IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

NASH CRONIN, et al.,

Respondents.

Case Number: SC01-202
L.T. Case No.: 1D99-3226

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JOINT ANSWER BRIEF OF DEFENDANTS/RESPONDENTS STEVEN WARFIELD, LAKEWOOD CHIROPRACTIC CLINIC, P.A, NORTH FLORIDA HEALTH CARE, INC., d/b/a WARFIELD CHIROPRACTIC CENTER, MARK E. KLEMPNER, CASMAR, INC., CRAIG J. OSWALD, NASH N. CRONIN, AND DEBORAH COMBS

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STATEMENT OF THE CASE AND FACTS

The Defendants in this case are chiropractors, chiropractic clinics, and two non-chiropractor individuals. The Defendants were initially charged by statewide grand jury indictment alleging one count of violating Florida's RICO Act, Section 895.02(3), Florida Statutes, and twenty-one counts of violating Section 817.234(8), Florida Statutes (1997), which prohibits unlawful solicitation for the purpose of making a motor vehicle tort claim or a claim for personal injury protection ("PIP") benefits. The alleged substantive violations of Section 817.234(8), Florida Statutes (1997), were the sole predicate acts alleged in support of the RICO count.

The state alleged that the chiropractor Defendants hired Defendants Nash N. Cronin and Deborah Combs to contact accident victims and refer those accident victims to the chiropractor Defendants for free consultations. See R2, p. 158. If the chiropractor Defendants treated the accident victims, the accident victims' PIP insurance would be billed.

Count II was typical of the alleged substantive violations of Section **817.234**(8):

> . . . on or between January **7,** 1996 and January 10, **1996,** in Duval and Indian River Counties, Nash N. Cronin, Deborah Combs, and Craig J. Oswald, D.C. . . . did unlawfully solicit business from Russell A. Hester for the purpose of making motor vehicle tort claims or claims for personal injury protection benefits required by Section 627.736, Florida Statutes, in violation of Section 817.234(8) and Section 777.011, Florida Statutes.

The only differences among the substantive counts were the dates, the individual Defendants charged, and the names of the persons solicited.

After substantial discovery had been taken, the state filed an information superseding the indictment. R2, pp. **306-21.** The superseding information also charged one RICO count, based solely on alleged violations of Section 817.234(8), Florida Statutes. In addition, the superseding information charged twenty-three counts of unlawful insurance solicitation in violation of Section 817.234(8), Florida Statutes, most of

which were identical to the substantive counts contained in the original indictment. In response to the information, the Defendants filed several motions to dismiss, asserting that violations of Section 817.234(8), Florida Statutes, did not "relate to fraud" and, therefore, could not be predicate acts to support a RICO violation (R2, pp. 323-31), that the statewide prosecutor lacked subject matter jurisdiction (R2, pp. 332-37), and that Section 817.234(8), Florida Statutes, was unconstitutionally overbroad and vague, was violative of equal protection rights, and unconstitutionally infringed on the right to freedom of commercial speech. R2, pp. 338-46.

While the Defendants' motions to dismiss the information were pending, the Fourth District Court of Appeal decided Bradford v. State, 740 So.2d 569 (Fla. 4th DCA 1999), review granted, 761 So.2d 331 (2000). The Defendants then filed another motion to dismiss on the basis that the superseding information failed to allege any offense under Section 817.234(8), Florida Statutes, because the state had not alleged the essential element of intent to defraud. R2, pp. 347-56.

At the hearing on the Bradford motion, the Defendants argued that Bradford mandated that intent to defraud was an essential element of any offense under Section 817.234(8), Florida Statutes, that the information failed to allege that essential element as required by Florida Rule of Criminal Procedure 3.140(d) (4), and that sworn discovery confirmed that the state could not prove any fraudulent intent or conduct by the Defendants.' R3, pp. 408-21. The state essentially conceded that it had not alleged intent to defraud and that, in any case, it could not prove that the Defendants acted with any intent to defraud or that any person was actually defrauded by the Defendants' conduct.[2] R3, p. 379. The court, relying on Bradford as the only precedent from one of

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[1] Subsequent to the state filing this appeal, the Third District Court of Appeal decided Hershkowitz v. State, 744 So.2d 1268 (Fla. 3d DCA 1999), explicitly adopting Bradford's reasoning and analysis.

[2] The state did not argue, and does not argue here, that intent to defraud is an element which can be sufficiently plead by mere recitation of § 817.234(8), Florida Statutes. The state argues instead that intent to defraud is not an element of the crime charged. See, e.g., R3, p. 433.

Florida's District Courts of Appeal on the issue,[3] dismissed all counts of the information based on the failure to allege the essential element of intent to defraud and, therefore, state an offense under Section 817.234(8), Florida Statutes.[4] R3, p. 380.

The state appealed the trial court's decision. On appeal, the Defendants argued Section 817.234(8) unconstitutionally restricted commercial speech, and that if the statute could be saved by a limiting construction, the only appropriate construction was to require an element of intent to defraud. The First District Court of Appeal affirmed the trial court's dismissal based on its holding that the statute was unconstitutional under the Central Hudson

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[3] Subsequently, the Fourth District Court of Appeals receded from Bradford, stating that the language regarding intent to defraud was "dicta." Hansbrough v. State, 757 So.2d 1282, 1283 (Fla. 4th DCA), review granted, 779 So.2d 271 (2000). The First District Court of Appeals, in the decision below, specifically held that an intent to defraud element could not properly be read into the statute. State v. Cronin, 774 So.2d 871, 874 (Fla. 1st DCA 2000).

[4] Count I, the RICO count, was predicated solely on the purported substantive violations of § 817.234(8) and, thus, could not stand once the court determined that the violations of § 817.234(8) were not sufficiently alleged.

test. The district court held that the statute was unconstitutional because it was not reasonably tailored to the state's substantial interest in preventing insurance fraud and could not be saved by either the state's or the Defendants' proposed narrowing constructions. Cronin, 774 So.2d at 874-76.

STJMMARY OF THE ARGUMENT

The decision under review, State v. Cronin, 774 So.2d 871 (Fla. 1st DCA 2000), should be affirmed because Section 817.234(8), Florida Statutes (1997), unconstitutionally restricts commercial speech. The statute does not directly advance the state's substantial interest in preventing insurance fraud and is not narrowly tailored to the state's substantial interest. Alternatively, if the statute can be saved by this Court adopting a narrowing construction, the only appropriate narrowing construction is that Section 817.234(8), Florida Statutes (1997), applies only to solicitations done with an intent to defraud. Construing the statute as requiring an intent to defraud would be consistent with the federal and state constitutions and the legislative intent. Section 817.234(8) is unconstitutional or, to be constitutional, must be construed to include an essential element of intent to defraud. Accordingly, the decision of the First District Court of Appeal, affirming the trial court's dismissal of the information, should be approved.

ARGUMENT

I. Section 817.234(8), Florida Statutes (1997) unconstitutionally restricts commercial speech if intent to defraud is not an element of the offense.

A. Section 817.234(8), Florida Statutes (1997), is a blanket ban on all solicitation of accident victims, by professionals.

The court below correctly recognized the great breadth of the statute at issue. Section 817.234(8), Florida Statutes (1997), states:

> It is unlawful for any person, in his or her individual capacity or in his or her capacity as a public or private employee, or for any firm, corporation, partnership, or association, to solicit any business in or about city receiving hospitals, city and county receiving hospitals, county hospitals, justice courts, or municipal courts; in any public institution; in any public place; upon any public street or highway; in or about private hospitals, sanitariums, or any private institution; or upon private property of any character whatsoever for the purpose of making motor vehicle tort claims or claims for personal injury protection benefits required by s.

> 627.736. Any person who violates the provisions of this subsection commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

"Under the express terms of section 817.234(8), any person who solicits business, through any medium, with the intent of receiving payment by making a motor vehicle tort claim or a claim for PIP benefits commits a third degree felony." Cronin, 774 So.2d at 872. Under the statute, the time, place or manner of the solicitation, whether the solicitor acts with any fraudulent or other ill intent, or whether the solicitor acts with a "legitimate" purpose in addition to the purpose proscribed by the statute,[5] are inconsequential.

In effect, the statute bans all solicitation of motor vehicle accident victims by any persons intending to make a PIP or tort claim, including chiropractors. All automobiles registered in Florida are required to carry PIP coverage. All victims of auto accidents have (or should have under law)

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[5] Such as reaching out to a prospective client who has a legitimate need for chiropractic services and informing that person of a legitimate potential source of payment for the service. See Cronin, 774 So.2d at 875 n.2.

recourse to PIP coverage - for eighty percent of all reasonable expenses for necessary medical services arising out of an accident. See § 627.736(1)(a), Fla. Stat. Thus, any person injured in an auto accident is normally entitled to make a PIP claim. A professional treating an accident victim for, or advising the victim about, the victim's accident-related injuries would be remiss in his duties if he did not make a PIP claim on behalf of the victim or at least suggest to the victim that some of the expense of treatment could be covered by PIP benefits. Thus, a professional acts with a "purpose" of filing a PIP claim any time he solicits business from a motor vehicle accident victim. In effect, Section 817.234(8), Florida Statutes (1997), prohibits any professional from soliciting any auto accident victim, regardless of the time, place, or manner of the solicitation and regardless of the solicitor's motives. See Cronin, 774 So.2d at 875.

B. The Statute is unconstitutional under the Central Hudson test.

The test for determining whether a state's regulation of commercial speech violates First Amendment protections is set forth in Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557 (1980). Under Central Hudson, commercial speech must concern lawful activity and not be misleading in order to receive First Amendment protection. Central Hudson, 447 U.S. at 566. Assuming those conditions are met, regulation of the speech is constitutional if the government asserts an interest which is substantial, the regulation directly advances the asserted interest, and the regulation is not more extensive than necessary to serve the interest. Central Hudson, 447 U.S. at 566. The regulation does not have to be the least restrictive means, but does have to be 'in proportion to the interest served," and "narrowly tailored to achieve the desired objective." Florida Bar v. Went For It, Inc., 515 U.S. 618, 632 (1995), quoting Board of Trustees of the State University of New York v. Fox, 492 U.S. 469, 479-80 (1989).

Section 817.234(8), Florida Statutes (1997), prohibits non-misleading commercial speech regarding otherwise lawful activity and is deserving of First Amendment protection. See Cronin, 774 So.2d at 873; Barr v. State, 731 So.2d 126, 129 (Fla. 4th DCA 1999).

1. *The State has a substantial interest in preventing insurance fraud.*

In this and previous cases in which criminal defendants have challenged the constitutionality of Section 817.234(8), Florida Statutes (1997), the state has asserted that it has an interest in preventing insurance fraud and that its interest is "substantial" for purposes of the Central Hudson test. The Defendants agree that the state has ***a*** substantial interest in preventing insurance fraud. See Cronin, 774 So.2d at 873; Hansbrough, 757 So.2d at 1283.[6]

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[6] Prior decisions addressing the state's asserted substantial interest have not found any other substantial interest related to Section 817.234(8). See Cronin; Hansbrough; Hershkowitz v. State, 744 So.2d 1268 (Fla. 3d DCA 1999) ; Bradford v. State, 740 So.2d 569 (Fla. 4th DCA 1999), review granted, 761 So.2d 331 (2000); Barr v. State, 731 So.2d 126 (Fla. 4th DCA 1999).

2. section *817.234(8), Florida Statutes (1997), does not directly advance the state's interest in preventing insurance fraud if intent to defraud is not an element of the offense.*

The appellate court below implicitly adopted the Barr court's analysis that "Section 817.234(8) does, in fact, directly advance the State's interest in preventing insurance fraud." Cronin, 774 So.2d at 873. However, the Fourth District Court of Appeal cast doubt on whether Central Hudson's third prong is satisfied by Section 817.234(8), stating that standing alone, the subsection 'does not speak directly to the state's interest in preventing insurance fraud." Bradford, 740 So.2d at 571. Although the court later receded from Bradford to the extent the case suggested that an intent to defraud was a necessary element of any offense under Section 817.234(8), see Hansbroush, 757 So.2d at 1283, the Bradford court's observation that the statute, as written, does not directly advance the state's interest is still valid.

The state's anecdotal evidence of the use of "runners" in insurance fraud schemes, see Barr v. State, 731 So.2d 126

(Fla. 4th DCA 1999) (citing the Dade County Grand Jury Report, Fall Term 1974, filed August 11, 1975 (the "First Grand Jury Report")); see also Appendix B to state's initial brief, 15th Statewide Grand Jury Interim Report dated August 2, 2000 (the "Second Grand Jury Report"), does not indicate that Section 817.234(8) directly and materially advances the state's interest in preventing insurance fraud. The grand jury reports describe doctors or chiropractors performing unnecessary tests or treatments and charging exorbitant rates for certain procedures. The reports also describe patient brokering among lawyers, doctors, chiropractors, and other professionals. These circumstances present aspects of fraud. The grand jury reports do not describe any cause/effect relationships between the solicitation of accident victims and the professionals' fraudulent acts. At best, the reports suggest that professionals who are willing to commit insurance fraud are also willing to hire runners to bring them business.

Section 817.234(8), Florida Statutes (1997), does not directly and materially advance the state's interest unless intent to defraud is an element of the offense. There is no

evidentiary support that banning solicitation of accident victims directly and materially helps prevent insurance fraud. See Edenfield v. Fane, 507 U.S. 761, 771 (1993) (holding that the burden is on the state to support the connection with evidence). Section 817.234(8), without a fraud element, thus "provides only ineffective or remote support for the government's purpose," and is an unconstitutional restriction on commercial speech. See Central Hudson, 447 U.S. at 564; see also 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996) (holding that a complete statutory ban on price advertising of alcoholic beverages was unconstitutional because there was no evidence to suggest that the restriction on speech would significantly reduce market-wide consumption of alcoholic beverages and, th-us, any significant change in consumption would be purely fortuitous); Edenfield, 507 U.S. at 771 (holding that the fact that the defendant's conduct was merely non-misleading solicitation of business highlighted the tenuous connection between the state's interest in preventing fraud and a ban on direct, in-person solicitation by CPAs). Accordingly, the record in this case fails to establish that

the statute directly and materially advances a substantial state interest.

3. *Section 817.234(8), Florida Statutes (1997), is not narrowly tailored to the state's asserted interest in preventing insurance fraud.*

Even assuming that Section 817.234 (8), Florida Statutes (1997), directly advances the state's interest in preventing insurance fraud, the statute is unconstitutional because the statute is not "narrowly tailored to achieve the desired objective." Went for It, Inc., ***515*** U.S. at 632. As the United States Supreme Court has stated, "the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful." Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 478 (1988).

Section 817.234(8), Florida Statutes (1997), makes no attempt to distinguish that which is offensive from that which

is not, and instead bans all solicitation of accident victims by professionals regardless of time, place, manner, or fraudulent intent. As the appellate court below stated:

> The statute as written is far too broad in terms of the scope of activities it can potentially reach. Proof of any advertisement for chiropractic services which solicits business from automobile accident victims would arguably be sufficient to get a prosecutor past a motion for judgment of acquittal in a prosecution based on an alleged violation of the statute, the theory being that the advertiser or solicitor obviously intended to be paid for his or her services with the reference to the accident being considered as evidence of an intent to access recoverable tort claims, damages, or PIP benefits. The fact that a prospective client may have had a legitimate need for chiropractic services as a result of an automobile accident would be irrelevant given that the statute contains no requirement **that** there be an intent to defraud.

Cronin, 774 So.2d at 875. Every solicitation of an accident victim by a professional 'has the potential of being funded by the proceeds of a tort settlement or PIP claim." Id. at 876. Thus, contrary to the fourth district's holding in Barr, the statute is not "narrowly tailored [merely] because it only

relates to solicitations made for the purpose of making motor vehicle tort claims or claims for PIP benefits." Id.

"In Bailey v. Morales, 190 F.3d 320 (5th Cir. 1999), the fifth circuit held that restrictions on commercial speech less expansive than those challenged here [under Section 817.234(8), Florida Statutes (1997)] were unconstitutional because they were not reasonably tailored to achieve the state's asserted interests." Cronin, 774 So.2d at 875. The similar statute at issue in Bailey applied only to in-person or telephone solicitation by professionals, if the professional knew the person solicited had a special need for services because of an accident or pre-existing condition. See Bailey, 190 F.3d at 321. Nevertheless, the Bailey court held that the statute was "neither reasonably tailored nor reasonably proportional to the harm the State seeks to prevent." Id. at 325; see also Gresorv v. Louisiana Bd. of Chiropractic Examiners, 608 So.2d 987 (La. 1992); Silvermanv. Walkup, 21 F.Supp.2d 775 (E.D. Tenn. 1998).

During the session just adjourned, the Legislature rewrote Section 817.234(8), Florida Statutes. Fla. CS for SB 1092, § 7 (2001) (First Engrossed). As rewritten, the statute limits the breadth of solicitations made unlawful by exempting advertising directed to the public. The rewritten statute likely cannot survive the Central Hudson test. See Bailey v. Morales, 190 F.2d 320 (5th Cir. 1999) (holding unconstitutional a similar statute which applied only to in-person or telephone solicitations); Cronin, 774 So.2d at 875 (First District rejecting the state's proposed narrowing construction of the statute consistent with the just-rewritten version and citing Bailey with approval). However, the rewritten statute is more narrowly tailored than the version at issue in the instant case and reflects the Legislature's recognition of the constitutional infirmity of Section 817.234(8), Florida Statutes (1997).

The Legislature also addressed the problems of insurance fraud which are at the heart of this case. In 2001 Florida Senate Bill Number 1092, the Legislature proposed numerous changes to the statutory scheme for PIP and motor vehicle no-

fault law. Proposed changes include: limiting charges for certain diagnostic and other procedures; requiring registration and other requirements for health care providers who qualify as "PIP clinics"; creating civil causes of action for insurance fraud, patient brokering, and PIP kickbacks; and prohibiting brokering of the use of medical equipment. See Fla. CS for SB 1092 (2001) (First Engrossed). The changes indicate the Legislature's ability to directly and materially address problems associated with insurance fraud, without prohibiting more protected commercial speech than necessary.

As the First District recognized, Section 817.234(8) is not reasonably tailored to the state's interest in preventing insurance fraud because it criminalizes too broad a scope of activity. Cronin, 774 So.2d at 875-76; see also Bailey, 190 F.3d at 325. The statute also has only a tenuous correlation, at best, to insurance fraud. For those reasons, Section 817.234(8), Florida Statutes (1997), unconstitutionally restricts commercial speech protected by the First and Fourteenth Amendments to the United States Constitution and Article I, Section 4 of the Florida Constitution.

11. If the Court adopts a narrowing construction, Section 817.234(8), Florida Statutes (1997), must require an intent to defraud.

Assuming arguendo that the statute is capable of constitutional construction, the onlypermissible construction requires an element of intent to defraud. The courts have a duty to construe statutes in favor of constitutionality if a constitutional construction is consistent with the legislative intent ascertainable from the statute or with the statute's common sense application. See State v. Globe Communications Corp., 648 So.2d 110, 113 (Fla. 1994); Lons v. State, 622 So.2d 536, 537-38 (Fla. 1st DCA), review denied, 629 So.2d 133 (1993). Section 817.234(8), Florida Statutes (1997), unconstitutionally restricts commercial speech absent a permissible narrowing construction. Therefore, this Court must determine whether a constitutional construction, consistent with the Legislature's intent, is indicated by the plain statutory language or common sense. Arguably, none is. See Cronin, 774 So.2d at 874-75. However, if such a construction exists, it is that the statute was intended to

apply only to situations in which the solicitor acts with an intent to defraud an insurer.

A. The indicia of legislative intent show that Section 817.234(8), Florida Statutes (1997), was meant to address solicitations with fraudulent intent.

1. *The grand jury reports.*

Throughout the instant case and other similar cases, the state has asserted a Dade County Grand Jury Report, Fall Term 1974, filed August 11, 1975 (the "First Grand Jury Report"), as the definitive word on the Legislature's intent with respect to subsection (8). R1, pp. 86-87; R2, pp. 155-56; R3, pp. 365-66; State's Initial Brief to the First DCA at 20-21; see also Barr, 731 So.2d at 129. A careful reading of the First Grand Jury report shows that fraudulent practices were the concern of the grand jury. The "problem" of so-called 'runners" soliciting accident victims was addressed in the report only in the context of insurance fraud schemes. See Appendix A to State's Initial Brief to the First DCA at 5-6.

The First Grand Jury Report dealt exclusively with outright fraud by doctors and lawyers in the form of unnecessary referrals by lawyers to medical providers, and unnecessary hospitalizations and treatments by medical personnel for the purpose of piercing the $1,000.00 PIP threshold which previously existed under Section 637.737, Florida Statutes. Appendix A to State's Initial Brief to the First DCA at 5-6. The use of runners was merely incidental to the fraud schemes described. The grand jury's recommendations omitted any reference to "runners" or non-fraudulent insurance solicitation.

On August 17, 2000, the Fifteenth Statewide Grand Jury issued an interim report (the "Second Grand Jury Report") revisiting the issues raised in the First Grand Jury Report.[7] See Appendix "B" to State's Initial Brief. Despite the Grand

[7] The Second Grand Jury Report appears to have been a direct response to the Bradford decision and the trial court's dismissal of the instant case. See Appendix "B" to State's Initial Brief at 6. Because it was issued long after Section 817.234(8), Florida Statutes (1997), was enacted, the Second Grand Jury Report obviously does not express the Legislature's intent with respect to the statute. The Second Grand Jury Report is mentioned here only to reinforce the conclusions derived from the First Grand Jury Report.

Jury's observations that accident victim solicitation can be harassing, the report reinforces that the real problem at issue, insurance fraud, has not changed since the issuance of the First Grand Jury Report. See, e.g., Appendix "B" to State's Initial Brief at 18-19 (stating in conclusion: "Fueled by the easy flow of insurance money, . . . PIP fraud is taking a large bite out of every Floridian's insurance budget. The huge profits from this fraud allow runners to make a killing . . . .")

The First Grand Jury Report demonstrated that fraudulent practices by doctors and lawyers were the concern of the Legislature when it passed what became Section 817.234(8), Florida Statutes (1997). The Second Grand Jury Report shows that insurance fraud continues to be the evil the state is seeking to stamp out. These reports support the notion that the Legislature's intent in enacting subsection (8) was to prohibit insurance solicitation done with an intent to defraud an insurer,

2. **The state's assertions of legislative intent in the instant case support intent to defraud as an element of the offense.**

In the instant case, the state argued that the legislative history of Section 817.234(8), Florida Statutes (1997) dictated that the crime described was one of fraud.[8] R2, p. 180. According to the state:

> When one solicits another for purposes of acquiring personal injury protection benefits or motor vehicle tort claims, this the beginning stage of the "fraudulent activity" i.e., fraudulent insurance claims. Thus, insurance solicitation under section 817.234 is fraudulent in nature and clearly fits within the purview of the violations of Chapter 817 "relating to fraudulent practices, false pretenses, fraud generally, and credit card crimes."

R2, p. 185. The state also argued that the title of Chapter 817, "Fraudulent Practices," and the title of Section 817.234,

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[8] " [T]he Legislature's intention was that Section 817.234(8) be 'logically and naturally associated' , . . with 'fraudulent practices'" (R2, p. 181); the statute is "associated with fraud' **as** established by the legislative history." R2, p. 187.

"False and Fraudulent Insurance Claims," indicated the Legislature's intent that Section 817.234(8) describe a fraud offense. R2, p. 185. An essential element of any fraud offense is intent to defraud. Thus, the grounds for the state's assertions of legislative intent support that intent to defraud is an intended element of the offense described by Section 817.234(8).

3. *Enactment of subsection (8) in same session as subsection (1)(a).*

The court in Bradford read subsections (8) and (1)(a)[9] of Section 817.234 ***in pari materia*** because subsection (8) was added in the same legislative session in which (I)(a) was amended and both subsections deal with the same subject matter, Bradford, 740 So.2d at 571; see also § 1.04, Fla. Stat.[10] Laws of Florida, Chapter 77-468, Section 36,

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

[10] 'Acts passed during the **same** legislative session and amending the same statutory provision are ***in pari*** materia, and

substantially amended Section 627.7375(1), Florida Statutes, and added new subsections, including subsection (8) .[11]

As the Bradford court stated, reading the two subsections in *pari materia* suggests that intent to defraud was meant to be an element of **any** offense under subsection (8) . Bradford, 740 So.2d at 571. Under that reading, the statute would directly advance the state's asserted interest in preventing insurance fraud and would be narrowly tailored to achieve that goal.

Assuming Section 817.234(8) can be narrowly construed, consistent with the foregoing indicators of the Legislature's intent and in a way which preserves its constitutionality, it must be read as criminalizing only those solicitations done with an intent to defraud. Under that reading,

> a chiropractor [would be able to] solicit any prospective patient even if that chiropractor happen[ed] to get paid for

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full effect should be given to each, if that is possible." § 1.04, Fla. Stat.

[11] Section 627.7375, Florida Statutes **was** the predecessor to Section 817,234, Florida Statutes (1997).

> his services by the patient's PIP insurance, as long as he [did] not solicit with the intent to defraud the insurer.

Bradford, 740 So.2d at 571. That construction would appropriately tailor the statute to the state's asserted interest in preventing insurance fraud and thereby preserve the statute's constitutionality.

B. The state's suggested narrowing construction is not supported by any indicia of legislative intent.

The state argues that the statute should be narrowly construed as applying only to in-person or telephonic solicitations. Nothing in the statute or its legislative history suggests that the Legislature intended the state's proposed construction. Cronin, 774 So.2d at 875. Even if the state's proposed narrowing construction was supported, it is unlikely that the interpretation would save the statute. See Bailey, 190 F.3d at 321 (holding that a similar, Texas statute which applied only to in-person or telephone solicitation was

not properly tailored to the state's interest in preventing insurance fraud).

III. Alternative grounds for affirmance.

Whether this court determines that the statute unconstitutionally infringes on the Defendants' rights guaranteed by the First and Fourteenth Amendments to the United States Constitution, or is constitutional because the statute can fairly be read as requiring intent to defraud as an element of the offense, the Court should approve the decision below in its affirmance of the trial court's order dismissing the charges against the Defendants.

CONCLUSION

The Court should approve the affirmance of the trial court's order granting Defendants' motion to dismiss the information. Section 817.234(8), Florida Statutes (1997) is unconstitutional under the Central Hudson test. If not, the solicitation subsectioncanwithstandconstitutionalchallenge only by requiring pleading and proof of an element of intent

to defraud, which the state has conceded it cannot allege in good faith in this case.

Respectfully submitted,

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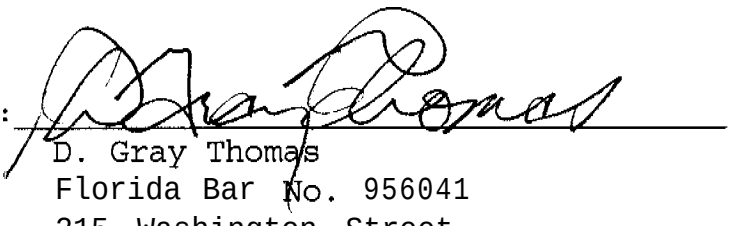
By: 

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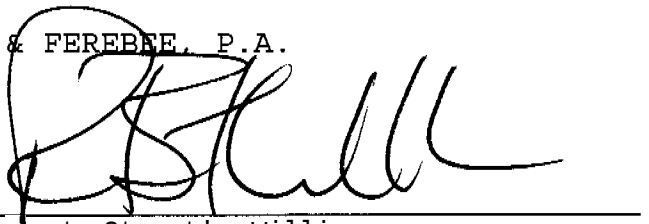
By: 

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by the method indicated below this 23rd day of May, 2001, to:

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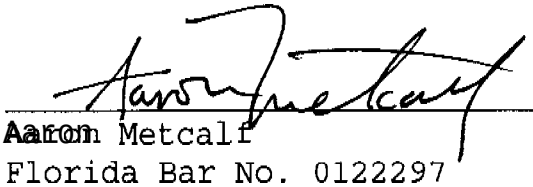

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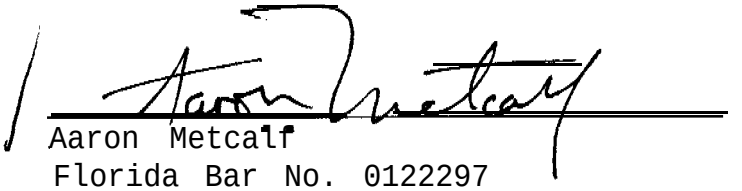
I DO HEREBY CERTIFY that the text of this brief, including footnotes and headings, has been printed in fully justified, 12 point, 10 pitch, Courier New type, and complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.



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