.[14] As this Court has acknowledged, "if the legislature had intended to make criminals out of people who were wholly ignorant . . . and subject them to lengthy prison terms, it would have spoken more clearly to that effect." Chicone, 684 So.2d at 743 (noting that "dispensing with scienter would 'criminalize a broad range of apparently innocent conduct'").

Seemingly wary of performing a thorough constitutional analysis of §817.234(8), the District Court, giving great deference to the legislature, sought fit to merely uphold the challenged statute both on its face, and as applied to the undisputed facts before it. Again, with great respect to the Fourth District Court of Appeals, our system of government provides that courts must review and interpret statutes to prevent constitutional abuses. 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 retains the power of judicial review over legislative acts—this power is not discretionary, but constitutionally mandated.

IV
CONCLUSION

Although reducing the filing of fraudulent insurance claims is surely a substantial state interest, controlling behavior by suppressing speech is certainly not. As applied by the State, §817.234(8), Fla. Stat., sacrifices 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, as applied cannot pass constitutional muster.

While the Judiciary has the inherent power, and duty, to interpret a statute in accordance with constitutional guarantees and legislative intent, this Court should find that §817.234(8) holds an implied element of intent to defraud.

Based on the foregoing, Petitioner, Randolph Hansbrough, respectfully requests that this Honorable Court enter an order declaring §817.234(8), Fla. Stat., unconstitutional on its face or as applied to the facts of his case.

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[14] *See, supra,* note 8.

Respectfully submitted,

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

By:_____
ROBERT A. ADER, ESQ.
Florida Bar No. 335126

-and-

By: _____
ELIZABETH B. HITT, ESQ.
Florida Bar No. 0176850

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Initial Brief was furnished by U.S. Mail this ___ day of July, 2000, to: FRANK J. INGRASSIA, Assistant Attorney General, Office of the Attorney General, Department of Legal Affairs, 110 S.E. 6th Street, Ft. Lauderdale, Florida 33301.

By: _____
ROBERT ADER