IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Plaintiff/Appellant, Case No. SC04-613

v. LT No. 3D03-521

GABRIEL HARDEN et al.,

Defendants/Appellees.
_____/

BRIEF OF AMICUS CURIAE JOEL M. BERGER, D.D.S., SUPPORTING APPELLEES AND AFFIRMANCE OF DECISION OF THIRD DISTRICT COURT OF APPEAL (MOTION FOR LEAVE BEING FILED SIMULTANEOUSLY)

Dated: August 11, 2004

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BRIEF AMICUS CURIAE OF JOEL M. BERGER, D.D.S., IN SUPPORT OF APPELLEES/AFFIRMANCE

Amicus Joel M. Berger, D.D.S., hereby submits his brief amicus curiae in support of appellees and affirmance of the decision of the Third District Court of Appeal.

III. INTEREST OF AMICUS CURIAE

As set forth in the accompanying motion, the amicus Joel M. Berger, D.D.S., has a substantial and direct interest in this appeal. Amicus is being prosecuted under the same statute as the present appellees for the same alleged violation. Amicus ran a company which manages dental offices and is being prosecuted for allegedly paying his employees per capita compensation relating to Medicaid patients. The criminal case against amicus is pending in Circuit Court, Miami-Dade County.

This present appeal is the only opportunity that amicus will have to address the pertinent legal issues which control his own criminal case. This appeal will establish controlling precedent and will be stare decisis, binding all Florida State Courts. This Court's decision on this appeal will bind amicus and the Circuit Court in which his case is pending. This appeal is the only opportunity for amicus to address the pivotal legal issues which control his case and ultimately his personal liberty.

Amicus may assist this Court by addressing parts of the federal Medicaid statute and HHS rulings which the parties have not addressed. These federal statutes and HHS rulings

are the governing law of the land, are addressed in this amicus brief and control the disposition of this appeal. They need to be addressed. This Court's decision will resolve important issues under the federal and State Medicaid programs and will set a legal standard with far-reaching effects on the scope and applicability of the safe harbor in the federal Medicaid statute. Maximum input on these intricate and far-reaching statutory questions should be encouraged. This Court should have the benefit of amicus's input which uniquely addresses the extensive statutory cross-references in the federal Medicaid statute and administrative rulings.

IV. SUMMARY OF ARGUMENT

This Court should affirm the decision of the Third District Court of Appeal holding invalid F.S. 409.920(2)(e) for lack of a safe harbor equivalent to that in the federal Medicaid statute. The federal safe harbor expressly permits incentive compensation (commission, per-capita, etc.) to bona-fide employees in connection with Medicaid services. The federal statute controls because Florida voluntarily has chosen to participate in the federal Medicaid program which requires its compliance with federal law.

In several ways, the federal statute expressly extends the federal safe harbor to State Medicaid programs. First, the federal statute expressly includes "State health care programs" in the definition of "Federal health care programs"

for safe harbor purposes (42 USC 1320a-7b(f)(2)). Second, the federal statute expressly requires States to adopt the federal anti-fraud provisions which include the safe harbor (42 USC 1396a(a)(52) & 42 USC 1396r-6). Third, the federal statute expressly requires States to use the federal exclusion criteria which incorporate the safe harbor (42 USC 1396a(a)(39) & section 15 of P.L. 100-93 (42 USC 1320a-7 note)) (pp.7-9, infra).

In each of these 3 ways, the federal Medicaid statute expressly makes the safe harbor binding on States which participate in Medicaid, as Florida does. Florida's statute is invalid for lack of compliance with these express federal requirements (pp.7-9, infra).

Because the federal statute is clear, contrary comments by an administrative agency do not control (pp.9-13, infra).

The State errs in its attempt to exclude "solicitation" or part-time employees from the federal safe harbor. Solicitation is integral to any successful business. This Court has recognized the integral nature of solicitation in affirming its protection by the First Amendment. In addition, HHS has rendered a binding interpretation of the safe harbor to cover solicitation activities, as well as part-time commission-only employees. The contrary provisions of Florida law are void (pp.14-17, infra).

The status of Florida case law since 1996 precludes anti-kickback prosecutions for activities since that year. In 1996 the Fourth District Court expressly upheld the governing nature of the federal safe harbor. As the only Florida appellate decision on point, this has been a controlling statement of Florida law on which the parties have been entitled to rely since 1996 (safe harbor applies). It precludes any prosecutions under F.S. 409.920(2)(e), which lacks a safe harbor, based on conduct occurring after 1996 (pp.17-19, infra).

Finally, the State admits that in 2004 the Legislature amended the governing State statute "to conform with federal law" (State br. at 6n.6). The prior State statute did not. Since the pre-2004 law contravened the federal statute, and since the 2004 amendment may not be applied retroactively, the present prosecutions should be dismissed (p.19, infra).

This Court should affirm the decision of the Third District Court of Appeal and hold invalid section 409.920(2)(e), Florida Statutes.

V. ARGUMENT

A. Standard of Review

Since this appeal involves interpretation of federal and State statutes, as well as federal administrative rulings, the applicable standard of review is de novo. Armstrong v. Harris, 773 So.2d 7 (Fla. 2000).

B. The Optional Nature of Medicaid -- A Joint Federal-State Program which is optional with the States, but States must Comply with federal Medicaid statute if they choose to participate

The Medicaid program is a cooperative federal-State effort to provide medical/dental assistance to needy persons. It should not be confused with "Medicare". Medicare is a federal-only program available only through federal law and a federal bureaucracy with federal-only funding (retirement, disability, survivors, etc.). By contrast, Medicaid is available only through joint federal-State cooperation with partial federal funding and is optional with each State.

Under the federal Medicaid statute, each State decides whether to participate. If a State chooses to participate in the federal Medicaid program, it will receive federal funds to subsidize its program, and in return, the State must comply with the federal Medicaid statute. If, on the other hand, a State chooses not to participate in the federal Medicaid program, there is no federal substitute program available for the residents of that State (no Medicaid in the absence of State participation), and the State may (or may not) create and operate its own medical-assistance program without the constraints of the federal Medicaid statute.

The important point remains: Although a State's participation in the federal Medicaid program is voluntary, a State which chooses to participate (and thereby receives federal Medicaid money) must comply fully with the federal Medicaid

statute and regulations in the administration of the State's Medicaid program. As the U.S. Supreme Court has held:

> "The Federal Government shares the costs of Medicaid with the States that elect to participate in the program. In return, participating States are to comply with requirements imposed by the Act and by the Secretary of Health and Human Services."

Atkins v. Rivera, 477 U.S. 154, 156-57, 106 S.Ct. 2456, 2458 (1986); see also Blanchard v. Forrest, 71 F.3d 1163, 1166 (5th Cir. 1996) ("A State's participation in the Medicaid program is voluntary; however, if a State chooses to participate, its Medicaid plan must comply with the federal Medicaid statute and regulations.").

Florida has chosen to participate in the federal Medicaid program. It receives substantial federal Medicaid funds and thus must comply fully with the federal Medicaid statute. Atkins v. Rivera, supra; Blanchard v. Forrest, supra.

C.The Safe Harbor in the Federal Medicaid Statute

As a general matter, both the federal and State Medicaid statutes contain a prohibition on incentive compensation relating to Medicaid services. Both statutes prohibit commission payments (percentages), per-capita compensation, etc. See 42 USC 1320a-7b(b)(1 & 2); F.S. 490.920(2)(e).

However, Congress recognized that a blanket restriction on incentive compensation would be too harsh and unrealistic. Congress, therefore, enacted numerous "safe harbors" which expressly permit incentive compensation relating to Medicaid

patients. These safe harbors protect against both criminal and civil liability. The safe harbors are listed in 42 USC 1320a-7b(b)(3). They include a safe harbor for incentive compensation paid to bona fide employees. Sub-section "(B)" provides a safe harbor (no criminal or civil liability) for:

> "any amount paid by an employer to an employee (who has a bona fide employment relationship with such employer) for employment in the provision of covered items or services".

42 USC 1320a-7b(b)(3)(B) (statutory safe harbor for employee incentive compensation).

The Secretary of Health and Human Services, at the federal level, adopted a similar regulation incorporating the employee safe harbor. It provides:

> "Remuneration [prohibition on incentive compensation] does not include any amount paid by an employer to an employee, who has a bona fide employment relationship with the employer, for employment in the furnishing of any item or service for which payment may be made in whole or in part under Medicare or a State health care program [Medicaid].... [T]he term "employee" has the same meaning as it does for purposes of 26 USC 3121(d)(2) [Internal Revenue Code]."

42 CFR 1001.952(i) (employee safe harbor in HHS regulations).

Despite the clear provision for this safe harbor under federal law, in both the federal statute and regulations, Florida's equivalent statute contains no such safe harbor (F.S. 409.920(2)(e). It is under this Florida statute,

lacking the federal protections, that appellees are being prosecuted.

D. The federal Medicaid statute on its face expressly makes the safe harbor applicable to participating State programs

On this appeal, the State argues that the federal safe harbor does not apply to the States (State br. at 13-20). The State errs. In numerous ways, the federal Medicaid statute on its face expressly extends this safe harbor to participating State Medicaid programs.

First, the federal statute makes the safe harbor applicable to "Federal health care programs" and then defines "Federal health care programs" to include all State Medicaid programs. Under 42 USC 1320a-7b(f)(2) "Federal health care programs" are defined to include "State health care programs" for safe harbor purposes. Thus the definitional provision in 42 USC 1320a-7b(f)(2) expressly extends the safe harbors to State Medicaid programs by including "State health care programs" in the definition of "Federal health care programs" for safe harbor purposes. See 42 USC 1320a-7b(f)(2).

Second, sections 1396a(a)(52) & 1396r-6 of the federal Medicaid statute have the same effect (42 USC 1396a(a)(52) & 42 USC 1396r-6). Section 1396a(a)(52) expressly requires State Medicaid plans to meet the requirements of 42 USC 1396r-6 ("meet the requirements of 42 USC 1396r-6"). In turn, section 1396r-6 incorporates the safe harbors by expressly

incorporating the fraud provisions of 42 USC 1320a-7b of which the safe harbors are an integral part. This express federal requirement for State programs to meet the fraud requirements of 42 USC 1320a-7b, of which the safe harbors are an integral part, further indicates the express statutory extension of the safe harbors to participating State Medicaid programs.

Third, the federal exclusion criteria require the same result. Section 1396a(a)(39) of the federal statute (42 USC 1396a(a)(39)) expressly requires participating States to use the exclusion criteria of federal law under 42 USC 1320a-7 & 1320a-7a ("shall exclude" in accord with sections 1320a-7 and 1320a-7a). In turn, the exclusion criteria of sections 1320a-7 & 1320a-7a incorporate the employee safe harbor. See section 15 of P.L. 100-93 (42 USC 1320a-7 note) which specifies that the safe harbors apply to the exclusion criteria of sections 1320a-7 & 1320a-7a. In short, under section 1396a(a)(39), the State's Medicaid plan must follow the exclusion criteria of sections 1320a-7 & 1320a-7a which track the safe harbors in federal law.

For each of these 3 reasons, the various sections of the federal Medicaid statute on their face expressly extend the federal safe harbors to participating State Medicaid programs. The structure and cross-referencing of the statutory sections make the federal safe harbor an integral part of the requirements which federal law mandates for State programs. This includes the federal statute's express inclusion of

"State health care programs" in the definition of "Federal health care programs" for safe harbor purposes (42 USC 1320a-7b(f)(2)) (p.8, supra). There is little room for doubt that Congress intended the safe harbors to apply to "State health care [Medicaid] programs". 42 USC 1320a-7b(f)(2).

1. The contrary isolated comment by HHS, without citation to authority, is invalid because it contravenes the express provisions of the federal statute and also is beyond the administrative expertise of HHS

Despite the express statutory extension of the federal safe harbors to State Medicaid programs (pp.7-9, supra), the State argues to the contrary. The State argues that the federal safe harbors are not binding on State Medicaid programs. The sole basis for the State's argument is an isolated one-paragraph statement by HHS that the safe harbors allegedly do not preempt or control State Medicaid programs (State br. at 19). HHS did not cite any authority for its isolated comment nor explain the basis for it.

This isolated comment by HHS is not controlling here for several reasons.

First, it is contrary to the express terms of the federal statute. As discussed above, the federal Medicaid statute expressly extends its safe harbors to State Medicaid programs (pp.7-9, supra). This is the clear intent of the federal statute, with its numerous express cross-references of State obligations to the federal safe harbor. Id. Since HHS's

comment conflicts with the express terms of the statute, the HHS comment is invalid. As the U.S. Supreme Court has held:

> "Because this case involves an administrative agency's construction of a statute that it administers, our analysis is governed by Chevron, USA, Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S.Ct. 2778 (1984). Under Chevron, a reviewing court must first ask whether Congress has directly spoken to the precise question at issue [citation]. If Congress has done so, the inquiry is at an end; the court must give effect to the unambiguously expressed intent of Congress [regardless of the administrative agency's interpretation]."

Food & Drug Administration v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132, 120 S.Ct. 1291, 1300 (2000) (reversing administrative interpretation). This is a hallmark of judicial review which the U.S. Supreme Court applies consistently. Barnhart v. Sigmon Coal Co., Inc., 534 U.S. 438, 462, 122 S.Ct. 941, 956 (2002) ("In the context of an unambiguous statute, we need not contemplate deferring to the agency's interpretation"); MCI Telecommunications Corp. v. Am.Tel. & Tel. Co., 512 U.S. 218, 229, 114 S.Ct. 2223, 2231 (1994) ("an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear"); cf. National RR Passenger Corp. v. Morgan, 536 U.S. 101, 110n.6, 122 S.Ct. 2061, 1071n.6 (2002) (administrative interpretative guidelines not entitled to deference).

This is so regardless of the purported expertise of the administrative agency. Where the statute is clear, as the

federal Medicaid statute is in applying the safe harbor to the States (pp.7-9, supra), the purported expertise of the administrative agency does not permit its departure from the statute, and a resulting administrative pronouncement which conflicts with the statute will be held invalid, regardless of the rubric of administrative expertise. Food & Drug Administration, Barnhart, MCI Telecommunications Corp., supra.

Second, the HHS comment is beyond its administrative expertise. It has no expertise in the area of legal preemption. This is purely a legal matter, not one for administrative deference. La. Public Serv. Com. v. FCC, 476 U.S. 355, 369, 106 S.Ct. 1890, 1899 (1986) ("The critical question in any preemption analysis is always whether Congress intended that federal regulation supersede State law"). As a result, HHS's bold pronouncement on the lack of federal-State preemption is not entitled to deference for that reason alone, in addition to its conflict with the express terms of the statute [*]

Third, HHS cited no authority for its bold pronouncement on the alleged lack of preemption. Despite the express terms

[*]When defining the substantive terms of the statute, and how the Medicaid program is to be administered, HHS rulings of course are entitled to great deference. This is the essence of administrative expertise. However, on issues of federal-State preemption, HHS has no expertise whatsoever. The latter is a pure question of law, dependent only on Congressional intent, which here clearly extends the federal safe harbors to State Medicaid programs (pp.7-9, supra).

of the federal statute (pp.7-9, supra), and the abundant case law applying federal Medicaid requirements to the States (p,5, supra), HHS did not cite a single authority for its comment. It blithely pronounced the alleged lack of preemption without an attempt to address or discuss the comprehensive federal statute or its numerous cross-references of the safe harbor to the obligations of participating State programs (pp.7-9, supra).

For these reasons, HHS's bare and unsupported comment, without citation to authority or explanation of how it relates to its administrative expertise, is not only not entitled to deference, but more importantly is a clear departure from the express terms of the federal statute. The statute expressly cross-references the federal safe harbor to the requirements imposed on State programs (pp.7-9, supra). This includes, without limitation, the federal statute's express inclusion of "State health care programs" in the definition of "Federal health care programs" for safe harbor purposes (42 USC 1320a-7b(f)(2)). It is the clear terms of the statute which control, not a bare administrative comment lacking citation to authority or explanation. Food & Drug Administration, Barnhart, MCI, supra.

2. The express inclusion of the federal safe harbor in the requirements of a State Medicaid program renders it unnecessary to engage in the preemption analysis addressed in the State's brief

Because the federal Medicaid statute expressly binds the States to the employee safe harbor (pp.7-9, supra), there is no need to engage in the protracted preemption analysis in the State's brief (State br. at 13-20). Amicus respectfully submits that appellees and the Third District Court are correct in their argument and decision that the federal Medicaid statute preempts the contrary provisions of F.S. 409.920(2)(e) & 409.920(1)(d). However, regardless of this preemption analysis, the express inclusion of the safe harbor in the requirements of a State Medicaid program (pp.7-9, supra) renders it unnecessary to make this preemption analysis in order to affirm the decision of the Third District Court. Dade Co. School Board v. Radio Station WQBA, 731 So.2d 638, 645 (Fla. 1999) ("appellee, in arguing for the affirmance of a judgment, is not limited to legal arguments [made below and may] present any arguments ... even if not expressly asserted in the lower court").

E. The federal safe harbor clearly covers solicitation of Medicaid business

The State argues that even if the safe harbor applies here (it does -- pp.7-9, supra), the safe harbor allegedly does not protect "solicitation" (State br. at 21-23). The State argues that appellees did not pay for "transportation" but only for "solicitation" of Medicaid business. Since "solicitation" is not a covered Medicaid service, the State argues that solicitation is not covered by the safe harbor.

The State errs on 2 levels: First, the employees who were alleged to have received the incentive compensation were drivers or otherwise involved in transportation of Medicaid patients. Transportation is clearly a covered service under Medicaid (42 USC 1396a(a)(43)).

Second, even if the recipients of the incentive compensation were engaged only in solicitation (which amicus does not concede), still the safe harbor applies. Solicitation and advertising are integral parts of medical and related professions, so much so that it is protected by the First Amendment. State v. Bradford, 787 So.2d 811 (Fla. 2001) (First Amendment protects solicitation of medical patients as long as the solicitation is not fraudulent, deceptive, etc.).

HHS also recognizes the integral nature of solicitation and expressly interprets the safe harbor to include solicitation activities. In both its final and proposed rule

makings, HHS made clear that the employee safe harbor protects the solicitation of Medicaid business:

> "The proposed exception [safe harbor] for employees permitted an employer to pay an employee in whatever manner he or she chose for having that employee assist in the solicitation of program business...."

56 Fed.Reg. 35952, 35953 (HHS final rule, July 29, 1991) (emp. added). This was a reaffirmation of HHS's similar statement, two years earlier, in its proposed rule making:

> "This statutory exemption [safe harbor] permits an employer to pay an employee in whatever manner he or she chooses for having that employee assist in the solicitation of Medicare or State health care program business."

54 Fed.Reg. 3088, 3093 (HHS prop.rule, Jan.23, 1989)(emp.added).

The same HHS rule making further confirmed the coverage of solicitation in the employee safe harbor. HHS referred to covered employees as "salespersons" and described their function as "the business they generate" -- clearly a reference to their solicitation activities. HHS held both to be protected by the employee safe harbor. HHS held:

> "[I]f individuals and entities desire to pay a [Medicaid] salesperson on the basis of the amount of business they generate, then to be exempt from civil or criminal prosecution, they should make these salespersons employees where they can and should exert appropriate supervision for the individual's acts."

54 Fed.Reg. 3088, 3093 (HHS proposed rule, Jan. 23, 1989) (emp. added), approved in Medical Development Network v.

Professional Respiratory Care, 673 So.2d 565, 567 (Fla. 4 DCA 1996) (holding the employee safe harbor to be binding and to cover "salespersons on the basis of the amount of business they generate").

The State fails to mention these HHS rulings. They expressly confirm the safe harbor's coverage of solicitation activities. These HHS rulings are fatal to the State's present argument that solicitation is somehow beyond the safe harbor. HHS has made clear, in interpreting the employee safe harbor, that solicitation is an integral part of the covered service for which safe harbor protection is appropriate (pp.14-15, supra).

In short, the employee safe harbor covers solicitation activities. It is clear from the statutory text, from HHS's interpretations of it, and from this Court's recognition of the integral nature of solicitation as a constitutionally protected ingredient in procuring patronage of a medical practice, State v. Bradford, supra, that solicitation is an integral part of a Medicaid practice and is covered by the employee safe harbor.

F. The federal safe harbor covers part-time commission employees and does not require a full-time regular salaried employee

The State suggests that part-time "referral" employees are not employees for safe harbor purposes and that commission

or per-capita payments to them allegedly are beyond the scope of the safe harbor (State br. at 21).

The State errs on 3 levels: First, there is nothing in the statute's text or history which excludes part-time commission employees from the safe harbor. The statute requires only a bona-fide employment relationship. 42 USC 1320a-7b(b)(3)(B) ("a bona fide employment relationship").

Second, the HHS regulations expressly apply the safe harbor to all persons who are employees for IRS purposes. 42 CFR 1001.952(i) (For safe harbor purposes, "the term `employee' has the same meaning as it does for purposes of 26 USC 3121(d)(2) [Internal Revenue Code]") (quoted more fully at p.7, supra).

Third, HHS expressly holds that part-time commission salespersons are covered by the employee safe harbor. HHS holds:

> "Comment: One commenter inquired whether a part-time employee paid on a commission-only basis falls within the employee exception.
>
> "Response: As long as a bona-fide employer-employee relationship exists between the part-time employee and the employer, such a relationship falls within the scope of this [safe harbor] provision."

56 Fed.Reg. 35952, 35961 (HHS Final Rule, July 29, 1991).

For these 3 reasons, the employee safe harbor covers part-time commission employees. HHS expressly so holds. Florida's contrary statute is void.

G. The status of Florida law under a 1996 Fourth District decision upholding the governing nature

of the federal safe harbor requires dismissal of all anti-kickback prosecutions brought for alleged violations since that date

In 1996 the Fourth District Court held that compliance with the federal safe harbor would provide an exemption from civil and criminal liability. It has been a controlling statement on the protections of the safe harbor on which all persons are entitled to rely.

In Medical Development Network, supra, 673 So.2d 565 (Fla. 4 DCA 1996), the Fourth District Court addressed the employee safe harbor. Without exception or qualification, it gave blanket protection to paying employee-salespersons on a commission basis. The Court quoted the above HHS ruling without condition or limitation. It warrants repeating:

> "[I]f individuals and entities desire to pay a [Medicaid] salesperson on the basis of the amount of business they generate, then to be exempt from civil or criminal prosecution, they should make these salespersons employees where they can and should exert appropriate supervision for the individual's acts."

Medical Development Network, supra, 673 So.2d at 567 (Fla. 4 DCA 1996) (emp.added) (quoting HHS ruling at p.15, supra).

As the only Florida appellate decision on point since 1996, Medical Development Network has been a controlling statement on the safe harbor protections since that date. The Court did not qualify or limit the safe harbor in any way. Although it is not binding on this Court, it is an otherwise dispositive statement of the law on which all parties have

been entitled to rely since 1996. In Pardo v. State, 596 So.2d 665 (Fla. 1992), this Court explained:

> "The decisions of the district courts of appeal represent the law of Florida unless and until they are overruled by this Court.... [I]n the absence of interdistrict conflict, district court decisions bind all Florida trial courts."

Pardo, 596 So.2d at 666 (Fla. 1992).

Pardo, therefore, makes Medical Development Network the dispositive statement on the safe harbor since 1996. It confirms the protections of the safe harbor (quoted at pp.15,18, supra) on which all parties are entitled to rely. The inconsistent provisions of F.S. 409.920(2)(e), which lack a safe harbor, may not be a basis for prosecution for conduct occurring since 1996. Pardo.

H. The Legislature's amendment of F.S. 409.920(1)(d) in 2004, to require a more stringent standard of mens rea in compliance with federal law, may not apply retroactively and vitiates prosecutions based on conduct predating the amendment

On June 23, 2004 Governor Bush signed legislation amending the mens rea requirement of F.S. 409.920(1)(d). The amendment adds willfulness to the mens rea requirement (2004 FL. Laws ch.344, SB 1064). The State admits that this amendment was necessary "to conform with the federal law" (State br. at 6n.6). Conversely, by the State's admission, the prior statute did not "conform with the federal law". Id. It follows that the prior statute may not be the basis for prosecution. See 42 USC 1396a(a)(52) & 1396r-6 (requiring

conformity with federal fraud requirements, discussed at p.8, supra). Atkins v. Rivera, Blanchard v. Forrest, supra.

Nor may the 2004 amendment be applied retroactively. U.S.Const., Art. I, sec. 10 (no ex post facto legislation).

As a result, the present prosecutions, based on F.S. 409.920(1)(d) and on conduct occurring prior to the 2004 amendment, may not be sustained. Lynch v. Mathis, 519 U.S. 433, 117 S.Ct. 891 (1997) (discussion of ex post facto prohibition).

IV. CONCLUSION

This Court should affirm the holding that section 409.920(2)(e) is invalid for lack of a safe harbor equivalent to that required in the federal Medicaid statute. Florida voluntarily has chosen to participate in the federal Medicaid program, thereby requiring its compliance with federal law. In numerous respects, the federal statute on its face expressly extends the federal safe harbor to State Medicaid programs, including the federal statute's express inclusion of "State health care programs" in the definition of "Federal health care programs" for safe harbor purposes (42 USC 1320a-7b(f)(2)).

Because the federal statute is clear on its face, contrary comments by an administrative agency do not control.

HHS expressly holds that the safe harbor covers solicitation activities, as well as part-time commission-only employees. The contrary provisions of Florida law are void.

In addition, the Fourth District Court's 1996 decision is a guiding statement on the protections of the federal safe harbor on which all parties have been entitled to rely.

Finally, the Legislature's 2004 amendment of the State Medicaid statute also bars the present prosecutions.

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CERTIFICATE OF FONT COMPLIANCE

I certify that the attached amicus brief was printed in Courier New 12-point font, in compliance with Fla.R.App.P. 9.210(a)(2).

Dated: August 11, 2004

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