ORIGINAL 0-17

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

NASH N. CRONIN, ET AL.,

Respondent.

CASE NO. SC01-202

PETITIONER'S INITIAL BRIEF

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, the Appellant in the First District Court of Appeal and the prosecuting authority in the trial court, will be referenced in this brief as Petitioner, the prosecution, or the State. Respondent, Nash N. Cronin, Et Al., the Appellee in the First District Court of Appeal and the defendant in the trial court, will be referenced in this brief as Respondent or his proper name.

The record on appeal consists of three volumes, which will be referenced according to the respective number designated in the Index to the Record on Appeal, followed **by** any appropriate page number in parentheses.

All emphasis through bold lettering is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The defendants in this case were originally charged by indictment issued **by** the statewide grand jury with violations of Florida's RICO Act.

Subsequently, the Statewide Prosecutor filed a superseding information. Count one of the information charged a RICO violation counts 2-24 charged violations *of* Florida's anti-solicitation statute, § 817.234(8) Fla. Stat. (1997)

Among the various motions filed by the defendants were motions to dismiss counts 2-24 of the information. (R2 347-356) The motion alleged that counts 2-24 of information did not allege a

crime. The argument, based on a new appellate decision, was that an essential element of the crime created by the legislature in § 817.234(8) Fla. Stat. was an intent to defraud. Since, the information did not allege an intent to defraud and informations must allege the elements of the crimes charged, the defendants argued that the court must dismiss the information. (R2 347-356)

The state filed a written response. (R3 357-368) The response asserted that the legislature did not include fraud as an element and never intended fraud to be part of the antisolicitation sections. The state argued that the intent was to preclude unethical solicitation and protect the privacy of citizens. The state also argued that the language relied upon by the motion to dismiss was dicta.

The trial court heard argument on the motion. (R3 408-435) At the hearing, each side expanded on their written positions. The state argued the intent *of* the legislature and the plain meaning of the language of the statute. The state also asserted that the opinion being relied upon was factually and legally incorrect. (R3 422-429) The trial court subsequently granted the motion to dismiss. (R3 377-381) The trial court's order provided:

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

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

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

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

be paid from **PIP** benefits, but that a defendant intends to file a fraudulent **PIP** claim.[1]

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

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

This Court recognizes that:

> As a general rule, an information must allege each of the essential elements **of** a crime to be valid. However, because the legislature has the primary authority for defining crimes, it will be the rare instance that an information tracking the language of the statute defining the crime will be found to be insufficient to put the accused on notice of the misconduct charged. Further...an information will not be dismissed on account of any defect in the information unless the court shall be for the

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[1]The Barr Court noted that the solicitation made by Barr was "...unlawful only because it violated section 817.234(8), and not for any other reason.'' Barr, supra, at 123. The court further recognized that the purposes behind the statute were at least twofold: to combat insurance fraud and to prevent the costs of paying fraudulent claims from being passed on to the consumer. The Court recognized that, while subsection (8) was "...not the least restrictive means available" to achieve these purposes, since it banned **all** solicitation, it was nonetheless constitutional. The Court further held that the statute did not violate due process because it "...only prohibits the chiropractor from soliciting a prospective patient for the purpose of receiving payment from the patient's PIP insurance." Id. at 130.

> opinion that the indictment or information is so vague, indistinct, and indefinite as to mislead the accused and embarrass him or her in the preparation of a defense or expose the accused after conviction or acquittal to substantial danger of a new prosecution for the same offense.
>
> Chicone v. State, 684 So.2d 736 (Fla. 1996) (citations omitted). However, it is equally **clear** that the elements of an offense cannot be established by mere inference. State v. VonDeck, 607 So.2d **1388** (Fla. 1992). An information failing to allege an essential element of a crime does not charge an offense. Akins v. State, 691 So.2d 587 (Fla. 1st DCA 19978). Here, the Court is bound to accept the Bradford Court's pronouncement that subsection (8) requires an element of fraudulent intent. Since that element has not been alleged, and may not merely be inferred without significant prejudice to Defendants' ability to prepare their defense or insulate themselves from future prosecution for the same behavior, the Court is constrained to grant Defendant's Motion.

(R3 377-381)

From this Order dismissing counts 2-24 of the information, the state filed a timely notice of appeal. **(R3** 385)

The appellate court determined that the trial court erred in finding that the statute required an intent to defraud. However, the appellate court held that the statute was an unconstitutional limitation on commercial speech. The court also certified conflict with the cases of Bradford, Barr, Hansbrough, and Hershkowitz. Bradford and Hansbrough are pending in this Court.

Based on the Court's finding a statute unconstitutional and its certification, the state invoked the jurisdiction of this Court.

SUMMARY OF ARGUMENT

This Court should apply the test of Central Hudson and find that s 817.234 Florida Statutes is constitutional as there exists a substantial governmental interest in restricting the commercial speech, the regulations directly advance the asserted interest, and the regulation is narrowly tailored.

Alternatively, this Court should find the statute constitutional by employing a narrowing construction **of** the term solicit. This would **be** in accordance with this Courts historic role interpreting the meaning **of** statutory language chosen by the legislature. Further, this would be in accord with the interpretation of the term solicit found in the Fourth District and the Third District opinions. Finally, this interpretation would **be** in accordance with the legislative language found in the statutory section which indicates that it intended to limit the statute to personal contacts.

Therefore, the statute should be found constitutional and the decision below quashed.

ARGUMENT

ISSUE I

ARE THE ANTISOLICITATION PROVISIONS OF FLORIDA STATUTE § 817.234(8) AN UNCONSTITUTIONAL RESTRICTION ON COMMERCIAL SPEECH?

The District Court found that the antisolicitation provisions of § 817.234 Florida Statutes to be an unconstitutional restriction on commercial speech. The state respectfully disagrees.

Jurisdiction

In its decision, the District Court found the section 817.234(8) Fla Stat. unconstitutional and also certified that its decision was in conflict with decisions of other District Courts. Thus, this Court has jurisdiction pursuant to Article V § 3(b)(1) of the Florida Constitution which provides the Supreme Court:

> (1) Shall hear appeals from final judgments of trial courts imposing the death penalty and from decisions of district courts of appeal declaring invalid a state statute or a provision of the state constitution.

FL CONST Art. 5 § 3, Supreme court

Additionally, because the District Court certified conflict with decisions of other District Courts, this Court has jurisdiction pursuant to Article V § 3(b)(3) of the Florida Constitution which provides that the Supreme Court:

> (3) May review any decision of a district court of appeal that expressly declares valid a state statute, or that expressly construes a provision of the state or federal constitution, or that expressly affects a class of constitutional or state officers, or that expressly and directly conflicts with a decision of another

district court of appeal or of the supreme court on the same question of law.

FL CONST Art. 5 § 3, Supreme court

Therefore, this Court has jurisdiction

Standard of Review

The issue before this Court is an issue of the constitutionality of a statute. Constitutional challenges to a statute are reviewed de novo. Dep't of Ins. v. Kevs Title & Abstract Co., 741 So. 2d 599, 601 (Fla. 1st DCA 1999), review denied, 710 So. 2d 158 (Fla. 2000) (stating that a trial court's decision on the constitutionality of a statute is reviewed by the de novo standard because it presents a pure issue of law and the appellate court is not required to defer to the judgment of the trial court); United States v. Head, 178 F.3d 1205, 1206 (11th Cir. 1999), cert. denied, 528 U.S. 1094, 120 S.Ct. 833, 145 L.Ed.2d 700 (2000) (noting that a district court's interpretation of the sentencing guidelines and statutes are reviewed de novo).

The Statute and Pending Cases

The statute in question is § 817.234 Fla. Stat. (1997) Issues relating to its constitutionality are pending before this Court in Bradford v. State, 740 So. 2d 569 (Fla. 4th DCA 1999) rev. granted State v. Bradford, 761 So.2d 331 (Fla. 2000) and Hansborough v. State, 757 So.2d 1282 (Fla. 4th DCA 2000) rev. granted Hansbrouah v. State, 25 Fla. L. Weekly 47, --- So.2d ---- (Fla. Nov. 13, 2000).

The statute in question provides:

817.234. False and fraudulent insurance claims

(l)(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.

FSA § 817.234, False and fraudulent insurance claims

At issue in this appeal, as in the Bradford and Hansboroush cases currently pending before this Court, is the constitutionality of section eight which provides:

> (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.

§ 817.234(8)

There are only a few decisions which interpret this statute. See State v. Marks, P.A. 698 So.2d 533, 540 (Fla. 1997), Barr v.

State, 731 So.2d 126 (Fla. 4th DCA 1999), Bradford v. State, 740 So.2d 569 (Fla. 4th DCA), State v. Falk, 724 So.2d 146 (Fla. 3rd DCA 1998), Hershkowitz v. State, 744 So. 2d 1268 (Fla.App. 3 Dist. 1999) and Hansbrough v. State, 757 So.2d 1282 (Fla. 4th DCA 2000) In each of these cases, the statute has been challenged on various grounds and has been held to be constitutional. [2]

In Bradford, the District Court found the statute constitutional but inferred the state **was** required to prove an intent to defraud. In Hansbrouuh, the Fourth District again found the statute constitutional but receded from its statement in Bradford relating to the needed intent.

Although rejected by every other court which considered the issue, the First District Court held that the provisions of the statute were an unconstitutional restriction on commercial speech.

Principles

There are a series of principles applicable to all cases where the constitutionality of statutes is challenged. As this Court stated in State v. Elder, 382 So.2d 687 (Fla. 1980)

> In construing section 365.16(1)(b), we are mindful of our responsibility to resolve all doubts as to the validity of a statute in favor of its constitutionality, provided the statute may be given a fair construction that is consistent with the federal and state constitutions as well as with the legislative intent. State v. Keaton, 371 So.2d 86 (Fla. 1979);

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

> White v. State, 330 So.2d 3 (Fla. 1976). The Court will not, however, abandon judicial restraint and invade the province of the legislature by rewriting its terms. State v. Keaton; Brown v. State, 358 So.2d 16 (Fla. 1978).

Id. at 690

Therefore, this Court should construe the statute as constitutional if it can be done without rewriting the provisions.

Argument

The test for evaluating whether restrictions on commercial speech are valid were set out by the United States Supreme Court in Central Hudson Gas & Electric Corp v. Public Service Comm'n, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). The state acknowledges that the District Court employed the appropriate test for analyzing the constitutionality of the statute. However, the state disagrees with the determination of the District Court that application of the Central Hudson test to the statute results in a determination that the statute is an unconstitutional restriction on speech.

The test of Central Hudson has been described in the following way:

> As such, the Supreme Court has developed a four-part analysis to determine whether the governmental restriction on such speech violates First Amendment protections. First, the court must determine that the expression concerns lawful activity and is not misleading. Second, it must ask whether the asserted state interest behind the restriction is substantial. Third, it must determine whether the regulation directly advances the interest so asserted, and, fourth, whether the regulation is not more extensive than necessary to serve that interest. Central Hudson, 447 U.S. at 566, 100 S.Ct. 2343. The Court later

> clarified that this last prong does not require the least restrictive means available for achieving the state's interest, but rather, just a reasonable fit between the means and the ends. Florida Bar v. Went for It, Inc., **515 U.S. 618, 632, 115** S.Ct. 2371, 132 L.Ed.2d 541 (1995).

Barr v. State, **731** So.2d 126 (Fla. 4th DCA 1999)

Otherwise lawful activity

The first part of the four part examination is to see if the commercial speech involves otherwise lawful activity and is not misleading. Commercial speech which involves unlawful activity or is misleading is entitled to no first amendment protection and can be regulated or banned.

The activity targeted by this statutory section is otherwise lawful activity, therefore, the other prongs of the test must be examined.

Substantial State Interest

Cronin concedes that the state has substantial interests in this arena but tries to limit the state's interest to insurance fraud. The state's substantial interests are not limited to insurance fraud. The court in Barr held there are substantial interests to public relating to fraud and substantial interests relating to escalating the cost of mandatory PIP auto insurance coverage. The United States Supreme Court also recognized that there are significant privacy issues involved in decisions to limit professional contacts to accident victims. See Florida Bar v. Went for It, Inc., This is particularly true in Florida where citizens have a constitutional right to privacy. Yet they are required to file accident reports, which under open government

provisions can be obtained and are now being used to first violate the citizen's privacy and then violate the citizen's pocketbook as mandatory insurance costs increase.

In Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978), the United States Supreme Court upheld a total ban on lawyer solicitation. The Court identified various substantial state interests involved in prohibiting similar solicitation by lawyers when it stated:

> The substantive evils of solicitation have been stated over the years in sweeping terms: stirring up litigation, assertion of fraudulent claims, debasing the legal profession, and potential harm to the solicited client in the form of overreaching, overcharging, underrepresentation, and misrepresentation. (FN18) The American Bar Association, as amicus curiae, defends the rule against solicitation primarily on three broad grounds: It is said that the prohibitions embodied in DR2-103(A) and 2-104(A) serve to reduce the likelihood of overreaching and the exertion of undue influence on lay persons, to protect the privacy of individuals, and to avoid situations where the lawyer's exercise of judgment on behalf of the client will be clouded by his own pecuniary self-interest. (FN19)
>
> [436 U.S. 462] We need not discuss or evaluate each of these interests in detail as appellant has conceded that the State has a legitimate and indeed "compelling" interest in preventing those aspects of solicitation that involve fraud, undue influence, intimidation, overreaching, and other forms of "vexatious conduct." Brief for Appellant 25. We agree that protection of the public from these aspects of solicitation is a legitimate and important state interest.

Id. at 98 S.Ct. 1921

Moreover, the state with a substantial interest in derailing solicitation abuses is not limited to any one narrow corrective approach. The Court made this clear in Ohralik when it stated:

> But appellant errs in assuming that the constitutional validity of the judgment below depends on proof that his conduct constituted actual overreaching or inflicted some specific injury on Wanda Holbert or Carol McClintock. His assumption flows from the premise that nothing less than actual proved harm to the solicited individual would be a sufficiently important state interest to justify disciplining the attorney who solicits employment in person for pecuniary gain.
>
> Appellant's argument misconceives the nature of the State's interest. The Rules prohibiting solicitation are prophylactic measures whose objective is the prevention of harm before it occurs. The Rules were applied in this case to discipline a lawyer for soliciting employment for pecuniary gain under circumstances likely to result in the adverse consequences the State seeks to avert. In such a situation, which is inherently conducive to overreaching and other forms of misconduct, the State has a strong interest in adopting and enforcing rules of conduct designed to protect the public from harmful solicitation by lawyers whom it has licensed.

Id at 98 S.Ct. 1922-1923

Importantly, the state below asserted all of these types of interests as substantial state interests for this statute. (R2 163-164, R3 359)

Advances the States Interests

The next part of the Central Hudson test is whether the statutory section directly advances the state's interests. It is a prophylactic measure designed to prevent insurance fraud, protect citizens and keep mandatory insurance rates reasonable. Like the restriction in Ohralik, it also advances the state's interests in maintaining high standards in the medical profession (eliminating ambulance chasing runners and ambulance chasers who use public records laws for private gain), protecting privacy of

injured individuals, and insuring the availability of mandatory PIP insurance at a reasonable cost.

Tailored to the Need

The last question to be addressed is whether the statute is sufficiently tailored to the need. This is the area in which the District Court found that the statute failed to meet the Central Hudson test. The State maintains that the statutory section is sufficiently tailored to pass constitutional muster.

The constitutional provision in this case is narrowly tailored. The state recognizes that absolute bans on all forms of solicitation will not generally withstand scrutiny. In Edenfield v. Fane, 507 U.S. 761, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993), the United States Supreme Court struck down a absolute ban on all solicitation by CPA's. The Court recognized that the state had legitimate and substantial interests, but, held that the state failed to establish that the ban would advance its legitimate interests in a material way. However, the Court found the balance was reached in Ohralik where Ohio permanently and totally banned in person solicitation by lawyers. The Court also found that the balance was reached in Went for It where Florida banned all solicitation of accident victims for thirty days. The lesson from these leading cases is that a ban that is more narrowly drawn than Edenfield and is related to the interest to be protected is valid.

Contrary to the position of the lower tribunal, other District Courts have found Florida's ban on solicitation to be very

limited. Barr These Courts have recognized that Florida's statute does not ban solicitation of any groups nor does it ban solicitation by any group. Unlike the Texas statute, Florida's statute does not ban solicitation of all accident victims. Slip and fall accidents victims, industrial accident victims, sport accident victims and various other types of accident victims are not effected. The statute only bans solicitation of automobile accident victims and only then when done with the intent to file a PIP or tort claim. Thus, the District Court was wrong to reject the reasoning in Barr, Bradford as the ban is narrowly tailored to the state's substantial interests.

The lower tribunal found that the solicitation ban found unconstitutional in Bailev v. Morales, 190 F.3d 320 (5th Cir. 1999), was narrower than Florida's and if it was invalid Florida's must be invalid. The Court's characterization of the ban in Bailey as narrower is not supportable. The Texas statute in question banned all direct solicitation if the professional knew the individual had a special need for services arising out of a particular occurrence or a preexisting condition. While both statutes ban direct solicitation, the Texas statute is much broader. The Texas Statute bans solicitation for preexisting conditions. Florida's statute allows solicitation for preexisting conditions. Texas bans solicitations for all types of occurrences. The Texas statute would ban solicitation related to injuries received from criminal assaults, from all types of accidents including sports injuries and slip and falls. The

Florida Statute is much narrower limiting itself to auto accidents for which a claim is to be filed against mandatory insurance coverage,

Furthermore, Texas offered no evidence as to need for such statute. Therefore, its analysis of the scope of the statute is dicta. It also would seem to be in conflict with the United States Supreme Court decision in Ohralik which approve a direct solicitation ban. In Florida there is substantial evidence of the need for limits on solicitation. There are two grand jury reports, the Dade County 1977 report and the 2000 Second Interim Report of the Fifteenth Statewide Grand Jury to the Florida Supreme Court Case no. 95,746, plus the reports done by the Bar for the Went for it case. Thus, there exists significant evidence of continuing problem in Florida. Therefore, Bailey is neither controlling or instructive and the District Court wrongly relied upon it. See also National Funeral Service v. Rockefeller, 870 F.2d 136 (4th Cir. 1989) (upholding a ban on in person and phone solicitation)

The District Court also cited Gregory v. Louisiana Bd of Chiropractic Examiners, 608 So.2d 987 (1992), as support for its position, however, the case is distinguishable and in fact supports the state's position. The statute in Gregory, prohibited direct, phone, and mail contact. The decision disallowed only the prohibition against mail contact. The United States Supreme Court in Shapero v. Kentucky Bar Association, 486 U.S. 466, 108 S. Ct. 1916, 100 L. Ed. 2d 475 (1988) stated that

the mode of the solicitation made the difference between the decision in Ohralik and Shapero. The Court noted that any regulation short of an outright ban would not be effective with certain types of solicitation and approved the direct solicitation ban but invalidated the indirect solicitation ban. Therefore, Gregory like Shapero decided on different facts does not provide authority for the District Court's determination that Florida's statute is unconstitutional.

Every Florida appellate court except the lower tribunal has concluded that the section is narrowly drawn to deal with the state's substantial interests and passes constitutional muster. This Court should do likewise.

Limiting Construction

As set out in the section on principles of construction courts should interpret statutes in a fashion so as to give meaning to legislative intent while rendering the statute constitutional.

The way to accomplish this reconciliation of competing principles of construction is to place a limiting interpretation on a term used by the legislature in the statute itself. The legislature use the term to solicit in the statute. In Hershkowitz v. State, 744 So. 2d 1268 (Fla.App. 3 Dist. 1999), the District Court used a definition of solicitation which required "personal petition and importunity addressed to a particular individual to do some particular thing" Id. at 1270. The structure of the statutory section bears out the limiting construction of a personal petition. The statute prohibits

persons being in certain locations soliciting business. Thus what the statute prohibits is direct person to person solicitation. Since, it is well established that direct personal solicitation can be totally banned, Orhlick a ban on direct solicitation for filing PIP claims is constitutional.

Interpretation of the language of the statute in this fashion is in keeping with this Court's interpretation of other statutes which regulate speech in some fashion. For example in State v. Elder, 382 So.2d 687 (Fla. 1980), this Court was dealing with a speech challenge to a statute prohibiting harassing phone calls. There this Court stated:

> In construing section 365.16(1)(b), we are mindful of our responsibility to resolve all doubts as to the validity of a statute in favor of its constitutionality, provided the statute may be given a fair construction that is consistent with the federal and state constitutions as well as with the legislative intent. State v. Keaton, 371 So.2d 86 (Fla. 1979); White v. State, 330 So.2d 3 (Fla. 1976). The Court will not, however, abandon judicial restraint and invade the province of the legislature by rewriting its terms. State v. Keaton; Brown v. State, 358 So.2d 16 (Fla. 1978). In dealing with statutory regulation of first amendment activity, this Court has in the past strictly construed a challenged statute to uphold it against vagueness or overbreadth attacks. See, e. g., State v. Saunders, 339 So.2d 641 (Fla. 1976); White v. State, supra. After careful consideration we, likewise, here conclude that the language of section 365.16(1)(b) is fairly susceptible to a constitutional construction that is consistent with the legislative intent.

Id at. 690-691

Likewise in White v. State, 330 So.2d 3 (Fla. 1976), the Court narrowly interpreted a statute reconciling its duty to enforce the first amendment protections and at the same time to construe

statutes so as to uphold their validity if possible. The District Court rejected the state's suggestion asserting that it would not rewrite the statute. The Court ignored the fact that if it adopted the state's argument that it would not be rewriting the statute. The term solicit is in the statute. It is not defined. By interpreting the statute in a constitutional manner this Court would be effectuating the purpose of the legislature to protect the citizens of the state, it would uphold the constitutionality of the statute and yet limit its reach to constitutional parameters. It would conform Florida's position to that of the courts in the case of Gregory which upheld a ban on in person and phone solicitation. See also National Funeral Service v. Rockefeller, 870 F.2d 136 (4th Cir. 1989) (upholding a ban on in person and phone solicitation)

While the state acknowledges that it is appropriate to interpret language used by the legislature in a statute, the state asserts that it is not appropriate to add language not included by the legislature. See Brown v. State, 358 So.2d 16 (Fla. 1978)

Because the Bradford case is before this Court and has been briefed and argued, the state will address the limitation suggested in Bradford. This discussion is appropriate because in the trial court, Cronin argued pursuant to Bradford that an element of intent to defraud should be read into the statute. The trial court decided the case on this ground and the District Court reversed this determination of the trial court.

Adding the element of fraud is an alternate approach which has been suggested as a construction of the statute which would render it constitutional. Adding language the legislature left out is not a proper approach to interpreting statutes. See Brown v. State, **358** So.2d 16 (Fla. 1978) This is especially true in this case because the legislature while it included an intent to defraud in other sections of the statute did not include an intent to defraud in this section. In broad language § 817.234 Fla. Stat. precludes presenting or causing to **be** presented fraudulent statements, or claims, precludes the preparing or making any statement to be presented to an insurer that is false, misleading or incomplete. Also in section 817.234(2) the statute provides:

> (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, commits insurance fraud,** punishable as provided in subsection (11). 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.

FSA § 817.234, False and fraudulent insurance claims

The emphasized language in the statutory sections covers fraudulent solicitation, For one who solicits someone to commit fraud also either, assists, conspires or urges an individual to commit fraud. Therefore, the fraud prevention sections of the statute cover fraudulent solicitations by professionals. The principles of statutory construction recognize that when the legislature includes language in one section and leaves its out of another section it is done for a purpose. Thus, it would not be proper to read an element of fraud into § 817.234(8).

The District Court in Barr and in Hansbrough found the statute constitutional and the convictions valid without any intent to defraud being alleged or proven. The United States Supreme Court in the cases of Florida Bar v. Went for It, Inc., 515 U.S. 618, 632, 115 S.Ct. 2371, 132 L.Ed.2d 541 (1995) and Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978), found total solicitation bans constitutional without any requirement that the regulating agency prove fraud. These cases refute the assertion that fraud is necessary for solicitation bans to pass the constitutional muster.

In Ohralik, an argument similar to Cronin's trial court argument was made. It was asserted that the solicitation could not be punished unless an actual injury was established. The Supreme Court of the United States utterly rejected the argument that injury was needed before the state could enact a solicitation ban. The Court held that the state could enact a prophylactic rule for the known dangers of direct solicitation.

Therefore, there is no need to resort to other principles of statutory construction and this Court should reject Cronin's trial court arguments based on Bradford. See also State v. Summerlot, **711** So.2d 589 (Fla. 3rd DCA 1998), State v. Copher, 395 So.2d 635 (Fla. 2nd DCA 1981)

In fact, there would be no need to engage in a Central Hudson analysis if fraud is an element of the statute. Insurance fraud is a crime independent of the solicitation section and such fraudulent activity is not protected commercial speech. See Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 413 U.S. 376, 93 S.Ct. 2553, 2560, 37 L.Ed.2d 669 (1973) Thus, the argument that addition of the element of fraud is necessary to make the statute pass the four part test of Central Hudson is erroneous.

Summary

This Court should apply the test of Central Hudson and find that § 817.234 Florida Statutes is constitutional as there exists a substantial governmental interest in restricting the commercial speech, the regulations directly advance the asserted interest, and the regulation is narrowly tailored.

Alternatively, this Court should find the statute constitutional by employing a narrowing construction of the term solicit. This would be in accordance with its historic role interpreting the meaning of language chosen by the legislature. Further, this would be in accord with the interpretation of the term solicit found in the Fourth District and the Third District

opinions. Finally, this interpretation would be in accordance with the legislative language found in the statutory section which indicates that it intended to limit personal contacts.

Therefore, the statute should be found constitutional.

CONCLUSION

Based on the foregoing, the State respectfully submits the the statute should be found constitutional, the decision of the District Court of Appeal should be quashed, and the case remanded for trial.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to **Lee Elzie, Assistant Public Defender, Office of the Public Defender, Leon County Courthouse, 301 South Monroe Street, Suite 401, Tallahassee, Florida 32301, Henry M. Coxe , Esquire, 101 East Adams Street, Jacksonville, Florida 32202; D. Gray Thomas, Esquire, 215 Washington Street, Jacksonville, Florida 32202; Robert S. Willis, Esquire, 503 East Monroe Street, Jacksonville, Florida 32202 and Defendant Gerald Mart, 1211-100 Street, Bay Harbor Island, Florida 33154,** by MAIL on March 29th, 2001.

Respectfully submitted and served,

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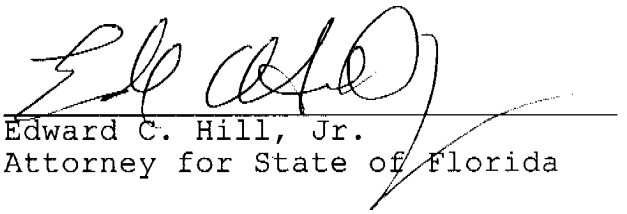
CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.



Edward C. Hill, Jr.
Attorney for State of Florida

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Appendix

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IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 1D99-3226

STATE OF FLORIDA,

Appellant,

v.

NASH N. CRONIN, DEBORAH COMBS, CRAIG J. OSWALD, STEVEN WARFIELD, LAKEWOOD CHIROPRACTIC CLINIC, P.A., GERALD R. MART, D.D., MARK E. KLEMPNER, D.C., CASMAR INC., D/B/A CASMAR CHIROPRACTIC,

Appellees.

Opinion filed December 29, 2000.

An appeal from the Circuit Court for Duval County. Lance M. Day, Judge.

Robert A. Butterworth, Attorney General; Edward C. Hill, Assistant Attorney General, Tallahassee, for appellant.

Nancy A. Daniels, Public Defender; Edgar Lee Elzie, Jr., Assistant Public Defender, Tallahassee; Henry M. Coxe, III and Aaron Metcalf of Bedell, Dittmar, DeVault, Pillans & Coxe, P.A., Jacksonville; D. Gray Thomas of Sheppard, White & Thomas, P.A., Jacksonville; Robert Stuart Willis of Willis & Ferebee, P.A., Jacksonville, for appellees.

WOLF, J.

This is an appeal from a final order dismissing criminal charges against appellees. The state asserts that the trial court erroneously concluded that in order to pursue a violation of section 817.234(8), Florida Statutes, the state must allege and prove that

the solicitation covered by the statute was made with an intent to defraud. While we conclude that fraudulent intent is not 'an element of the offense defined in the statute, we nevertheless hold that the statute as written violates the First Amendment of the United States Constitution and article I, section 4 of the Florida Constitution. The order dismissing the charges is therefore affirmed.

Appellees were charged with one violation of Florida's RICO Act and several violations of section 817.234(8), Florida Statutes, otherwise known as Florida's anti-solicitation statute, with the predicate conduct for the RICO charge being the several counts of unlawful insurance solicitation. The counts charging appellees with violations of section 817.234(8) alleged only that appellees had unlawfully solicited business from the victims for the purpose of making motor vehicle tort claims or claims for personal injury protection (PIP) benefits. Among the various motions to dismiss filed by appellees was a joint motion to dismiss the charges on grounds that the information failed to allege the essential element of the anti-solicitation offense that appellees had solicited their victims with the intent to defraud. The trial court dismissed the charges based on the fourth district's decision in Bradford v. State, 740 So; 2d 569 (Fla. 4th DCA 1999), which the trial court interpreted as requiring an allegation that the solicitation occurred with the intent to defraud.

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. See Barr v. State, 731 So. 2d 126, 130 (Fla. 4th DCA 1999) (holding that "to solicit" as used in the statute means to contact or communicate with either orally or in writing). In Barr, the defendant chiropractors had been charged with violating section 817.234(8) and filed motions to dismiss the charges arguing that the statute was unconstitutionally vague, overly broad, and violative of equal protection. See id. at 128. After the trial court in Barr denied their motions, the defendants pled no contest to the lesser offense of conspiracy to commit violations of the statute, specifically reserving their right to appeal the alleged unconstitutionality of the statute. Seed . On appeal, the fourth district held that the statute passed the four-part test announced in Central Hudson Gas & Elec. Corp. v. Public Service Comm'n, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980) for determining the constitutionality of a restriction on commercial speech. Bea r r , 731 so. 2d at 129. The four prongs of the Central Hudson test, as modified by Board of Trustees of State Univ. of New York v. Fox, 492 U.S. 469, 109 S. Ct. 3028, 106 L. Ed. 2d 388 (1989), are: (1) whether the speech at issue is not misleading and concerns lawful activity; (2) whether the government has a substantial interest in restricting that

speech; (3) whether the regulation directly advances the asserted governmental interest; and (4) whether the regulation is narrowly tailored, but not necessarily the least restrictive means available, to serve the asserted governmental interest. See Central Hudson, 447 U.S. at 566, 100 S. Ct. at 2351; Fox, 492 U.S. at 476-81, 109 S. Ct. at 3032-35. The fourth district in Barr reasoned that the first prong of the Central Hudson test had been satisfied because the solicitations made by the defendants in that case were unlawful only because they violated section 817.234(8). See Barr, 731 so. 2d at 129. The court in Barr also reasoned that the second prong of the Central Hudson test had been satisfied because the state had a substantial interest in combating insurance fraud and the resulting increase in insurance premiums borne ultimately by the public. See id. The court in Barr further reasoned that the third prong of the Central Hudson test had been satisfied because section 817.234(8) does, in fact, directly advance the state's interest in preventing insurance fraud. See id. With regard to the fourth prong of the Central Hudson test, the court in Barr reasoned that it too had been satisfied because,

> 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.

Id. [1]

A little over two months after the issuance of the decision in Barr, the fourth district again had occasion to write on the constitutionality of section 817.234(8) in ~~Bradford v. State,~~ 740 So. 2d 569 (Fla. 4th DCA 1999). In Bradford, the defendant chiropractor had been charged with violating section 817.234(8) and had, like the defendants in Barr, filed a motion to dismiss the charges arguing that the statute was unconstitutionally vague, over broad, and violative of equal protection. See id. at 570-71. After the trial court denied his motion, the defendant in Bradford pled no contest to the lesser offense of conspiracy to commit violations of the statute, specifically reserving his right to appeal the alleged unconstitutionality of the statute. See id. On appeal, the fourth district in Bradford affirmed, based on its prior decision in Barr, but wrote to "clarify why subsection (8) does not punish purely innocent activity." Id. at 570. The fourth district explained that only solicitations made with an intent to defraud were prohibited by the statute. See id. at 571. The

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[1] The fourth district in Barr had not been called upon to address, nor had it specifically addressed in its opinion, whether the elements of the offense defined in section 817.234(8) included an intent to defraud on the part of the defendant. See Barr, 731 So. 2d at 128-31.

supreme court subsequently granted review. See State v. Bradford, 761 So. 2d 331 (Fla. 2000).

After the fourth district issued its opinion in Bradford, but before the supreme court granted review in that case, the third district in Hershkowitz v. State, 744 So. 2d 1268 (Fla. 3d DCA 1999), also held that section 817.234(8) does not constitute an impermissible burden on the right to commercial speech, nor was it unconstitutionally vague, over broad, or violative of equal protection. In doing so, the court in Hershkowitz merely adopted "the reasoning and analysis outlined by the fourth district in [Barr] and reiterated and further supported in [Bradford]," without specifically adopting the language in the Bradford opinion which had indicated that an intent to defraud was a necessary element of the offense defined in section 817.234(8). See Hershkowitz, 744 So. 2d at 1269.

Subsequently, the fourth district in Hansbroush v. State, 757 SO. 2d 1282 (Fla. 4th DCA 2000), receded from its statement in Bradford that an intent to defraud was a necessary element of the offense defined in section 817.234(8). The court in Hansbroush indicated that "[w]hile the state [had] not alleged intent to defraud in Hansbrough's case," the language from Bradford indicating that such was required had been merely dicta and not controlling. See id. The supreme court has granted review. See Hansbrough v. State, 25 Fla. L. Weekly 47 (Fla. Nov. 13, 2000).

Consequently, at the present time, there is no court in Florida which has specifically indicated that an intent to defraud is-an essential element of the offense defined in section 817.234(8). Appellees, however, request that we insert the words "intent to defraud" into the statute in order to save the constitutionality of the statute. We decline to do so.

"Whenever possible, a statute should be construed so as not to conflict with the constitution." Firestone v. News-Press Publishins Co., Inc., 538 So. 2d 457, 459 (Fla. 1989). such construction, however, must be consistent with the legislative intent ascertainable from the statute itself or its common sense application.. See State v. Globe Communication Corp., 648 So. 2d 110, 113 (Fla. 1994); Long v. State, 622 So. 2d 536, 537-38 (Fla. 1st DCA 1993). "It is fundamental that judges do not have the power to edit statutes so as to add requirements that the legislature did not include." Mever v. Caruso, 731 So. 2d 118, 126 (Fla. 4th DCA 1999).

Sections 817.234(1)(a),(2), and (3), Florida Statutes, specifically indicate that an intent to defraud is an element of the offenses defined in those subsections. Subsection (8), however, reads:

> 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.

As Judge Stone wrote in his special concurrence in Hansbroush, section 817.234(8) clearly and unambiguously does not include the requirement that the solicitation occur with the intent to defraud. See Hansbroush, 757 so. 2d at 1283 (Stone, J., concurring specially), If we were to read an intent to defraud into subsection (8), it would render the subsection essentially superfluous not only in light of subsections (l)(a) and (2) of the statute which independently criminalize conduct designed to defraud insurance companies, but also in light of other sections in chapter 817 which independently criminalize general schemes to defraud. See §817.034(4), Fla. Stat. (1997). We thus find no legislative intent to include an intent to defraud as an element of the offense defined in section 817.234 (8).

The state also asks us to rewrite the statute to preserve its constitutionality. They argue that the statute should be construed as applying only to in-person or telephonic solicitations and that with such a limiting construction the statute would be constitutional. We find nothing which would indicate that such a limiting construction was intended by the legislature. We

therefore decline to amend the statute in the manner requested by the state. See Bailey v. Morales, 190 F.3d 320, 324-25 (5th Cir. 1999) (declining to rewrite statute or exempt conduct from the scope of a similar statute in order to preserve its constitutionality),

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 OF 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.[2]

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 were unconstitutional because they were not reasonably tailored to achieve the state's asserted interests.

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[2] An economically disadvantaged person with a legitimate need for services might, therefore, be precluded from being informed of a legitimate potential source of payment for the service.

The Texas statute at issue in Bailev prohibited chiropractors and other professionals from soliciting employment, either by telephone or in person, from individuals known by the professional to have a special need for services arising out of either a particular occurrence (e.g. an accident) or a pre-existing condition (e.g., having arthritis). See id. at 321.

As in Bailev, the blanket ban on solicitations directed to a specific target group which is here at issue is "neither reasonably tailored nor reasonably proportional to the harm the state seeks to prevent." Id. at 325. See also Gregory v. Louisiana Bd. of Chiropractic Examiners, 608 So. 2d 987 (1982) (striking down a similar anti-solicitation statute which prohibited direct mail solicitations of recent accident victims).

While a statute regulating commercial speech need not be the least restrictive means of achieving the state's asserted goal objective, it must be narrowly tailored to achieve the desired objective:

> [W]hile we have insisted that the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the harmless from the harmful, we have not gone so far as to impose upon them the burden of demonstrating that the distinguishment is 100% complete, or that the manner of restriction is absolutely the least severe that will achieve the desired end. What our decisions require is a fit between the legislature's ends and the means chosen to accomplish those ends--a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served; that employs not necessarily the least

> restrictive means but, as we have put it in other contexts . . . a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed.

Board of Trustees of the State Univ. of New York v. Fox, 492 U.S. 469, 479-80, 109 S. Ct. 3028, 3034-35, 106 L. Ed. 2d 388 (1989).

We disagree with the fourth district's holding in Barr that the prohibition in section 817.234(8) is narrowly tailored because it only relates to solicitations made for the purpose of making motor vehicle tort claims or claims for PIP benefits. Every solicitation of business from an accident victim in the context has the potential of being funded by the proceeds of a tort settlement or PIP claim. Persons ~~that~~ who are legitimately injured, even those who cannot independently afford treatment, have a right to obtain needed treatment. There is no legitimate basis for not informing an injured person of all available funding sources. The statute is, therefore, not narrowly tailored to only address the state's interest in preventing insurance fraud. We affirm, and certify conflict with the fourth district's decisions in Barr, Bradford, and Hansbroush, and the third district's decision in Hershkowitz.

BOOTH and JOANOS, JJ., CONCUR.

Sealed

#165

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 95,746

FILED
8-17-00
Debbie Causseaux, Acting Clerk
Supreme Court of Florida
By: _____
Deputy Clerk

SECOND INTERIM REPORT

OF THE

FIFTEENTH STATEWIDE GRAND JURY

REPORT ON INSURANCE FRAUD IN FLORIDA

l-N THE AREA OF

PERSONAL INJURY PROTECTION

TABLE OF CONTENTS

I. INTRODUCTION

This is the second interim report of the Fifteenth Statewide Grand Jury. In this' report we examine the issue of fraud in the personal injury protection insurance line (hereinafter "PIP"). For the purpose of this report we define PIP fraud as follows: (1) illegal solicitation of accident victims for the purpose of filing for PIP benefits and motor vehicle tort claims; (2) brokering patients between doctors, lawyers and diagnostic facilities, as well as the attendant fraud, which can include the filing of false claims; (3) billing insurance companies for treatment not rendered; (4) using phony diagnostic tests or misusing legitimate tests; (5) inflating charges for diagnostic tests or procedures through brokers; and (6) filing fraudulent motor vehicle tort lawsuits.

We have taken testimony from a variety of sources including investigators from the Department of Insurance, Division of Insurance Fraud (DIF); insurance company fraud investigators; lawyers; chiropractors; representatives of the Board of Chiropractic Medicine; representatives of The Florida Bar; accident victims; MRI brokers; and individuals engaged in the practice of illegal solicitation. In our investigations of this criminal activity, we examined the types, extent, causes and effects of the illegal behavior. In this report we outline our findings and suggest recommendations to protect the public and prevent this fraud and abuse in the future,

II. FINDINGS

A, SCOPE OF PROBLEM

All drivers in Florida are required to carry a minimum of $10,000 in PIP insurance with a maximum deductible of $2,000. The object is to have all drivers and their passengers at least minimally covered for injuries suffered as a result of a motor vehicle accident. The $10,000 personal injury policy is intended to provide not only protection and peace of mind for the insured, it also

relieves taxpayers from shouldering the burden of caring for injured drivers and passengers, who do not otherwise have health care insurance.

Unfortunately, a number of greedy and unscrupulous legal and medical professionals have turned that $10,000 coverage into their personal slush fund. Paying kickbacks for patients, abusing diagnostic tests, grossly inflating costs by engaging in sham transactions and filing fraudulent claims of injury, these individuals think nothing of enriching themselves by exploiting the misfortunes of others. The result is loss of coverage and marginal medical treatment for those who are injured, as well as higher insurance rates for all drivers.

Over *20* years ago a Dade County Grand Jury criticized this practice of "ambulance chasing." At that time, mandatory PIP coverage was only $1,000 not the $10,000 minimum we have today. Unfortunately not much else has changed as "ambulance chasing" is alive and well throughout Florida. Numerous investigations underway by DIF reveal that the practice of patient solicitation and brokering by organized groups of lawyers, medical professionals, and professional solicitors known as "runners" is occurring in counties as diverse as Duval, Hillsborough, Leon, Broward, and Palm Beach to name a few. Though patient solicitation is illegal, it is not necessarily a *fraudulent* act in and of itself. We see however, a strong correlation between illegal solicitation and the commission of a variety of frauds, including phony or inflated billing, unnecessary or inappropriate diagnostic testing, and trumped up lawsuits. We find it difficult to believe any medical professional can render competent care to patients when the exercise of independent professional judgment is clouded by the lure of exorbitant profits. Correspondingly, lawyers who engage in perpetuating this practice, or who seek out the victims to encourage the lawsuits, are also challenged to uphold their professional standards while counseling their client.

We must pause here to say that we do not intend to cast aspersions on all personal injury lawyers, chiropractors, or other professionals who provide necessary and important legal and medical care to motorists and automobile passengers in Florida. This is not a condemnation of any lawful practice or the vast majority of professionals who abide by the law and their respective codes of ethics, We have, however, learned that the illegal behavior is so rampant that those who are acting illegally are causing tremendous harm to the citizens of this State. It is the conduct of this group to which our concerns are addressed. To the law abiding professionals, we direct our plea for assistance in combating this scourge.

Where illegal accident victim solicitation occurs, the bulk of the people solicited are those whose names appear in traffic accident reports. As discussed below, the wholesale availability of these reports is a major contributing factor to this illegal activity. The other major contributing factor, it seems to us, is that the laws prohibiting this conduct have been ineffective in providing strong enough consequences to prohibit it. Despite the best efforts of many individuals in both the legal and health care professions, there appear to be few consequences for doctors and lawyers caught soliciting. Prosecutions have been difficult and disciplinary actions are rare. The punishment imposed provides little disincentive, and the behavior is unabated.

B. RELEVANT FLORIDA STATUTES

Florida has a variety of statutes in place to combat "ambulance chasing'.', and the fraud to which it inevitably leads. Among the statutes are:

1. F. S. §8 17.234(8) (Solicitation) prohibits anyone from soliciting business for the purpose of filing a motor vehicle tort claim, or claims for PIP benefits. This statute was only recently amended to make it a third degree felony, punishable by up to five (5) years in prison.

2. F.S. § 119.105 (Protection of Victims of Crimes or Accidents)

This statute is part of the public records law and while allowing access to anyone who wishes to view or to have a copy of police reports, it prohibits the use of such reports for a commercial purpose. Violation of this statute is punishable as a first degree misdemeanor, with up to one year in the county jail.

3. F. S. §§ 17.505 (Patient Brokering Prohibited) makes it unlawful for anyone to pay anything, directly or indirectly to induce the referral of patients from a health care provider or facility, or to solicit any kind of payment directly or indirectly in return for referring a patient to a health care provider or facility. This statute is a third degree felony, punishable by up to five (5) years in prison.

Recent court decisions have weakened the legislative intent and effect of these statutes, and criminals have employed strategies to avoid the statutes altogether. Both of these factors indicate the need for some legislative change which we will discuss later in our report.

C. PATIENT SOLICITATION

Investigations by the Florida Department of Insurance, Division of Insurance Fraud as well as the Special Investigative Units of various insurance companies have revealed a typical scenario for the solicitation of accident victims. The following paragraphs generally describe how patient solicitation occurs in Florida. [See also Exhibit 1]

Most traffic accidents in Florida result in an accident report being filed with the local law enforcement agency. Individuals called “runners” contact the law enforcement agency to pick up copies of all accident reports filed with that agency. The “pickups” occur anywhere from a daily to a weekly basis, depending on how quickly the agency makes the reports available to the public.

Most of the time the runners have made arrangements with the local agencies to have all reports copied and ready to be picked up. A typical law enforcement agency may have hundreds-of records copied and stacked waiting for pickup from up to a dozen runners on any given day. Because accident reports are public records under Chapter 119, Florida Statutes, law enforcement agencies have no choice but to comply with the requests.

The runners subsequently use the reports to personally solicit accident victims or to turn a list of victims' names over to a third party who will solicit. These solicitations generally take the form of either harassing or invasive telephone calls or intimidating personal visits to the insured's home. Whether by telephone or in person, the solicitor generally misleads the victims into thinking they are speaking to their insurance company and that the visit to a doctor or chiropractic clinic is mandatory. The runner will often also refer victims to an auto body shop and a lawyer, all in return for kickbacks. The biggest payoff, though, comes from medical professionals who typically pay between $250.00 and $500.00 to the runner per referral. Other times victims are induced to believe they will receive large settlements for their injuries, whether real or not, but only if they visit the specific doctor or chiropractor immediately. Some runners dispense with formalities and offer the victims money to visit the doctor or clinic.

Some runners pick up accident reports for so-called "accident journals." These periodicals have nothing in common with any legitimate newspapers or periodicals. They are nothing more than a list of the names, addresses and phone numbers of people involved in accidents which have been summarized from the accident reports. These "'journals" are then sold to chiropractors and lawyers to be used for a mail solicitation, or to solicitors who will call or visit victims directly.

Once they appear for medical care, the victims are given a battery of diagnostic tests which rarely vary regardless of the reported injury. Some tests are of dubious value; others, like video fluoroscopy, we have learned, can be dangerous if not administered correctly. Whatever the test, they all have one thing in common; they're extremely expensive and are primarily for the purpose of draining PIP benefits.

Some doctors or chiropractors will in turn refer the patient to a lawyer with whom they have a business relationship, This typically does not involve a money exchange, rather the doctor will expect referrals back from the lawyer.

Last year, the Fourth District Court of Appeal announced its decision in Bradford v. State, 740 So.2d 569 (Fla. 4th DCA 1999). In that case the court upheld the constitutionality of F.S. §8 17.234(8) prohibiting patient solicitation, but only when the solicitation was done with the intent of filing *afraudulent* PIP or motor vehicle claim. DIF has informed us that patient solicitation investigations and prosecutions around the state have been stalled in order to uncover these additional facts. One filed case in Duval County was dismissed on the basis of Bradford, and several major cases have not been filed because of this decision. We heard testimony that some runners, aware of the Bradford decision, openly and brazenly plied their trade.

Recently, the Fourth District Court of Appeal ruled in yet another solicitation case, Hansbrough v. State, (757 So.2d 1282 (Fla. 4th DCA 2000), that it was receding from Bradford and that in fact fraudulent intent was never an element of F.S. §817.234(8). While this decision puts the law back where it was prior to Bradford, the Fourth District Court of Appeal has in its opinion, asked the Supreme Court of Florida to review the case and determine whether fraud is, after all, a necessary element of F.S. §8 17.234(8).

D. ACCIDENT REPORTS

Probably the single biggest factor contributing to the high level of illegal solicitations is the ready access to public accident reports in bulk by runners. These reports provide runners, and the lawyers and medical professionals who use them, the ability to contact large numbers of potential clients at little cost and with almost no effort. As a result, virtually anyone involved in a car accident in Florida is fair game to the intrusive and harassing tactics of solicitors. Such conduct can be emotionally, physically, and ultimately, financially destructive.

Pursuant to Florida Statute $119.105 all police reports, which includes auto accident reports, in the State of Florida are considered to be public records unless they are part of a continuing investigation. Once that investigation is complete, any citizen can request to inspect or copy any and all police reports within the possession of any law enforcement agency. Officials who fail to comply with the public records requests can be sued for costs and legal fees as well as be liable for a civil infraction. That statute, however, prohibits any individual from using the information contained within the report for a commercial purpose, including solicitation. Nevertheless, the law has been widely flouted by individuals engaged in the practice of solicitation, perhaps because a violation of the statute is only a first degree misdemeanor. We received as evidence a survey of law enforcement agencies in Southeast Florida, West Florida, and Central Florida which revealed that the majority of bulk accident reports are acquired by just a few categories of individuals, all tied to the solicitation trade. [See Exhibit 2]

Since December of 1998, the United States District Court for the Southern District of Florida has enjoined the enforcement of F.S. § 119.105. In its order granting the preliminary injunction, the court held that Florida's law was an unconstitutional restriction on the First Amendment right of free

speech. Sal Pellegrino, D.C. v. Michael J. Satz as State Attorney for Broward County, 98-7356-Civ. Since that time, runners have been able to acquire and use police reports for commercial purposes with impunity.

Some runners attempt to disguise their use of these police reports by claiming they would be used to publish what they called "transportation news" or "accident journals". These periodicals are nothing more than flimsy two or three page copies of a list of the names, addresses and phone numbers of accident victims, which information is summarized from the police reports. These "journals" are then sold at high prices to chiropractors, lawyers, auto body shops and even other solicitors for the specific purpose of soliciting the accident victims. This easy access to these reports so soon after the accident gives unscrupulous individuals an opportunity to directly contact victims of accidents with specific information about their accident.

Several states have struggled with many of the same issues we are facing and have taken action to restrict the dissemination of police reports to the general public. In 1994, Kentucky, for example, made accident reports confidential with few exceptions, including one for the media. The statute specifically banned the commercial use of these reports. Predictably, the statute was challenged as unconstitutional by a group of personal injury lawyers, chiropractors and an "accident journal" publisher. In that case, Amelkin v. Kentucky, 158 F.3d 893 (6th Cir., 1999), the Sixth Circuit Court of Appeals discussed the reasons and circumstances behind the Kentucky statute. The court wrote, "Accident reports soon became a prime source for attorneys and chiropractors in Kentucky to identify prospective clients. . . . The efforts to solicit potential clients through the procurement and use of accident reports became so incessant that those involved in traffic accidents immediately began receiving large stacks of direct mail solicitations from various attorneys and

chiropractors." The court noted that because of these activities a ". . .public groundswell developed against the release of accident reports to attorneys and chiropractors. One editorial described the attorneys who used such accident reports as 'greedy, money grabbing lawyers' who seemed to 'prey on the misfortune of others.' Ky Bench & Bar, Summer 1993 at 7. In addition to the solicitations tarnishing the image of the legal community in the eyes of the public, some who received a mailbox full of such letters grew concerned over their personal privacy and safety." Amelkin at 896.

California has also sought to restrict the use of police reports for commercial purposes including solicitation. In 1996, California amended its statute to authorize the release of police reports to individuals only when those individuals sign an affidavit under penalty of perjury that they will only use the information for one of five prescribed purposes, and that the information will not be used directly or indirectly to sell a product or service. California Government Code §6254(f)(3). The amended statute was also challenged as unconstitutional by the publisher of yet another "accident journal". That challenge eventually made its way to the Supreme Court of the United States. In that case, decided in December of 1999, the Supreme Court upheld the validity of California's statute. Los Angeles Police Department v. United Reporting Publishing Corporation, 120 S.Ct. 4x3 (1999).

E. RUNNERS

In addition to the ban on solicitation imposed by F.S. §8 17.234(8), doctors, lawyers, and chiropractors are prohibited by their respective ethical rules from contacting potential clients or patients in person or by telephone. As a result unethical practitioners will turn to runners to do the dirty work.

Runners generally will work for a specific lawyer, auto body shop, or chiropractor though sometimes they will freelance and work for more than one individual. Most of these runners work for chiropractors who typically pay $250.00 to $500.00 per referral. Lawyers and auto body shops generally pay less.

Runners use a variety of practices to convince individuals to go to a specific doctor or chiropractic clinic for treatment. Sometimes victims are led to believe that the solicitor works for their insurance company and that they must appear as directed or risk loss of insurance benefits.

Scare tactics are often employed. Runners emphasize that the individual may be suffering from some hidden injury that will only manifest itself later, perhaps at a time too late for coverage or treatment. Many others will be promised implicitly or explicitly that they stand to make large sums of money, but only if they appear, and continue to appear, for treatment. Sometimes, either alone or in combination with the above tactics, victims are given money in order to induce their cooperation. Most often runners contact individuals over the telephone, but others are brazen enough to actually contact the individuals at their home or place of business. Often these personal solicitations can become quite intimidating. One witness testified that in the past year she had been confronted at home by an aggressive solicitor who browbeat her and threatened her with loss of her car, her home and possible criminal prosecution if she did not do as was directed. This solicitor made three visits to this victim's home over a period of three days in order to coerce her cooperation, which was emotionally upsetting to the victim and her family.

We also learned of one incident where a runner was encouraged by his employer, a law firm, to attend a hospital's course on becoming a lay cleric, in order to hasten contact with injured victims or grieving family members at hospitals. In that case, the runner actually contacted the grieving

parents of a young child severely injured in an automobile accident. The runner met the family members in the intensive care waiting room where he prayed with them and offered solace, after which he produced a lawyer's business card to the shocked parents.

Clearly, no tactic appears to be beneath the sensibilities of these runners. The tremendous financial incentive may be one reason. One runner testified to us that he made an average of $20,000 per week referring patients to a chiropractor. In order to reach this magic plateau, he only had to bring in 30 individuals at $500 per referral, for which he also received a $5,000 bonus.

The same financial incentive leads health care professionals to use runners. As an example, we heard testimony that a one person chiropractic office may average gross billings of $200,000 per year. By using runners to bring in a steady stream of patients, that same office may generate $700,000 to $800,000 in billings per year.

F. DIAGNOSTIC TESTING

Once individuals come in for treatment at a doctor's or chiropractic office they are generally given a variety of tests which vary little, regardless of the symptoms or injuries. Some tests are of marginal utility or validity, but all are extremely profitable. One popular test employed by medical professionals engaged in patient solicitation and brokering are nerve conduction studies. One chiropractor who testified before us explained how. he paid a technician approximately $100 per patient to conduct these nerve conduction studies in his office. The chiropractor would then bill the insurance company $900 for these same studies. This enormous markup for diagnostic tests is not customary among legitimate medical professionals.

Another test commonly employed by doctors and chiropractors who solicit patients is video fluoroscopy, a test many experts decry as virtually useless as employed in the treatment or diagnosis

of auto accident victims. Video fluoroscopy, we have learned, is essentially a motion picture x-ray which can last several minutes. Manufacturers of these fluoroscopy machines claim that the exposure from these devices is lower than that of an x-ray; but because the individuals are being bathed in the gamma radiation for as long as 15 minutes in one session, the total amount of radiation exposure can be many times greater than that of a typical x-ray. A video fluoroscopy machine can be leased for as little as $1,500 per month and the tests billed at over $650 per five minute examination. The profit potential makes this test extremely attractive to unscrupulous medical practitioners.

Other diagnostic tests come and go in popularity, but what they all have in common is that they are extremely expensive, highly profitable, and generally employed to drain the $10,000 coverage as quickly as possible. In fact one nationally syndicated diagnostic company boasts in its literature that it can teach professionals to reach "policy limits in 90 minutes." The question triggered by such a statement is why medical professionals, ostensibly dedicated to providing the best medical treatment possible to their patients, would ever be concerned about reaching policy limits quickly or otherwise, The enormous profit potential in ordering these tests can only have a corrosive influence on a doctor's independent medical judgment.

G. MRI BROKERING

The brokering of certain diagnostic tests creates another opportunity for unscrupulous medical professionals to profit from these tests. MRI or Magnetic Resonance Imaging tests have long been used by the medical establishment and have a long history of benefits to patients. Because of a glut of MRI facilities in many populated areas of this state, the price of MRIs has come down over the years, Taking advantage of the excess capacities of MRI facilities, some unscrupulous

individuals have formed what they call MRI brokerage businesses. What these businesses do is negotiate a deal with an MRI facility or multiple MRI facilities to perform MRI tests, for' a price of roughly $350-$450. The MRI broker will then bill out these same tests to an insurance company for as much as $1,700. They do so by indicating in the billing documents that the broker is actually the facility administering the test, sometimes going so far as cutting and pasting documents, removing the letterhead from the real MRI facility and substituting their own.

Because there is no fee schedule set by the government in PIP claims, and because of the strict rules regarding PIP claims, as discussed below, insurance companies must pay almost any amount billed. For example, a lumbar MRI scan would typically be billed on average at $1,700 to a PIP insurer. Medicare, however, would only pay $592 for that same test, a workers compensation carrier would only pay $546, and a typical preferred patient plan would on average pay $653.

MRI brokers provide no real service other than scheduling an appointment which any doctor's office can do, or for that matter for which any patient can do on their own. Even MRI brokers who testified before us readily admitted that a patient could take their prescription for an MRI to any facility, just as that same patient could take a drug prescription to any pharmacy. Given that they are providing absolutely no benefit to the process, MRI brokers must somehow induce a doctor or chiropractor to refer their patients to them. All too often that inducement is in the form of a kickback. Typically an MRI broker involved in paying kickbacks will pay $200.00 for each patient referred.

At least one court has taken notice of this MRI brokering practice. In the case of Nuwave Diagnostics, Inc. vs. State Farm Mutual Automobile Insurance Company, Broward County Circuit Case No. 97-09174, the court disallowed two charges of $1,500 for MRI scans billed by the Plaintiff,

an MRI broker. The facts in that case, as recited in the court's opinion, were that the broker contracted with an MRI facility to pay $400 per scan. The broker would then refer patients to the facility which would perform the MRI scans. Thereafter, the broker would bill the insured's PIP carrier $1,500 for each scan. The Court rejected, as a legal fiction, the broker's claim that it had provided the MRI services. The Court further found that the brokering activity outlined in that case constituted a clear violation of F.S. $817.505. The court concluded that the $1,100 markup charged by the broker was nothing more than a kickback.

Some unethical MRI diagnostic centers pay doctors and chiropractors the kickback directly rather than through a broker. In either scenario, medical professionals who accept this kickback are in no position to exercise independent professional judgment in the ordering of these exams. Nor are their patients, unaware of the kickback scheme, able to give informed consent to such tests.

H. PERSONAL INJURY LAWYERS

Florida's PIP Statute imposes a rigid 30 day rule on insurance companies. F.S. $627.736 mandates that PIP claims must be paid within 30 days or the claim is considered overdue and the insurance company will be liable in a suit to recover these PIP benefits. The company will also be responsible for paying plaintiffs legal fees, which can add thousands to the amount of the settlement. Insurance companies complain that 30 days is rarely enough time to investigate and demonstrate that the claim is fraudulent. For this reason, many insurance companies have resigned themselves to paying any sort of PIP claim no matter how outlandish, In the past, this has included paying inflated MRI claims that they knew, or believed to be, brokered.

Doctors and chiropractors who engage in patient brokering and solicitation generally have relationships with one or more lawyers who will file suit on the 3 I st day if the claim is not paid.

Because of these aggressive tactics, insurance companies are hesitant to challenge what they consider to be suspicious claims. Many personal injury attorneys benefit from a relationship with such chiropractors and doctors. Unethical lawyers will often refer clients to a doctor or chiropractor they know will make a finding that their client has been permanently injured, Such a finding is crucial under Florida law because it allows the insured to sue for pain and suffering and thereby recover much more money than simply reimbursement for medical treatment. The lawyers, of course, will make 30-40% of these recoveries. The doctors' or chiropractors' reward for consistently finding permanent injury in these referrals from lawyers is their opportunity to drain the $10,000 coverage with often bogus, and always highly profitable diagnostic tests.

Lawyers will also protect the doctor's or chiropractor's interest in the PIP deductible, which can be as high as $2,000, insuring that any settlement from the insurer will 'first pay for any outstanding bill by the medical professional. By the time all the bills are paid and the lawyers receives their cut, insureds generally receive very little money for all their trouble.

I. PROFESSIONAL DISCIPLINE

Patient solicitation and brokering by doctors, lawyers or chiropractors is banned by the ethical rules of each profession. While we are certain that the great majority of these professionals practice ethically and honorably, we find the prevalence of solicitation and brokering significant enough to justify serious attention to the problems by each professions' disciplinary boards. It does not appear to us, however, that the discipline handed out to date, either in number or in punishment, is enough to dissuade unethical professionals from participating in patient solicitation.

1. Board of Chiropractic Medicine

All complaints against chiropractors are initially funneled to the Agency for Health Care

Administration (AHCA) for review. If the complaint is legally sufficient, it is referred to an AHCA attorney under contract to the Department of Health to perform prosecutorial functions before the Board of Chiropractic Medicine. The attorney investigates the case and brings his/her findings before a probable cause panel. The panel consists of two members of the Board of Chiropractic Medicine and the Board's counsel, who is an Assistant Attorney General. If there is probable cause, the case moves forward. Ultimately the chiropractor can (1) enter into an agreement with the prosecutor, (2) request an informal hearing before the Board, or (3) request a formal hearing before the Hearing Officer. In all cases where the behavior has been proven or admitted, the chiropractor comes before the Board which ultimately imposes the discipline.

The Board generally meets six times a year in two-day sessions to hear all business, including disciplinary matters. On average the Board may hear 4-5 disciplinary cases each time. The cases vary from malpractice to poor record keeping. On average, patient solicitation cases may be 20% of disciplinary cases in a given year or 5-6 cases per year. Given that there are over 4,000 licensed chiropractors in the state of Florida, and given what we know about the level of criminal activity in the field, we find this number of disciplinary cases to be grossly inadequate and under-representative.

While the Board has the ability to suspend, or even revoke, a license for such activity the typical penalty is more likely to be a fine, which has been recently raised from $1,000 maximum per count to $5,000 maximum per count. Investigative costs and a period of probation during which the chiropractor can continue to work, is also typical. We find that these penalties are inadequate and serve as no deterrence. As we said before, a single chiropractor could boost gross income several hundred thousand dollars a year by using runners to keep the practice stocked with patients. A

$5,000 fine per count, for one of the very unlucky few prosecuted in a given year, is simply an insignificant slap on the wrist, easily absorbed in the overhead.

Last year approximately thirty disciplinary cases were heard by the Board. Five cases resulted in suspended or revoked licenses, none for patient brokering. This is inconsistent with the Board's stated position that patient brokering is extremely serious.

While any sort of discipline would serve to chagrin legitimate professionals who takes pride in their work, we do not believe those are the sort of individuals engaged in this unethical conduct. Chiropractors who brazenly solicit dozens of patients and expose them to batteries of expensive and unnecessary tests or treatments, motivated solely by profit, are highly unlikely to be affected by this discipline. We see no reason why the Board should want to keep such people within its ranks, given the negative effect they have not only on the public at large but also on the reputation and continued vitality of the profession itself.

We understand the Board is also frustrated with the small number of disciplinary cases being brought before them. In fact, because of the lack of cases, the Board has recently reduced its meetings to one day sessions. One reason for the low numbers may be how overwhelmed the Board's prosecutors are. The lone prosecutor assigned to the board (this year a second, part-time prosecutor will be added) carries several hundred disciplinary cases. Coupled with a high turnover rate (four different prosecutors were assigned to the board last year) it's easy to identify this as a potential choke point. If the chiropractors aren't prosecuted, the Board can't be expected to act.

2. The Florida Bar

The numbers are not much different when we examine the situation with lawyers. Complaints against attorneys are made to the local Florida Bar office. If the complaint is found to

be legally sufficient it is referred to the local Bar Grievance Committee, made up of six lawyers and three lay members. The committee may assign a bar investigator to assist in the investigation. If the investigation determines that an ethical violation has occurred a formal complaint is filed. Upon filing the complaint, the Chief Judge of the Supreme Court appoints a referee (a sitting judge) to hear the complaint. If the matter proceeds to a hearing the referee will recommend the discipline to be imposed. Either party may appeal that recommendation to the Supreme Court of Florida.

Since 1989, The Florida Bar has found five attorneys to have been involved in patient solicitation or brokering. In all five cases the Bar recommended disbarment, but the penalty was ultimately reduced by the Supreme Court.

We do not think it is a stretch to say that far more than five lawyers have been involved in patient brokering over the last ten years. While we commend The Florida Bar for its strong stance on discipline, even the Bar representative acknowledged that this is a minuscule number given the approximately 40,000 lawyers in Florida, and the reported level of illegal behavior in this realm. The evidence we have heard strongly suggests a much higher number of lawyers are involved in the practice, and we encourage The Florida Bar to be more vigilant.

III. CONCLUSION

Fueled by the easy flow of insurance money, and enabled by greedy and disreputable lawyers, chiropractors and doctors, 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, as much as $20,000 a week to simply call names on police reports and have them come in to see a chiropractor or doctor. Inflated charges for worthless diagnostic tests line the pockets of unprincipled doctors, As a result all manner of shady characters are drawn to the sleazy trade of patient referrals, marginal medicine and

worthless MRI brokering. Most of the time the accident victim is left with no coverage and little to show' for time spent at the medical facility.

Complex problems require innovative solutions and constant attention. The Florida Legislature, the Department of Insurance, The Board of Chiropractic Medicine, The Florida Bar, the insurance industry, law enforcement, and prosecutors have provided both, in varying degrees. We are grateful that all representatives of the professional, commercial, and regulatory groups who appeared before us were forthright about the obstacles which have made even their best efforts ineffective in stemming the tide of this illegal and detrimental activity. By way of encouraging a fresh look at prevention and deterrence options, we urge consideration of the following recommendations, which we believe will close the gaps, tighten the reinforcements, and provide financial and professional disincentives to continued PIP fraud in Florida.

IV. RECOMMENDATIONS

A. Recommendations to the Legislature

1. Amend Florida Statute 119.05, Protection of victims of crimes or accidents, to prohibit the release of accident reports to anyone other than the victim, their insurance company, a radio or TV station licensed by the FCC or a professional journalist as defined in F.S. $90.5015. This will close the door to access by solicitors with no legitimate need for the reports.
2. Increase the penalty for violation of Florida Statute 119.05 from a first degree misdemeanor under the current statute to a third degree felony.
3. Require the regulation and licensing of all medical facilities.
4. Consider adopting a fee schedule for reimbursement under the PIP statute similar to the schedule employed in the worker's compensation statute.

5. Give insurers an additional 30 days to pay PIP claims, at least in those instances where the insurer certifies the claim is being reviewed for possible fraud. This will give insurers more opportunity to identify and deny fraudulent claims.

6. Make all charges for magnetic resonance imaging (MRI) tests unenforceable against the recipient of such services, an insurer, a third-party payor, and any other person or entity unless such charges are billed and collected by the loo-percent owner or the loo-percent lessee of the equipment used to perform such services, This will remove any incentive for creating useless brokering services.

7. Amend Florida Statute §817.234(8) to state that no insurer or auto accident victim is obligated to pay for any services rendered by any medical provider or attorney who has solicited the victim or caused the victim to be solicited contrary to Florida Statutes. Any such billings for such services are rendered null and void and unenforceable as a matter of law. This will remove the financial incentive to solicit patients.

B. Recommendations to Professional Groups

1. Place more emphasis on the unprofessional practice of patient brokering and kickbacks in their continuing education curriculum.

2. Recognize the existence and extent of the problem and demonstrate the organizations' intolerance for such behavior, and potential for censure.

C. Recommendations to the Board of Chiropractic Medicine

1. Proactively identify and discipline chiropractors engaged in patient brokering or solicitation.

2. Impose greater discipline on those caught engaged in patient brokering or solicitation including the greater use of license revocation as a penalty.

3. Ask for more resources, including prosecutors, to commit to the investigation and discipline of chiropractors engaged in patient brokering and solicitation.

D. Recommendations to The Florida Bar

1. Raise public awareness of the issue of patient brokering and solicitation by attorneys.

2. Proactively identify and discipline lawyers involved in patient brokering or solicitation.

E. Recommendations to the Insurance Industry

1. Improve audit procedures to identify suspicious billing patterns.

2. Take a stronger stance against paying claims where there is reason to believe fraud or solicitation has occurred.

3. Raise public awareness of patient solicitation and encourage reporting by insureds contacted by solicitors,

4. Keep policy holders informed about the laws concerning patient brokering and solicitation through the use of enclosures in their billing statements,

THIS REPORT IS RESPECTFULLY SUBMITTED to the Honorable Belvin Perry, Jr., Presiding Judge of the Fifteenth Statewide Grand Jury, this 17 day of August, 2000.

ROLAND P. PICCONE
Foreperson
Fifteenth Statewide Grand Jury of Florida

I, MELANIE ANN HINES, Statewide Prosecutor and Legal Adviser, Fifteenth Statewide Grand Jury of Florida, hereby certify that I, as authorized and required by law, have advised the Grand Jury which returned this report on this 17th day of August, 2000.

MELANIE AN-N HINES
Statewide Prosecutor
Legal Adviser
Fifteenth Statewide Grand Jury of Florida

I, OSCAR GELPI, Special Counsel and Assistant Legal Adviser, Fifteenth Statewide Grand Jury of Florida, hereby certify that I, as authorized and required by law, have advised the Grand Jury which returned this report on this 17 day of August, 2000.

OSCAR GELPI
Special Counsel
Assistant Legal Adviser
Fifteenth Statewide Grand Jury of Florida

THE foregoing Report on Insurance Fraud in Florida in the Area of Personal Injury Protection was returned before me this 17th day of August, 2000 and is hereby sealed until further order of this court, upon proper motion of the Legal Adviser.

Further, upon the Legal Adviser's oral motion for the disclosure for the purposes of furthering justice of the Report on Insurance Fraud in Florida in the Area of Personal Injury Protection, the Legal Adviser is ordered to disclose the testimony and proceedings recounted in the foregoing document in furtherance of the criminal investigative and civil administrative responsibilities of the Fifteenth Statewide Grand Jury.

A TRUE COPY
Attest:
Deborah Causseaux, Acting Clerk
Supreme Court of Florida

Belvin Perry, Jr.
Presiding Judge
Fifteenth Statewide Grand Jury of Florida

Exhibit **#1**

UNLAWFUL SOLICITATION OF AUTOMOBILE ACCIDENT VICTIMS

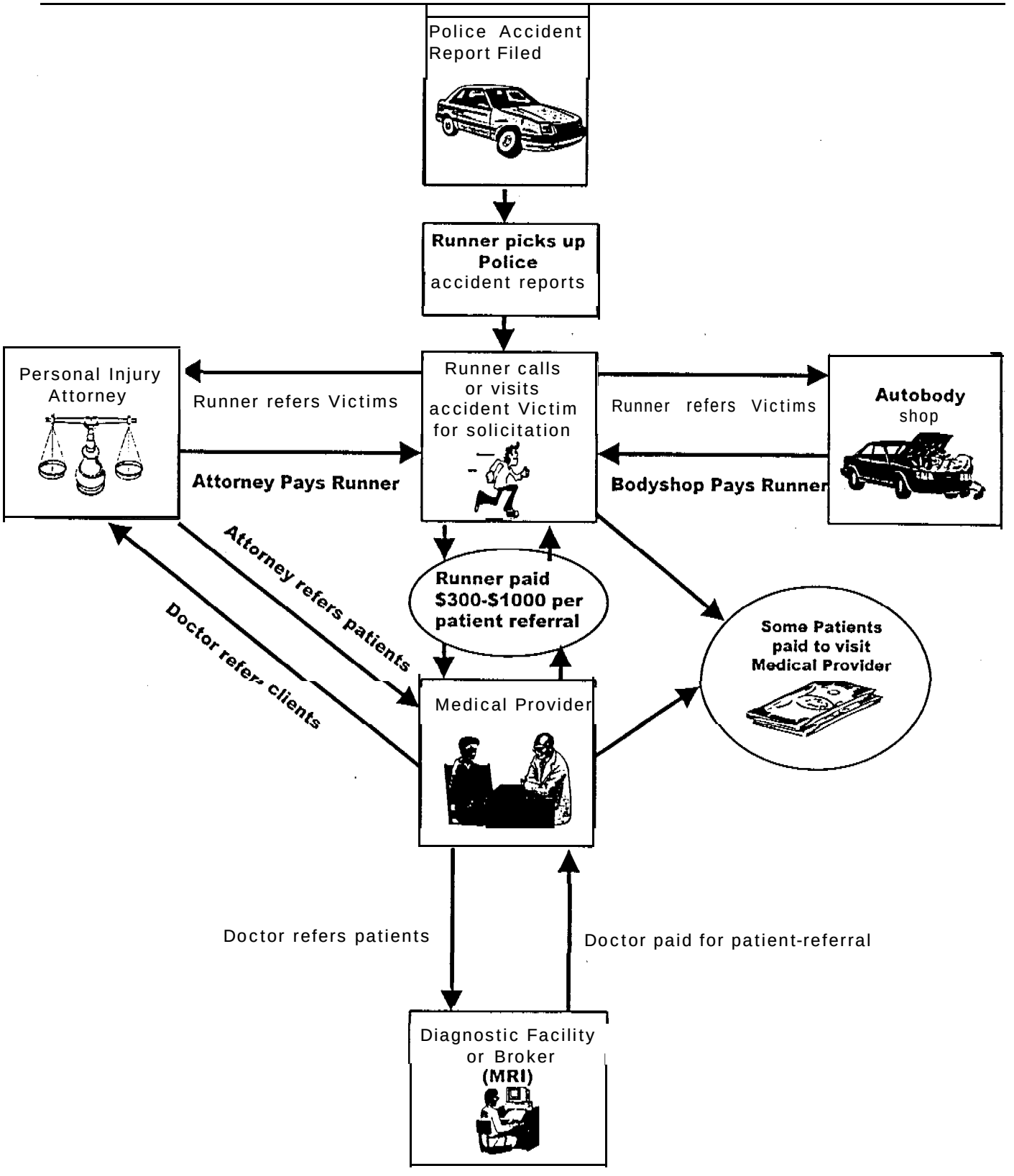

Exhibit #2

Bulk Accident Report Requests by Type