No. SC04-613

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Plaintiff/Appellant,

v.

GABRIEL HARDEN and
ELSA CORTORREAL, et al.,

***Defendants/Appellees*.**

On Appeal From the District Court of Appeal
Third District of Florida
(CASE NO. 3D03-521)

JOINT BRIEF OF APPELLEES HARDEN & CORTORREAL

ANTHONY C. VITALE, Esq.
ANTHONY C. VITALE, P.A.
Brickell Plaza, Suite 700
Miami, FL 33131
Telephone: (305) 358-4500
[*Attorney For Gabriel Harden]*

G. RICHARD STRAFER, ESQ.
G. RICHARD STRAFER, P.A.
2400 S. Dixie Highway, Suite 200
Miami, Florida 33133
Telephone: (305) 857-9090
[Attorney For Gabriel Harden]

RONALD J. MANTO, ESQ.
MANTO & KASSEBAUM, L.L.P.
Grove Forest Plaza, Suite 107
Coconut Grove, FL 33133
Telephone: (305) 445-2985
[*Attorney For Elsa Cortorreal*]

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

CONSTITUTION, STATUTES AND RULES

MISCELLANEOUS

STATEMENT OF THE ISSUES

I. WHETHER THE THIRD DISTRICT COURT OF APPEAL CORRECTLY RULED THAT TWO ASPECTS OF FLORIDA'S MEDICAID FRAUD "ANTI-KICKBACK" STATUTE, F.S. § 409.920, WERE PRE-EMPTED BY THE FEDERAL MEDICAID ACT AND ITS ADMINISTRATIVE "SAFE HARBORS":

(A) THE STATE'S ATTEMPT TO DEFINE AND PROSECUTE AS A FORM OF UNLAWFUL "REMUNERATION" UNDER F.S. § 409.920(2)(e) THE WAGES PAID BY A MEDICAID PROVIDER TO ITS EMPLOYEES FOR THE PURPOSE OF SOLICITING AND TRANSPORTING MEDICAID-ELIGIBLE PATIENTS TO ITS FACILITIES FOR BONA FIDE AND PROPERLY BILLED TREATMENT; AND

(B) THE USE OF A DILUTED *MENS REA* ("SHOULD BE AWARE") STANDARD IN F.S. § 409.920(1)(d) RATHER THAN A "WILLFULNESS" STANDARD AS REQUIRED BY THE FEDERAL MEDICAID ACT FOR THE SAME CONDUCT?

II. WHETHER, IN THE ALTERNATIVE, THE CIRCUIT COURT CORRECTLY RULED THAT THE OPERATIVE TERM "REMUNERATION" IN F.S. § 409.920(2)(e) WAS EITHER UNCONSTITUTIONALLY VAGUE OR IN VIOLATION OF THE FIRST AMENDMENT, AS APPLIED BY THE STATE BELOW, TO WAGES PAID BY A MEDICAID EMPLOYER TO ITS EMPLOYEES FOR THE PURPOSE OF SOLICITING MEDICAID-ELIGIBLE PATIENTS TO ITS FACILITIES FOR BONA FIDE AND PROPERLY BILLED TREATMENT?

STATEMENT OF THE CASE AND FACTS

The Criminal Information

On December 22, 2000, the Office of the Statewide Prosecutor (hereinafter "the State") filed a nine count criminal Information against ten defendants, Gabriel Reginald Harden, Edward Polsky, Maria Rodriguez, Bruce Eric Smith, Herbert Lee Goss, Flora Johnson, Elsa Cortorreal, Victor Rivera, Billy Madison and Vonshelia Carter, all of whom, the Information further alleged, were associated with or "employed by" three corporate entities engaged in the business of providing dental services to children: Dental Express Dentists, D.D.S., P.A., Dental Express, Inc. and Express Dental, Inc. (R1: 2.) Counts 3-9 alleged that the defendants violated the "anti-kickback" provision of Florida's Medicaid fraud statute, Fla. Stat. § 409.920(2)(e), which, among other things, makes it unlawful to "knowingly ... pay ... any remuneration ... in return for referring an individual to a person for the furnishing ... of any ... service for which payment may be made ... under the Medicaid program."[1]

---

[1] Section 409.920(2)(e) thus provides:

> **(2)** It is unlawful to: ***
>
> **(e)** Knowingly solicit, offer, pay, or receive any remuneration, including any kickback, bribe, or rebate, directly or indirectly, overtly or covertly, in cash or in kind, in return for referring an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made, in whole or in part, under the Medicaid program, or in return for obtaining, purchasing, leasing, ordering, or arranging for or recommending, obtaining, purchasing, leasing, or ordering any goods, facility, item, or service, for which payment may be made, in whole or in part, under the Medicaid program.

Unlike the federal Medicaid statutes and regulations discussed *infra*, Section 409.920(2)(e) fails to define the operative term "remuneration." Moreover, the *mens rea* element "knowingly" is defined in Section 409.920(1)(d) to encompass acts committed "by a person who is aware ***or should be aware*** of the nature of his or her conduct and that his or her conduct is substantially certain to cause the intended result." (Emphasis added.)

In Counts 3-9, the State charged that the defendants violated Section 409.920(2)(e) by paying drivers – who were also expressly alleged to be associated with or "employed by" the corporate dental service providers – a "per head fee" or commission for the "solicitation and transportation" of Medicaid eligible children "to dental facilities for treatment." (R1: 6-9.)[2] The State did not contend that the recipients of the defendants' dental services (the children) were ineligible for Medicaid services or that the services billed to Medicaid were fictitious, falsely billed or in any way inflated. Rather, the State's theory of prosecution for Counts 3-9 rested on the core contention that commission-based wages paid by a Medicaid provider to its driver-employees ***standing alone*** constituted a "kickback" or unlawful "remuneration" in violation of Section 409.920(2)(e)**.**

[2] The State incorrectly asserts that "the information charged defendants with making payments for solicitation and referral, ***not transportation***." State's Brief, at p. 8 (emphasis added). *See also* State's Brief, at p. 23 (asserting that "the offense charged here is payment of a per-head fee for solicitation and referral of patients, ***not the furnishing of transportation***") (emphasis added).

Counts 1 and 2 of the Information, in turn, charged the defendants with racketeering and conspiracy to commit racketeering, in alleged violation of F.S. §§ 895.03(3) and (4). (R1: 2-5.) The predicate criminal "incidents" alleged in Counts 1 and 2 were identical to Counts 3-9. Accordingly, and as the Circuit Court correctly concluded, the theory of prosecution upon which all counts of the Information rested was that the unlawful "remunerations" consisted of the commission-based wages paid to the drivers by their corporate employers. (*See* R1: 175-175.)

The Motions To Dismiss

On October 4, 2002, Harden filed a motion to dismiss the Information, arguing that the payment of wages by a Medicaid provider to its employees for the "solicitation and transportation" of Medicaid-eligible children "to dental facilities for treatment" was expressly protected by federal Medicaid statutes and regulations (the so-called "safe harbors") and that the State's attempt to criminally prosecute this federally protected activity was unconstitutional under Article VI, Clause 2, of the United States Constitution (hereinafter "the Supremacy Clause"). Alternatively, Harden argued that the otherwise undefined term "remuneration" in Section 409.920(2)(e) was unconstitutionally vague as applied to employer-employee wages and/or was unconstitutional because the "solicitation" of patients by a legitimate Medicaid provider, through its employees, was – absent an intent to defraud – protected activity under the First Amendment to the United States Constitution and Article I, Section 9 of the Florida Constitution. (*See* R1: 61 *et seq.*) The other defendants subsequently adopted Harden's motion. (SR1: 20-24.)

In an abundance of caution, Harden also filed a separate "sworn" motion to dismiss the Information, pursuant to Fla. R. Crim. P. 3.190(c)(4). The sworn motion was aimed solely at factually establishing that the drivers were "employees" rather than "independent contractors" of the dental service providers – a potentially important distinction under the federal Medicaid statutes and regulatory "safe harbors." (*See* SR1: 1.)[3]

On December 12, 2002, the State filed its response to Harden's principal motion to dismiss. (R1: 159.) The State conceded that the dental service providers in this case were scrupulous in treating only Medicaid-eligible patients:

> If the child was eligible, they [sic] were treated. If a dentist could clearly see that a child had a cleaning or coating within the last six months, the child would not be treated, since Medicaid will not reimburse the service.... If a child was not eligible; had fraudulent paper work; was not who he claimed to be or had recently been treated, the drivers were not paid the 25 to 30 dollars.

(R1: 160.) The State nonetheless argued that commission-based "[t]he method of payment" used by the providers to pay the drivers was itself unlawful under Section 409.920(2)(e): "The method of payment was usually 25 to 30 dollars cash which would be given to each driver for each Medicaid eligible child the driver could find and bring into the clinic." (R1: 160.) According to the State, the "[r]ecruiting" or "solicitation" of patients by Medicaid providers through its paid employees was unlawful under "both" federal and state law and amounted to "kickbacks for patient

[3] As noted above, the Information already alleged that the drivers were "employed by" the dental service providers.

referrals." (R1: 165-167.) The State's response, however, did not identify any statutory or regulatory source for this sweeping contention. The State also argued, still with no statutory or regulatory citations, that "Congress' purpose" in creating the Medicaid program was to "remov[e] the financial incentive for [the] solicitation" of otherwise legitimate Medicaid business by Medicaid providers. (R1: 166.)

The State separately filed a "Traverse/Demurrer" to Harden's sworn motion. (SR1: 14.) However, the "Traverse/Demurrer" did not specifically deny any of the factual allegations made by Harden establishing that drivers were "employees" rather than "independent contractors." (SR1: 14-15.)

The Hearings On the Motions To Dismiss

On January 10 and 31, 2003, the Circuit Court, the Honorable David C. Miller, entertained oral arguments on the defense motions. The State continued to maintain that the solicitation and transportation of Medicaid-eligible patients by a Medicaid provider through commission-based employees was unlawful under both federal and state law and that "[i]f the appellate Court says that's not a crime, then we can all go home":

> MR. COBB: ....[T]he real point is [the drivers] are going out, we think it's illegal, they were going out directly on the street soliciting people per capita and only get paid for the number of eligible people or getting paid the full shot for the number of eligible people they brought in. In a nutshell that's the crime. If the appellate Court says that's not a crime, then we can all go home.

(R2: 281; *see also* R2: 238-239.) Although the State did not concede that the drivers were "employees," the State argued that, assuming that they were, the method of payment was illegal anyway:

> MR. COBB: ...What the Defense is saying ... is that if you're an employee, a bona[fide] employee, you can pay them in any fashion that you please to go outside and get a Medicaid recipient and bring them in. That is not true....
>
> If you pay somebody for each referral that they go and bring in then [the employee payment system] is based on the volume of the patient services. Judge, that simply is not legal. That takes you out of the Safe Harbor....
>
> The very essence, the core of this case is that you're paying someone to bring in Medicaid patients. That's illegal under state law, illegal under federal law, yesterday, today, twenty years from now....
>
> ***...It doesn't matter if you're an employee or not. Your relationship did not matter. It's the nature of the payment if you pay per head for referring the patients. It doesn't matter who you are or who you are working with, paying for patients is always illegal.***

(R2: 240-241, 243, 253, 256; emphasis added.) Indeed, the State contended, in response to a hypothetical posed by the Circuit Court, that patient solicitation was a crime under federal and state law even if done through conventional forms of advertising:

> MR. COBB: ...But the point is, what they're paid to do is to go out and find patients. In other words, these aren't patients that are waiting somewhere to just go pick up and [bring] back, that the doctors have arranged to have waiting. They're going out in the neighborhoods, they are going up to people, finding people. They're going out and finding Medicaid eligible recipients, individually – speaking to them.... The remuneration to the patients it's not really the issue here. It's the remuneration to the drivers to do this, all right. And they are only paid, they're paid per capita for each person they go out and find that's

> Medicaid eligible and bring them in. The method of bringing them in could be any way. Okay, so they're bringing them in by buses, so what.
>
> The transportation is not the issue here. The issue is that they're going out and finding people on an individual basis, right to Medicaid eligible recipient[s]. Are you Medicaid eligible, fine, come with me and they're bringing them in and they're getting paid per head to do that. That is a crime.
>
> THE COURT: ***If they were to go out and put a flyer on every door on a block and then somehow arrange to pick up the people that raised their hands, I want to do that, would that be a problem for the State?***
>
> MR. COBB: ***If. It might be, yes. If. And if the way they were paid. Were they paid to go out and just hand out flyers, probably not, but if they were paid on a per capita basis for the number of patients that they directly brought in, I think it would be....***

(R2: 274-275; emphasis added.)

At no time in its pleadings or arguments in the Circuit Court did the State cite any state or federal statute, regulation or precedent that prohibited the use of "flyers" or any other type of advertising to solicit business, no matter how the advertisers were paid or how the patients were eventually transported for treatment. Nonetheless, as the oral argument progressed, the State's theory of what was allegedly criminal under the Medicaid laws continued to expand. Thus, the State argued that it was legal to solicit Medicaid eligible patients from a location "say a nursing home that has Medicaid patients ... already there and you solicit that nursing home ... that is okay ... [b]ecause you are not really having any impact on the number of people who are potentially eligible for Medicaid that come into the system, you see." (R2: 275-276.) However, the State contended, again without citing any supporting authority, that the

same type of solicitations would be criminal if the targeted population was not ***already*** enrolled in the Medicaid program:

> MR. COBB: ...In other words, those [nursing home] people already exist. They're already an expended [sic] group. You're just getting people who have expanded [sic] groups to come to a particular place. That has been ruled to be okay. What is not okay is to go out and try to find people who aren't already coming in somewhere, grabbing them, and having them come in directly and being paid per head for that. That is exactly the method of payment and that's really is the crux of this whole case. What is in a nutshell what we say is being done wrong here and it violates the law and violates the statute. That is it.

(R2: 276; *see also* R2: 278.) Since the "crux of this whole case," according to even the State, was the legality of the direct solicitation of Medicaid-eligible patients by a Medicaid provider for otherwise proper Medicaid-reimbursable services, the State did not oppose the deferral of any factual dispute presented by Harden's sworn motion and the State's "Traverse/Demurrer" until ***after*** the Third District Court of Appeal resolved the core issues raised in Harden's principal motion: "MR COBB: I think that's probably true. If they're going to find what we're doing is unconstitu-tional and prevent us from prosecuting, it stops right there until the appeal [sic] court says yea or nea." (R2: 283.)

The Circuit Court's Order

Based on the pleadings, the oral argument and the State's agreed position how the issues should be litigated, on February 18, 2003, the Circuit Court entered a lengthy order granting Harden's motion to dismiss. (R1: 170-190; *see* **APPENDIX 1**.) The Circuit Court agreed with Harden that the State's attempt in this case "to prosecute, as a category of unlawful 'remuneration' barred by Section 409.920(2)(e),

the wages paid by Harden's business, Dental Express, Inc., (*i.e.*, an employer) to certain of its employees for the purposes of soliciting business and transporting Medicaid-eligible patients to Harden's dental facilities [was] preempted" by federal law and, therefore, was unconstitutional as applied under the Supremacy Clause. (R1: 171.) The Circuit Court further held that the *mens rea* requirement in Fla. Stat. § 409.920(1)(d) was preempted by federal law and was also unconstitutional under the Supremacy Clause. (R1: 171.) Finally, the Circuit Court agreed with Harden's alternative arguments that the State's construction of § 409.920(2)(e) as a criminal ban on the solicitation of commercial business would, absent an "intent to defraud" requirement not found in Section 409.920(2)(e),violate the First Amendment and/or render the statute unconstitutionally vague as applied. (R1: 171.)

The State appealed the Circuit Court's decision but the Third District Court of Appeal affirmed it, agreeing completely with the Circuit Court's preemption analysis. *See State v. Harden*, 873 So.2d 352 (Fla. 3rd DCA 2004), *2004 Fla. App. LEXIS 623*, **APPENDIX 2**. First, the Third District held that Florida's anti-kickback provision "stands as an obstacle to the accomplishments and execution of the full purposes and objectives of Congress" because it effectively criminalizes conduct protected by the federal statute and safe harbor provisions. *Harden*, 873 So.2d at ___, *2004 Fla. App. LEXIS 623*, at * 4 (citation omitted). Second, with respect to the *mens rea* issue, the Third District held:

> This Florida definition of "knowingly" would include "mere negligence," thereby criminalizing activity that the federal statute intended to protect. *Hanlester Network v. Shalala*, 51 F.3d 1390, 1399 n. 16 (9th Cir. 1995)

> ("The legislative history demonstrates that Congress, by use of the phrase 'knowingly and willfully' to describe the type of conduct prohibited under the anti-kickback laws, intended to shield from prosecution only those whose conduct 'while improper, was inadvertent.'"). Again, enforcement of the Florida anti-kickback statute would stand as an obstacle to the accomplishment of the full purposes and objectives of Congress. *Meadows*, 304 F.3d at 1206.
>
> For these reasons, we conclude that the trial court properly found that there was implied conflict preemption and declared *section 409.920, Florida Statutes* (2000), unconstitutional.

Harden, 2004 Fla. App. LEXIS 623, at **7-8. In light of these twin rulings, the Third District did not to consider the Circuit Court's alternative rulings. *Id.* at * 8, n. 1.

STANDARD OF REVIEW

The Court reviews *de novo* issues of law, including the constitutionality of statutes. *See Execu-Tech Bus. Sys. v. New Oji Paper Co.*, 752 So.2d 582 (Fla. 2000).

SUMMARY OF THE ARGUMENT

I. Both the federal Medicaid Act and applicable administrative regulations define the term "remuneration" to ***exclude*** bona fide employer-employee relationships and, for important policy reasons governing the entire Medicaid program, require an elevated *mens re* standard of "willfulness" in order to support criminal prosecutions. Both the Third District and the Circuit Court correctly ruled that the federal definitions of what constitutes an unlawful "remuneration" and the burden of proof necessary for prosecuting it preempt the State's attempt herein to prosecute such relationships.

II. Medicaid providers are constitutionally entitled to solicit business through advertising and marketing and, like all commercial enterprises, may hire employees to

do so. Absent an "intent to defraud," such commercial speech is constitutionally protected under the First Amendment. *State v. Cronin,* 801 So.2d 94 (Fla. 2001); *State v. Bradford*, 787 So.2d 811 (Fla. 2001). Therefore, the Circuit Court correctly ruled that the State's attempt to prohibit the solicitation of business by Medicaid providers was unconstitutional under the First Amendment and/or the Due Process Clauses of the Florida and federal constitutions.

ARGUMENT

I. F.S. § 409.920(2)(e) AND F.S. § 409.920(1)(d) ARE UNCONSTITUTIONAL UNDER THE SUPREMACY CLAUSE

A. The Medicaid Program in the State of Florida

The Medicaid program is a cooperative federal-state public assistance program that provides federal financial assistance to States that elect to pay for the medical services of certain needy individuals. *See Frew v. Hawkins*, 124 S.Ct. 899, 901 (2004) (citation omitted). State participation in the Medicaid program is optional, but "once the State of Florida elected to participate in the Medicaid program, its medical assistance plan must comply with the federal Medicaid statutes and regulations." *The Public Health Trust of Dade Co. v. Jackson*, 693 So.2d 562, 564 (Fla. 3rd DCA 1996) (citation omitted).

State participation in the Medicaid program is accomplished through comprehensive "plans." States that do not maintain their plans in compliance with federal law can be denied continued federal funding. 42 U.S.C. § 1396c. While Congress has afforded States some flexibility in tailoring the scope and coverage of

their Medicaid plans, all such plans must be approved by the Secretary of Health and Human Services, as now administered by the Center for Medicare and Medicaid Services ("CMS"). 42 U.S.C. § 1396a(b). Moreover, the flexibility afforded the States in developing their plans is not uniform. Under federal law, some services are ***mandatory*** and must be covered by any State that elects to participate in Medicaid, while other services are optional. *See* 42 U.S.C. § 1396a(a)(1)-(65). [4] For mandatory services, "these federal standard[s] remain the directly applicable standards with which the States must comply in order to receive federal Medicaid funding." *Antrican v. Odom,* 290 F.3d 178, 187 (4th Cir. 2002).

One of the mandatory requirements imposed by Congress on all states that have elected to participate in Medicaid is to provide an Early and Periodic Screening, Diagnosis and Treatment ("EPSDT") program, as set forth in 42 U.S.C. § 1396d(a)(4)(B). *See Frew*, 124 S.Ct. at 901. Mandatory EPSDI services expressly include dental treatment and maintenance for children. 42 U.S.C. § 1396d(k)(3). *See also* 42 U.S.C. § 1396d(a)(10); 42 U.S.C. § 1396a(a)(43). Therefore, States that elect to receive Medicaid funds are required to provide a full range of dental screening and treatment to potential Medicaid beneficiaries, including: (1) equal access and quality care, *see* 42 U.S.C. § 1396a(a)(30)(A) and 42 C.F.R. § 447.204; (2) statewide availability of dental services, *see* 42 U.S.C. § 1396a(a)(1) and 42 C.F.R. § 431.50;

[4] In order to avoid full coverage of mandatory services, States may apply to CMS for waivers under 42 U.S.C. § 1396n(c). The State of Florida has never sought a waiver from the dental service requirements discussed in the text *infra*.

(3) timely dental services, *see* 42 U.S.C. § 1396a(a)(8) and 42 C.F.R. § 435.930; (4) a free choice of dental care providers, *see* 42 U.S.C. § 1396a(a)(23) and 42 C.F.R. § 431.51; (5) dental care that is comparable to the care available to non-Medicaid patients, *see* 42 U.S.C. § 1396a(a)(10)(B) and 42 C.F.R. § 440.230, 440.240; (6) early treatment and screening services, *see* 42 U.S.C. § 1396a(a)(10)(A), 1396a(a)(43), 1396d(a)(4)(B), 1396d(r) and 42 C.F.R. § 441.50, et seq.; and (7) transportation and scheduling help needed to take advantage of the services, as required by 42 U.S.C. § 1396a(a)(43)(B) and 42 C.F.R. § 441.62).

Perhaps most importantly in light of the State's anti-marketing theory at the crux of its theory of prosecution herein, in addition to providing the actual dental services, under 42 U.S.C. § 1396a(a)(43), the mandatory EPSDT programs must provide for: "***informing all persons in the State*** who are under the age of 21 and who have been determined to be eligible for medical assistance ... ***of the availability of [EPSDT] services*** as described in section 1396d(r) of this title" and the "***arranging for*** (directly or through referral to appropriate agencies, organizations, ***or individuals***)" all necessary treatment. (Emphasis added.)

The failure by state governments to comply with their duty to provide full dental EPSDT services, including the marketing ("informing") provision highlighted above, has already resulted in one class action law suit in the State of Texas. *See Frazar v. Gilbert*, 300 F.3d 530 (5th Cir. 2002), *rev'd sub nom. Frew v. Hawkins*, 124 S.Ct.

899 (2004).[5] In an *amicus* brief filed on behalf of the United States in support of the (prevailing) plaintiff class in *Frew*, the Solicitor General argued that "[t]he United States has an interest in ensuring that the duties that States voluntarily assume under the EPSDT program are enforced in a manner that protects the beneficiaries of the program...." *See* Brief For the United States as Amicus Curiae, *Frew v. Hawkins*, No. 02-628 (U.S. May 8, 2003), *2002 U.S. Briefs (LEXIS) 628, at * 1*.[6] *See also Antrican v. Odom*, 290 F.3d 178 (4th Cir. 2002) (rejecting North Carolina's Eleventh Amendment defense to class action under 42 U.S.C. § 1983 seeking an injunction requiring North Carolina to insure the availability of dental services for minors).

---

[5] The issue before the Supreme Court in *Frew* was whether the Eleventh Amendment precluded efforts by the patient class to enforce a consent decree entered by the State of Texas and the class to settle the State's previous non-compliance with EPSDT dental programs. The Supreme Court held that the decree was enforceable.

[6] The Brief filed by the plaintiff class in the Supreme Court specifically emphasized the failure by Texas officials to sufficiently market the availability of dental services to eligible children and their families as required by federal law.

> The children suffered because the officials did not meet their important EPSDT obligations. Many children did "not receive check-ups or other services because they [did] not understand the Medicaid system or what Medicaid covers. Defendants' past methods of informing class members about EPSDT have often been ineffective." Fairness Order at 15; *see* 42 U.S.C. § 1396a(a)(43)(A)(inform all children about EPSDT). Even though many children did not have a doctor to provide screens or other necessary health care, the State officials' "systems for assisting class members to find health care providers did not work well." Fairness Order at 14; see also, Id. At 30. 42 U.S.C. §§ 1396a(a)(43)(B) & (C) ("arrange" screens and treatment).

Brief For Petitioners, *Frew v. Hawkins*, No. 02-628 (U.S. May 8, 2003), *2002 U.S. Briefs (LEXIS) 628, at * 3.*

North Carolina and Texas are not alone in failing to provide mandatory dental EPSDT services to the Medicaid-eligible. According to a comprehensive report issued in 1996 by the Department of Health and Human Services, Office of Inspector General ("OIG"), no state in the union provided more than 50 percent of the dental services required by the Medicaid program and three-quarters of the states provided less than 30 percent. *See* OIG Report No. OEI-09-93-00240, April 1, 1996 (R1: 109-158). The Report found several reasons for the lack of responsibility by the states. Few dentists were willing to accept Medicaid patients due to "inadequate reimbursement" caused by "slow Medicaid payments, arbitrary denials, and prior authorization requirements for routine services." (R1: 116.) Medicaid-eligible families also were frequently "unwilling to wait for appointments ***or make necessary travel*** or child care ***arrangements*** which increase[d] the likelihood of missed appointments and failure to seek services." (R1: 116, 120; emphasis added.)

Like North Carolina and Texas and, indeed every other state in the union, Florida has elected to join the Medicaid program and administers its plan though the Florida Agency for Health Care Administration ("AHCA"). The federal government currently provides 56 percent of Florida's Medicaid funds. *See 65 Fed. Reg. 69560-61*. The remaining funds must be supplied from Florida tax revenues.

While the Florida Legislature has been while quite willing to accept federal funds for certain services, it has repeatedly engaged in efforts to avoid having to provide the full coverage required by its federal benefactor. *See Meadows*, 304 F.3d at 1198 (characterizing Florida statute creating a "preferred list" of prescription drugs that

would be reimbursed under its Medicaid program as "another chapter in the ongoing efforts of states to hold down their Medicaid drug costs"). For example, although Florida law requires the implementation of "a comprehensive dental program" for indigent persons, *see* F.S. § 381.0052, and Medicaid Act and federal regulations likewise require States to provide a broad range of dental care for eligible minors, the Florida Legislature has unilaterally declared that dental services were "optional" under its plan. *See* F.S. § 409.906.

Similarly, federal Medicaid statutes and regulations require participating States to provide transportation for those eligible for dental services. *See* 42 U.S.C. § 1396a(a)(43)(B); 42 C.F.R. § 441.62. While the Florida Legislature purports to require the AHCA to provide "transportation" to Medicaid eligible patients, the services have been unilaterally deemed discretionary and expressly qualified by "fiscal limitations" and "policies" of the AHCA. *See* F.S. § 409.905(12).[7] Indeed, instead of making efforts to comply with mandatory federal requirements, in 1998 the Florida

---

[7] Section 409.905(12) provides:

> **(12) TRANSPORTATION SERVICES.**-- The agency shall ensure that appropriate transportation services are available for a Medicaid recipient in need of transport to a qualified Medicaid provider for medically necessary and Medicaid-compensable services, provided a client's ability to choose a specific transportation provider ***shall be limited to those options resulting from policies established by the agency to meet the fiscal limitations of the General Appropriations Act.*** The agency ***may*** pay for transportation and other related travel expenses as necessary ***only if these services are not otherwise available***.

(Emphasis added.)

Legislature restricted access to dental services by banning the use of mobile dental units that had previously been delivering such services directly to needy children in cooperation with school systems and day care centers around the state. See F.S. § 409.906(1), (6). After the Florida Legislature banned private "mobile" services, it failed to create any alternative program to fill the breach by providing either "inform[ation]" to or the "transportation" of children to dentists, as required by federal law.

In the Circuit Court below, Harden proffered that he started his dental businesses to fill this gap in service. Prior to the enactment of Section 408.906(1) in 1998, Harden had contracts with Dade County Head Start, 150 day care centers in Dade and Broward Counties and 22 schools and numerous school boards to provide "portable" EPSDT dental services directly to South Florida children. (R1: 63-64.) After the Florida Legislature eliminated the ability of dentists to bring their services directly to Medicaid-eligible children, Harden began a marketing and transportation program designed to bring the children to the dentists. (R1: 64-65.) Rather than allowing Harden and his employees to at least partially satisfy the State's obligations to market and provide EPSDT dental services to eligible Medicaid recipients, the State com-menced this prosecution. However, as demonstrated below, both the Circuit Court and the Third District correctly found that Harden's activities were protected by federal statutes, regulatory "safe harbors" and the United States and Florida Constitutions.

B. <u>The -Employee Exemption and Safe Harbor</u>

The original federal Anti-Kickback statute was enacted in 1972. It prohibited, but only as a misdemeanor, the solicitation or offering of a "kickback, bribe, or rebate" in connection with furnishing covered services or referring a patient to a provider of those services. *See* Social Security Amendments of 1972, Pub. L. No. 92-603, § 242(b), (c), 86 Stat. 1419. In 1977, Congress upgraded the violation to a felony. *See* Medicare-Medicaid Anti-fraud and Abuse Amendments, Pub. L. No. 95-142, 91 Stat. 1175, 1182 (1977). In 1980, Congress began to realize the potential for abusive prosecutions and made two key amendments.

First, Congress upgraded the *mens rea* requirement to "knowingly and willfully." Thus, after consolidating the anti-kickback laws for Medicare and Medicaid into Section 1128B(b) of the Social Security Act in 1987, the federal Anti-Kickback provision, 42 U.S.C. § 1320a-7b(b), now makes it a felony to "knowingly ***and willfully*** solicit[] or receive[] any remuneration" for referrals for services covered by the Medicaid program. (Emphasis added).

Second, in 1980, Congress also created a statutory exception, described below, for employer-employee relationships. Due to the potential breadth of anti-kickback provisions,[8] in 1987, Congress enacted the Medicare and Medicaid Patient and Program Protection Act, § 14, Pub. L. 100-93. The Act established a list of specific

[8] *See generally* Final Rule, Medicare and State Health Care Programs: Fraud and Abuse; OIG Anti-Kickback Provisions, *56 Fed. Reg. 35952* (July 29, 1991) (Background Section) ("[s]ince the statute on its face is so broad, concern has arisen among a number of health care providers that many relatively innocuous, or even beneficial, commercial arrangements are technically covered by the statute and are, therefore, subject to criminal prosecution").

exceptions to the definition of what would otherwise constitute unlawful "renumeration" – essentially a list of business practices and relationships that "would not be treated as criminal offenses under the anti-kickback statute." *See* Dept. of Health and Human Services, *Medicare and State Health Care Programs: Fraud and Abuse; Clarification of the Initial OIG Safe Harbor Provisions and Establishment of Additional Safe Harbor Provisions Under the Anti-Kickback Statute*, Office of Inspector General, Final Rule, Background, *64 Fed. Reg. 63518* (Nov. 19, 1999). Congress codified this list of exceptions within the anti-kickback statute itself, *see* 42 U.S.C. § 1320a-7b(b)(3)(D).

One of the original statutory exceptions was designed to prevent prosecutors from claiming that wages paid by an employer to his or her employees to solicit business was a form of illegal "remuneration." Thus, *42 U.S.C. § 1320a-7b(b)(3)* provides that the Anti-Kickback statute's prohibition on referral payments "***shall not apply to ... 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 and services***...." (Emphasis added.) Harden's drivers were "employed" to assist their employer in providing "covered items and services" by "inform[ing]" the parents of Medicaid eligible children of their right to obtain EPSDT dental services for their children and "transporting" the eligible children to the dental service provider.

Not content with creating only the statutory exception, Congress also authorized the Secretary of the Department of Health and Human Services to promulgate

regulations construing these and creating other exceptions or administrative "safe harbors." In 1991, the OIG promulgated final rules, creating a parallel administrative "safe harbor" for employer-employee relationships. This safe harbor was ultimately promulgated and codified at 42 C.F.R. § 1001.952(i), which provides in pertinent part:

> **§ 1001.952 Exceptions.**
>
> The following payment practices ***shall not be treated as a criminal offense*** under section 1128B of the Act and shall not serve as the basis for an exclusion: ***
>
> (i) Employees. As used in section 1128B of the Act, "remuneration" 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, Medicaid or other Federal health care programs. For purposes of paragraph (i) of this section, the term employee has the same meaning as it does for purposes of 26 U.S.C. § 3121(d)(2).

(Emphasis added.)

The employee "safe harbor" was intended to be expansive and to give every benefit of the doubt to the employer. As OIG explained in issuing Section 1001.952(i) as a final rule for the first time in 1991: "The proposed exception 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***...." Final Rule, Medicare and State Health Care Programs: Fraud and Abuse; OIG Anti-Kickback Provisions, *56 Fed. Reg. 35952* (July 29, 1991) (Proposed Safe Harbors) (emphasis added). Thus, contrary to the State's unsupported arguments before the Circuit Court

and in its Brief herein, Federal law makes no distinction between hourly wages and commission-based methods of paying employees.

The express intent of the statutory exemption and safe harbors was to prevent what the State attempted to do in this case – criminally prosecute a Medicaid employer for paying wages to its employees by characterizing the wages as unlawful "kickbacks." *See* Final Rule, Medicare and State Health Care Programs: Fraud and Abuse; OIG Anti-Kickback Provisions, *56 Fed. Reg. 35952* (July 29, 1991) (General Comments Response No. 1: "If a person participates in an arrangement that fully complies with a given provision, he or she will be assured of not being prosecuted criminally or civilly for the arrangement that is the subject of the provision"); *id.* (Response No. 9: "The clear congressional intent behind the development of these safe harbor provisions is to define innocuous arrangements that should not be prosecuted, including the statutory exceptions"). Indeed, the OIG has acknowledged that even some relationships that do not squarely meet the IRS's definition of "employer-employee" could still qualify for the separate "safe harbor" promulgated for personal services and management. *See* Final Rule, Medicare and State Health Care Programs: Fraud and Abuse; OIG Anti-Kickback Provisions, *56 Fed. Reg. 35952* (July 29, 1991) (Comments and Responses to Employee Safe Harbor). Thus, the State's contention that the solicitation and transportation services provided by Harden's drivers was illegal under federal law is not only unsupported but frivolous.

In an attempt to characterize the drivers' wages as criminal under state law, the State has relied upon the Florida Medicaid "fraud" statute, F.S. § 409.920(2)(e), which

prohibits all forms of "remuneration." In contrast to its federal counterpart, Section 409.920(2)(e) fails to define the term or incorporate by reference the federal exemptions and safe harbors. Moreover, the Florida Legislature diluted the federally-mandated "willfulness" requirement by authorizing prosecutors to seek convictions using the negligence ("should be aware") standard set forth in Section 409.920(1)(d).

C. Preemption Principles Generally

Under the United States Constitution, the "Laws of the United States ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., Art. VI, Cl. 2. Since *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 427 (1819), "it has been settled that state law that conflicts with federal law is 'without effect'" *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). Both federal statutes and regulations can have preemptive effect. *See Fidelity Federal Sav. & Loan Assn. V. De la Cuesta*, 458 U.S. 141, 153 (1982) ("[f]ederal regulations have no less pre-emptive effect than federal statutes"). *Accord O'Loughlin v. Pinchback*, 579 So.2d 788 (Fla. 1991); *The Public Health Trust of Dade Co. v. Jackson Memorial Hospital*, 693 So.2d 562 (Fla. 3rd DCA 1996).

Courts have recognized three discrete categories of preemption: (1) ***express preemption***, where a federal statute contains "explicit preemptive language"; (2) ***field preemption***, in which the federal regulatory scheme is "so pervasive as to make reasonable the inference that Congress left no room for States to supplement it"; and

(3) ***implied conflict preemption***, in which "compliance with both federal and state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Gade v. National Solid Wastes Mgmt.*, 505 U.S. 88, 98 (1992) (quotations and citations omitted). *Accord Pinchback*, 579 So.2d at 791-792 (citations omitted). Since the Medicaid program expressly contemplates state involvement, courts have uniformly analyzed Supremacy Clause challenges to state laws affecting the Medicaid program under the third category, conflict preemption. *See e.g., Pharmaceutical Research and Manufacturers of America v. Meadows*, 304 F.3d 1197 (11th Cir. 2002); *Jackson*, 693 So.2d at 566.

Implied conflict preemption occurs when (1) compliance with specific federal and state regulations is impossible, or (2) when a state law is an obstacle to execution and accomplishment of the objectives and purpose of a Congressional enactment. *Gade*, 505 U.S. at 98; *Meadows*, 304 F.3d at 1206 (citations omitted); *Pinchback*, 579 So.2d at 791-792 (citations omitted). In determining whether state law is preempted by implication, the Court's ultimate task is "to determine whether state regulation is consistent with the structure and purpose" of the federal regulatory scheme "as a whole." *Gade*, 505 U.S. at 98. *Accord Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000); *Dalton v. Little Rock Family Planning Servs.*, 516 U.S. 474, 476 (1996). The touchstone is Congressional intent. *Gade*, 505 U.S. at 96. "The nature of the power exerted by Congress, the object sought to be attained, and the character of the obligations imposed by the law, are all important in considering the question of whether supreme federal enactments preclude enforcement

of state laws on the same subject." *Hines v. Davidowitz*, 312 U.S. 52, 70 (1941). Thus, state law will be preempted by implication where, "under the circumstances of th[e] particular case," the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress – whether that 'obstacle' goes by the name of conflicting; contrary to; ... repugnance; difference; irreconcilability; inconsistency; violation; curtailment; ... interference, or the like." *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 873 (2000) (internal quotations omitted).

The State contends that the Third District violated a "presumption" against implied preemptions with respect to the Medicaid program. *See* State's Brief, at p. 9. To the extent that such a "presumption" exists, it is rebuttable. Indeed, since States both covet the millions of federal dollars available to them under the Medicaid program and wish to restrict their own expenditures, it should not be surprising that State legislatures have frequently attempted to limit their own obligations under the Medicaid Act at the expense of Medicaid providers and beneficiaries. These efforts have consistently been rebuffed by state and federal courts in this and other jurisdictions under the conflict preemption principles outlined above, despite any "presumption" against preemption.

For example, the Third District Court of Appeal in *The Public Health Trust of Dade Co. v. Jackson Memorial Hospital*, 693 So.2d 562 (Fla. 3rd DCA 1996), found that federal law preempted a Florida Administrative Code (*Regulation 59G-7.055(6), Florida Administrative Code*) that allowed hospitals to hold third parties liable for

patient services in excess of the amounts paid by the Medicaid program. This provision conflicted with federal Medicaid statutes and regulations (42 U.S.C. § 1396a(a)(25); 42 C.F.R. § 449.15; 42 C.F.R. §§ 433.138, 433.139(d) and 433.154) that required Medicaid providers to consider the federal Medicaid payments as "payment in full" for all services rendered through the program. The Third District had no trouble holding that "[b]ecause this state administrative regulation [was] in direct conflict with federal law, the state administrative provision [was] invalid under the Supremacy Clause." *Jackson*, 693 So.2d at 566 (citations omitted).

Similarly, in *Antrican v. Odom*, 290 F.3d 178 (4th Cir. 2002), the United States Court of Appeals for the Fourth Circuit applied federal preemption principles to the dentistry requirements of the Medicaid program, holding that North Carolina's plan violated and was preempted by more expansive federal dentistry standards. Numerous other federal and State courts have likewise held that various State laws were preempted by the federal Medicaid Act and its regulations. *See, e.g., Dalton,* 516 U.S. at 478 (remanding for the entry of an injunction against the enforcement of state law relating to abortion services to the extent that it conflicted with the Medicaid Act); *Planned Parenthood Affiliates of Mich. v. Engler*, 73 F.3d 634, 637 (6th Cir. 1996) (holding that a provision of Michigan law was invalid under the Supremacy Clause because it conflicted with the Medicaid Act); *Randall v. Lukhard*, 709 F.2d 257 (4th Cir. 1983) (holding that a Virginia rule was invalid because it conflicted with a provision of the Medicaid Act), *aff'd in part*, 779 F.2d 966 (4th Cir. 1984) (en banc), *cert. denied* 469 U.S. 872 (1984); *Smith v. Travelers Indemnity Co.*, 763 F. Supp.

554, 558 (M.D. Fla. 1989) (because Florida's "collateral source rule permits private automobile liability insurers to become secondary sources of recovery behind Medicare, Florida's collateral source rule obstructs the Congressional purpose" behind the Medicare Act and, therefore, is preempted) (citation omitted); *Olszewski v. Scripps Health*, 30 Cal. 4th 798, 69 P. 3rd 927 (2003) (holding that federal Medicaid statutes and regulations pre-empted lien provisions of California plan, citing *Jackson* with approval); *Martin v. State*, 642 N.W.2d 1, 34-36 (Minn. 2002) (Minnesota law allowing the state to assert a subrogation right to personal injury awards preempted by anti-lien provision of federal Medicaid Act because "the federal law prohibits exactly what the state law allows"). *Cf. Agency For Health Care Admin. v. Estabrook*, 711 So.2d 161 (Fla. 4th DCA 1998) (construing Florida's Medicaid Third Party Liability Act so that it was not in conflict with, and therefore preempted by, the Medicaid Act); *Kearse v. Dept. of Health and Rehab. Services*, 474 So.2d 819 (Fla. 1st DCA 1985) (upholding a provision of Florida's Administrative Code after construing the provision so as not to conflict with parallel provisions of the Medicaid Act).

D. The Third District Correctly Ruled That the Federal Definition of "Remuneration" Preempted the State's Attempt To Expand the State Law Definition of "Remuneration" To Void the Federal Exemption and Safe Harbor For Employer-Employee Wages

The Third District correctly analyzed and applied these well established principles to bar the State from prosecuting as unlawful "remuneration" under Section 409.920(2)(e) the wages paid by Harden's companies to their driver-employees. The Supremacy Clause precludes such a theory of prosecution because employee wages

are expressly protected under the federal statutory exception and the administrative "safe harbor" created for employer-employee relationships.

The undefined term "remuneration" in Section 409.920(2)(e) is similar to the term originally used by the federal anti-kickback provision. However, as previously discussed, after years of careful study, Congress and the OIG created a series of statutory exceptions and regulatory safe harbors, specifically excluding from the federal definition of "remuneration" bona fide wages paid by an employer to its employees. The Circuit Court and the Third District below properly rejected the State's contention that the federal exemption and safe harbor were not binding on the State of Florida. The regulatory history of the safe harbors clearly evinces an intent to broadly apply the safe harbors to prohibit both federal ***and state*** prosecutions for conduct falling within their scope. *See* Final Rule, Medicare and State Health Care Programs: Fraud and Abuse; OIG Anti-Kickback Provisions, *56 Fed. Reg. 35952* (July 29, 1991) (noting that the final rules apply to "the Federal ***and State*** health care programs' anti-kickback statute"); *id.* (noting that the safe harbor provisions were "designed to specify various payment and business practices which, although potentially capable of inducing referrals of business under the Federal ***and State*** health care programs, would not be treated as criminal offenses under the anti-kickback statute" and, therefore, "will not provide a basis for exclusion from Medicare or the State health care programs") (emphasis added). If the State was free to prosecute under Section 409.920(2)(e) the very conduct the federal exemption and safe harbor were intended to immunize, Section 409.920(2)(e) would plainly "stand[] as an

obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Geier.*, 529 U.S. at 873.

The State contends that other federal regulatory opinions have stated that the safe harbors do not apply to state laws. *See* State's Brief, at p. 19. However, the state laws referred to in the commentaries cited by the State were licensing and anti-trust statutes, not parallel anti-kickback statutes that punish the same conduct protected by a safe harbor. Moreover, the safe harbor in this case is expressly patterned after a federal ***statutory exemption*** for the same conduct, a factor the State ignores.

The Circuit Court and the Third District also correctly found that commission-based wages paid by a Medicaid provider to its employees for the "solicitation" and "transportation" of Medicaid eligible patients to its facilities fell squarely within the scope of the federal exemption and "safe harbor." However, since the State's arguments as to why the appellees' conduct allegedly did not qualify for protection under the exemption and safe harbor have materially altered on appeal from the arguments relied upon by the State before the Circuit Court, we address each of the State's contentions separately.

1. The State's Arguments In the Circuit Court

When these issues were litigated in the Circuit Court, the State eventually abandoned half of its original theory of prosecution, conceding in oral argument that payments for "transportation" were not the issue but only the payments for the "solicitation." As the State flatly conceded to the Circuit Court: "The transportation

is not the issue here." *See* p. 7 *supra*.[9] The State also ended up conceding in oral argument that not all employer-employee payments for the "solicitation" of patients were unlawful. According to the State's *ad hoc* arguments, it was "probably not" unlawful for a Medicaid provider to pay employees to hand out "flyers" soliciting business but it definitely was a felony to pay the employees who handed out the flyers "on a per capita basis for the number of patients that they directly brought in." *See* pp. 8-9 *supra*. Upon further interrogation by the Circuit Court, the State modified this position again by declaring that solicitations of patients ***already*** receiving Medicaid treatments – such as the elderly in nursing homes – were lawful and that it was only the direct solicitation of ***new*** clientele that made the solicitations a felony. "That is exactly the method of payment and that's really is the crux of this whole case. What is in a nutshell what we say is being done wrong here and it violates the law and violates the statute. That is it." *See* pp. 8-9 *supra*. At no time during the Circuit Court proceedings, however, did the State ever identify a single statutory or regulatory source for these purported distinctions or where a law-abiding Medicaid provider might turn to differentiate, in advance of a prosecutor's whim, between conduct that was "probably" legal from conduct that was "probably" not.

Not only is there no statutory or regulatory support for the State's arguments but what scarce precedent exists refutes them. (*See* R1: 180-181.) For example, in

[9] This concession was compelled by the fact that transportation services are expressly authorized by both federal and state Medicaid statutes. *See* pp. 13-14 and 17 *supra*.

United States ex rel. Obert-Hong v. Advocate Health Care, 211 F. Supp. 2d 1045 (N.D. Ill. 2002), the court dismissed a *qui tam* fraud action brought against a hospital. The hospital had entered into contracts with doctors. Under these contracts, the hospital would purchase the doctors' practices, transform the doctors into hospital employees and, in return, require the doctors to refer patients to the hospital as a condition of their employment. The opinion makes clear that the amounts paid to the doctors under the employment aspect of the contracts were expressly based on "a percentage of fees collected for referred patients." *Obert-Hong*, 211 F. Supp. at 1047.[10] That is, the doctors were paid on a commission basis, similar to the manner in which Harden paid the drivers in this case. *See also New Boston General Hospital, Inc. v. Texas Workforce Comm.*, 47 S.W.3d 34 (Tex. App. 2001) (contract between hospitals and recruiter was not voidable as in violation of the anti-kickback provision of the Medicaid Act because the recruiter was an "employee" under "safe harbor" provisions of the Act).

2. The State's Arguments In Its Brief

What the State claimed in the Circuit Court was the "crux" and "nutshell" of this case has now been abandoned. In its Brief before this Court, the State contends that ***no*** wages of ***any*** kind can be paid by a Medicaid provider to employees if the purpose

---

[10] In *Obert-Hong*, the court also noted that the price the hospital paid to the doctors to initially purchase their practices was "commercially reasonable" and based on "fair market value." *See Obert-Hong*, 211 F. Supp. at 1047, 1049. The situation in *Obert-Hong* was thus in marked contrast to the situation in *United States v. Lahue*, 261 F.3d 993 (10th Cir. 2001), a case repeatedly relied upon by the State, where a hospital's consulting service contracts with doctors were shams.

for the wages is the "solicitation" of Medicaid-eligible patients. *See* State's Brief, at pp. 10, 21-23. The State reaches this radical conclusion by pressing on this Court an extremely narrow construction of the federal statutory exception and administrative safe harbor for employer-employee wages. According to the State, such wages only fall within the exemption and safe harbor if the wages are paid to those employees who ***directly*** provide the medical or dental services – presumably the doctors, dentists, nurses and technicians but no one else. *Id.* at pp. 21-23. Since Medicaid will allegedly not reimburse a provider for marketing costs, it is a crime – according to the State – for a Medicaid provider to engage in marketing through paid employees. *Id.* There are numerous flaws in the State's new-found argument:

First, the State's argument is contrary to the language of the safe harbor in 42 C.F.R. § 1001.952. That provision immunizes payments for all those "employ[ed] ***in the furnishing of*** any item or service ***for which payment may be made in whole or in part*** under Medicare, Medicaid or other Federal health care programs." (Emphasis added.) Any bona fide employee of a dental practice is "employed" in the "furnishing" of services, whether or not the employee is the dentist him or herself, a dental assistant, bookkeeper, receptionist or advertiser. In this day and age, marketing is as much a part of a successful dental practice as cleaning teeth.

During the oral argument in the Circuit Court, Harden's counsel presented the Court with an exhibit describing a nationwide dental company similar to Harden's, InterDent, Inc. (R1: 214.) A copy of the exhibit is attached hereto as **APPENDIX 3**. According to its internet description, InterDent, Inc., has 2,226 employees nationwide,

including a "marketing" division – as well as other divisions that do not directly provide medical services, such as "accounting" and "information management." Under the State's theory, all of these employees would be criminals since they receive unlawful "remuneration," especially those employed in "marketing" designed to induce Medicaid-eligible patients to use the provider's services. Applied to a smaller dental practice, the State's theory would mean that the salaries paid to a receptionist or bookkeeper would be considered kickbacks but the salary paid to a dental assistant would be legal. In reality, all of these forms of employer-employee relationships are exempt from prosecution because they all bona fide employees – from the receptionist to the marketing specialist – since they all assist the provider in the "furnishing of" items and services "for which payment may be made in whole or in part."

If the Court were to adopt the State's radical construction, then ***all*** forms of Medicaid marketing would be criminalized, from the "flyers" discussed during the Circuit Court oral argument – some of which the State, at the time, conceded were lawful – to television or internet advertising. *See* Section II *infra*. The State's sweeping argument also makes no distinctions between methods of payment – the "crux" of the State's argument before the Circuit Court. Under the State's current theory, all types of wages for the purpose of marketing or advertising would be criminal, from commission-based wages to monthly salaries to payments made to BellSouth for an advertisement in the Yellow Pages.

Second, the State's argument wholly ignores the fact that one of the recognized – indeed mandatory – requirements of an EPSDT program is that Medicaid-eligible

minors be "inform[ed]" of the "availability" of EPSDT services and the "arranging" of treatment. *See* p.14 *supra* (discussing 42 U.S.C. § 1396a(a)(43)). If "informing" potential patients that treatment is "available" and making the "arrangements" for that treatment through "transportation" is authorized by federal law, it cannot be criminally prosecuted by the State of Florida in an attempt to interfere with the goals of the EPSDT program. Under the State's theory, marketing, advertising and transportation would only be lawful if ***personally*** performed by doctors and dentists themselves. Once doctors and dentists pay employees to perform these tasks, they and their employees suddenly become felons. There is no basis in the law for such a draconian construction of the Medicaid statutes and regulations.

Third, the only case the State cites in support of its new theory of what constitutes unlawful "remuneration" is inapposite: *United States v. Starks*, 157 F.3d 833 (11th Cir. 1998). In *Starks*, a corporation that operated a drug treatment program gave kickbacks (essentially bribes) to two employees of the State of Florida Department of Health and Rehabilitation Services ("HRS") to refer patients to the corporation. *See Stark*s, 157 F.3d at 835-836. The defendants argued that the federal anti-kickback statute was unconstitutionally vague, claiming that "ordinary people in their position might reasonably have thought" that the two HRS "employees" qualified for the statutory exception and safe harbor for employer-employee relationships. *Id.* at 839. The United States Court of Appeals for the Eleventh Circuit soundly rejected this argument for the obvious reason that the recipients of the kickbacks were not bona fide employees of the corporation but ***government*** HRS employees. *Id.* In what

amounts to *dicta*, the Eleventh Circuit added that the defendants also provided no "covered items" or "legitimate service for which the Hospital received any Medicare reimbursement." *Id.* This dicta, however, cannot be divorced from the principal holding (that the defendants were not corporate employees) or the facts of the case – the defendants were corrupt government HRS workers misusing their public offices for private gain. Nothing of the sort took place here. In any event, the services provided here – "transportation" and the scheduling of services – ***are*** covered services. *See* 42 U.S.C. § 1396(a)(43)(B); 42 C.F.R. §§ 431.53, 441.62; F.S. § 409.905(12).

Fourth, at several points in its brief, the State criticizes the Circuit Court for having granted the defendants' motion to dismiss before resolving the alleged dispute about whether the drivers in this case were "employees" or independent contractors. *See, e.g.*, State's Brief, at pp. 2-3, 20. Indeed, the State contends that the existence of this unresolved dispute is, standing alone, a basis to vacate the Third District's ruling. *Id.* at p. 20. The Court should summarily reject the State's contention because it is directly contrary to the State's position in the Circuit Court where the State expressly urged the Circuit Court to defer ruling on the factual dispute. *See* p. 9 *supra*.[11]

---

[11] In fact, there was no bona fide dispute about the employee status of the drivers. In the Circuit Court, Harden filed a sworn motion to dismiss devoted solely to establishing that the drivers were "employees." The factual basis for this claim stemmed from the deposition testimony of the State's own case agent, Karen Lee. (SR1: 1.) Ms. Lee acknowledged in her deposition that Harden and/or his company, Dental Express: (1) hired the drivers to pick up patients and transport them to Dental (continued...)

Since none of the State's shifting theories is legally supportable, the Court should affirm the Third District's and Circuit Court's rulings that the State's attempt to criminalize the marketing of otherwise legitimate Medicaid services through paid employees is preempted by federal law.

E. The Third District Correctly Ruled That the Federal "Willfulness" Requirement Preempted the Diluted "Should Be Aware"Element In F.S. § 490.920(1)(d)

The Third District and Circuit Court also correctly ruled that the Florida Legislature's attempt to dilute the *mens rea* requirement for proving kickback violations – from the federal "willfulness" requirement to a negligence standard – constituted a separate violation of the Supremacy Clause. Defining "fraud," especially

---

[11](...continued)
Express to receive dental care; (2) conducted background checks on the drivers, made copies of their credentials (including their drivers' licenses), and required the drivers to sign tax forms; (3) leased many of the vehicles used by the drivers to transport children to the facilities and paid approximately $20,000 in lease payments; (4) documented as business expenses of Dental Express for tax purposes the wages to drivers as well as the lease payments for the vehicles; (5) had written policies that prohibited their employees, including the drivers, from offering kickbacks or gratuities of any kind to patients or their families; and (6) required the drivers to acknowledge their awareness of these company policies by signing forms that expressly contained the written prohibition against offering kickbacks. (SR1: 1.) The remainder of the sworn motion established that Ms. Lee's admissions established that the drivers were "employees" under federal standards set forth in 26 U.S.C. § 3121(d)(2) and Treas. Reg. § 31.3121(d)-1. Although the State filed a traverse and demurrer to the sworn motion, it did not dispute any of the facts sworn to by its own case agent and did not identify any additional material facts that would render the drivers independent contractors instead of employees. Accordingly, the traverse was improper. *See generally State v. Kalogeropolous*, 758 So.2d 110 (Fla. 2000); *State v. Gonzalez*, 759 So.2d 731 (Fla. 3rd DCA 2000); *Newman v. State*, 698 So.2d 896 (Fla. 4th D 1997); *State v. Morales*, 693 So.2d 1063 (Fla. 4th DCA 1997); *Ellis v. State*, 346 So.2d 1044, 1046 (Fla. 1st DCA), *cert. denied*, 352 SO.2d 175 (Fla. 1977).

in connection with the operation of a federally funded program, is ***not*** "a field which States have traditionally occupied." *Buckman Co. v. Plaintiff's Legal Comm.*, 531 U.S. 341, 347 (2001). The Supreme Court in *Buckman* concluded that a state cause of action seeking damages for injuries allegedly caused by bone screws that had been approved by Food and Drug Administration (FDA), predicated on a "fraud-on-the-FDA" theory, was preempted by federal statutes. The Court reasoned that "[p]olicing fraud against federal agencies is hardly 'a field which the States have traditionally occupied,' citation omitted, such as to warrant a presumption against finding federal preemption of a state-law cause of action." *Buckman*, 531 U.S. at 348. *See also Nathan Kimmel, Inc. v. Dowelanco*, 275 F.3d 1199, 1205 (9th Cir. 2002) (plaintiff's state law tort of intentional interference with prospective business advantage based on a "fraud against the [Environmental Protection Agency]" theory was preempted by standards in the Federal Insecticide, Fungricide, and Rodenticide Act). *Cf. McCall v. Pacificare of Cal., Inc.*, 25 Cal. 4th 412, 426, 21 P.3d 1189, 1200, 106 Cal. Rptr. 2d 271 (2001) ("[t]o the extent that the [plaintiff's] complaint alleges fraud on the HCFA, defendants may, on remand, assert it is preempted under the rule in *Buckman*").[12]

---

[12] In a similar vein, numerous courts have held that state law tort claims are preempted by the Medicaid Act law, where the claims are based, in whole or in part, on a theory that the torts arose from an improper denial of benefits under the Medicaid Act. *See, e.g., Midland Psychiatric Associates, Inc. v. United States*, 145 F.3d 1000 (8th Cir. 1998); *Bodimetric Health Services v. Aetna Life & Cas.*, 903 F.2d 480 (7th Cir. 1990); *Marin v. HEW, Health Care Financing*, 769 F.2d 590 (9th Cir. 1985). *See also Wilson v. Chestnut Hill Healthcare*, Civ. A. No. 99-CV-1468 (E.D. Pa. Feb. 10, 2000), *2000 U.S. Dist. LEXIS* 1440 ("courts must discount any 'creative (continued...)

Congress defined the benefits available under the Medicaid program, the duties of both the States and providers, the definitions of what conduct constitutes "fraud" and what conduct constitutes lawful forms of "remuneration." Due to the facial breadth of the statute, Congress limited criminal sanctions to "willful" conduct and then afforded federal agencies with substantial enforcement powers to make a measured response to suspected fraud against the program. United States Attorneys were authorized to seek substantial civil and criminal penalties for violations of the Act and its implementing regulations.

To be sure, the Medicaid Act also authorizes, and even requires, state law enforcement authorities to assist in the investigation and prosecution of frauds committed in connection with the Medicaid program. *See* 42 U.S.C. § 1396b(q); 42 U.S.C. § 1396a(a)(61). However, Congress was careful to restrict this delegation of the prosecution function to expressly require states to seek and obtain the "approval of the Inspector General of the relevant Federal agency" before investigating or prosecuting "the activities of providers of such services under any Federal health care program [defined to include the Medicaid Act] ... if the suspected fraud or violation of law in such case or investigation is primarily related to the State plan under this subchapter." 42 U.S.C. § 1396b(q)(3)(B). The State has never claimed that it obtained approval for the instant prosecution.

---

[12](...continued)
pleading' which may transform Medicare disputes into mere state law claims, and painstakingly determine whether such claims are ultimately Medicare disputes").

Moreover, nothing in the Medicaid Act remotely suggests that Congress intended to delegate to the 50 state legislatures the power to ***define the conduct*** that would be considered a "fraud" on the federal program. Indeed, it is inconceivable that Congress did not intend to oust state legislatures of jurisdiction to define what types of business practices were either permitted or "fraudulent" in violation of the Medicaid Act. The fact that States were enlisted to assist in ***enforcing*** the federal standards does not mean that Congress intended to allow States to define those standards or under what circumstances they would be deemed violated. By criminalizing the "accidental" or "negligent" (*i.e.*, non-willful) payment of allegedly unlawful "remunerations" – under circumstances where the Florida legislature has not even attempted to define the operative term "remuneration" – contravenes both the intent of Congress and the common law meaning of the term "fraud."

Congress' decision to include a "willfulness" requirement in the federal anti-kickback provision was intentional and guided by policy concerns over the breadth of the statute. At the very least, the term "willfulness" means "that the defendant acted with an evil-meaning mind, that is to say, that he acted with knowledge that his conduct was unlawful." *Bryan v. United States*, 524 U.S. 184, 193 (1998).[13] The legislative

[13] Courts are split as to whether the "willfulness" requirement of the Anti-Kickback provision must also satisfy the elevated standard set forth in *Ratzlaf v. United States*, 510 U.S. 135 (1994), *i.e.*, requiring proof that the defendant was aware of the specific provision of the law that he was charged with violating. *Compare United States v. McClatchey*, 217 F.3d 823 (10th Cir. 2000) (specific intent to violate the law required but not knowledge of specific law violated); *United States v. Starks*, 157 F.3d 833 (11th Cir. 1998) (same); *United States v. Davis*, 132 F.3d 1092, 1094 (5th Cir. 1998) (same); *United States v. Jain*, 93 F.3d 436, 440 (8th Cir. 1996) (same), *cert. denied*, (continued...)

history of the 1977 amendments that added the "willfulness" requirement demonstrates that the intent behind the requirement was to prevent criminal culpability for mere negligence – *i.e.*, conduct that, "while improper, was inadver-tent." *Hanlester Network v. Shalala*, 51 F.3d 1390, 1399 n. 16 (9th Cir. 1995), quoting H.R. No. 96-1167, 96th Cong., 2d Sess. 59 (1980). Similarly, the common law meaning of the term "fraud" requires intentional conduct and excludes mere negligence. *See* RESTATEMENT (SECOND) OF TORTS, § 528 (1977) ("[a] represen-tation that is believed to state the truth but which because of negligent expression states what is false is a negligent but not a fraudulent misrepresentation"). A heightened *mens rea* requirement is particularly necessary for the Medicaid Act because the Act is "among the most intricate ever drafted by Congress" with a "byzantine construction." *Schweiker v. Gray Panthers*, 453 U.S. 34, 43-44 (1981). *See also State AHCA v. Estabrook*, 711 So.2d 161 (Fla. 4th DCA 1998) (recognizing that the Medicaid Act "is 'among the most intricate' acts ever drafted by Congress," *quoting Schweiker*).

Florida's anti-kickback statute, Section 409.920(2)(e), thus stands in direct conflict with the federal statute and the Congressionally recognized need for a "willfulness" requirement. By permitting a prosecution based on what a provider allegedly "should be aware" of, Section 409.920(1)(d) allows convictions to be

---

[13](...continued)
520 U.S. 1273 (1997); *United States v. Bay State Ambulance and Hosp. Rental Serv., Inc.*, 874 F.2d 20, 33 (1st Cir. 1989) (same); *Medical Development Network, Inv. v. Professional Respiratory Care/Home Medical Equipment Services, Inc.*, 673 So.2d 565 (Fla. 4th DCA 1996) (same), *with Hanlester Network v. Shalala*, 51 F.3d 1390, 1400 (9th Cir. 1995) (knowledge of statute required).

predicated on conduct that "while improper, was inadvertent" – precisely the opposite of what Congress intended. *See Hanlester*, 51 F.3d at 1399 n. 16 (citation omitted). Therefore, this Court should agree with the Third District and the Circuit Court and find that the burden of proof provision in Section 409.920(1)(d) is invalid under the Supremacy Clause because it is preempted by federal law. *See Fireman's Fund Ins. Co. v. City of Lodi*, 302 F.3d 928 (9th Cir. 2002) (holding invalid under the Supremacy Clause a City ordinance that required companies suspected of committing hazardous waste contamination to prove by "clear and convincing evidence" that others were responsible for the contamination, rather than by a preponderance of the evidence, as required by federal law, 42 U.S.C. §§ 9601-9675), *cert. denied* 538 U.S. 961 (2003); *Lukhard*, 709 F.2d at 267 (holding that Virginia's burden of proof provisions in its transfer of assets rule under the Medicaid Act were invalid in light of less restrictive federal requirements), *modified in part*, 779 F.2d 966 (4th Cir. 1984) (en banc) (construing Virginia's burden of proof provision so as not to conflict with federal standard).

II. IN THE ALTERNATIVE, THE CIRCUIT COURT CORRECTLY RULED THAT F.S. § 409.920 WAS UNCONSTITUTIONAL AS APPLIED BECAUSE PROHIBITING THE SOLICITATION OF MEDICAID SERVICES IS PROTECTED BY THE FIRST AND FOURTEENTH AMENDMENTS

The Circuit Court correctly perceived that the State's attempted construction of Section 409.920 had other, equally-fatal constitutional implications in this case. As the Circuit Court held, the State's construction of Section 409.920 renders it unconstitutional because the solicitation of commercial business is, absent an intent

to defraud, a constitutionally protected activity under the First Amendment. Applying Section 409.920(2(e) to such conduct also renders the term "remuneration" unconstitutional vague under the Fifth Amendment.

A. The First Amendment Violation

In *Screws v. United States*, 325 U.S. 91 (1945), the United States Supreme Court recognized that "the requirement of a specific intent to do a prohibited act may avoid those consequences to the accused which may otherwise render a vague or indefinite statute invalid." *Accord Deehl v. Knox*, 414 So. 2d 1089, 1093-94 (Fla. 3rd DCA 1982). The converse is also true. The failure to require a sufficient level of intent may render a statute unconstitutional. *Morissette v. United States*, 342 U.S. 246 (1952); *Lambert v. California*, 355 U.S. 225 (1957); *State v. Bradford*, 787 So.2d 811 (Fla. 2001); *State v. Oxx*, 417 So. 2d 287 (Fla. 5th DCA 1982). As the United States Supreme Court recognized in *Morissette*, 342 U.S. at 250:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of human will and a consequent ability and duty to the normal individual to choose between good and evil.

Accordingly, criminal statutes which attempt to dispense with an intent requirement have a "generally disfavored status." *United States v. United States Gypsum Co.*, 438 U.S. 422, 438 (1978).

The United States Supreme Court has approved the complete elimination of a *mens rea* requirement *only* in the narrow field of public welfare offenses. In such cases, "Congress has rendered criminal a type of conduct that a reasonable person

should know is subject to stringent public regulation and may seriously threaten the community's health or safety." *Liparota v. United States*, 471 U.S. 419, 434 (1985). *See, e.g.*, *United States v. Freed*, 401 U.S. 601, 609 (1971) (affirming conviction for possession of unregistered hand grenades absent requirement that defendant knew they were unregistered, since "one would hardly be surprised to learn that possession of hand grenades is not an innocent act"); *United States v. Dotterweich*, 320 U.S. 277, 284 (1943) (no "consciousness of wrongdoing" necessary to affirm conviction for shipping adulterated or misbranded drugs). However, the United States Supreme Court made clear in *Liparota* that the types of public welfare offenses for which *mens rea* could be eliminated did ***not*** include federal regulatory offenses, such as the food stamp program at issue in *Liparota*. The Supreme Court specifically distinguished food stamp legislation from traditional public welfare offenses, noting that "[a] food stamp can hardly be compared to a hand grenade, *see* [*United States v. Freed*, 401 U.S. 601 (1971)], nor can the unauthorized acquisition or possession of food stamps be compared to the selling of adulterated drugs, as in [*United States v. Dotterweich*, 320 U.S. 277 (1943)]." Accordingly, to convict a merchant of illegally accepting food stamps in violation of federal requirements, the Court held that the government would have to prove the merchant's "knowledge" that the customer acquired the food stamps illegally.

If participating in the federal food stamp program "can hardly be compared to" dealing in hand grenades or adulterated drugs, we fail to see how participating in the state Medicaid program could be either. And, *Liparota* teaches that the fact that the

Medicaid program is a highly regulated activity does not alter these rules. On the contrary, if anything the highly regulated and complex nature of the medicaid program requires strict adherence to constitutional norms prior to imposing ***criminal*** sanctions. The Medicaid Act, after all, is "among the most intricate ever drafted by Congress" with a "byzantine construction." *Schweiker*, 453 U.S. at 43-44.

The federal act ameliorates these problems by (1) defining the term "remuneration" to exclude constitutionally protected activity and authorizing the administrative creation of "safe harbors" that do so as well and (2) requiring "willfulness" as an element of a criminal charge. Florida's anti-kickback provision contains none of these ameliorating provisions. The State, through Section 409.920(2)(e), seeks to criminalize the "solicit[ation]" or "pay[ment]" of ***any*** "remuneration" in return for even "arranging the furnishing" of Medicaid services based on a "knowledge" required that is defined to include negligence or accidental behavior. According to the State, this definition includes wages paid by a provider to its employees to "solicit" legitimate services and to provide "transportation" that is specifically required by the federal and state law. Indeed, the State's current definition of unlawful "remuneration" would also prohibit all radio, television and print media advertising. If these diluted standards are not preempted by the federal ones under the Supremacy Clause, they are unconstitutional under the First and Fourteenth Amendments of the United States Constitution.

A similar situation occurred in *State v. Bradford*, 787 So.2d 811 (Fla. 2001), and *State v. Cronin*, 801 So.2d 94 (Fla. 2001). In these companion cases, this Court

found unconstitutional under the First Amendment a provision of Fla. Stat. § 817.234(8), a statute that criminalized businesses or their "private employee[s]" from "solicit[ing] any business" at any hospitals or courts and lawyers from "solicit[ing] any business" for the "purpose of making motor vehicle tort claims or claims for personal injury protection benefits...." Although the intent of the statute was to prevent fraud, the statute did not require proof of an "intent to defraud." The Court in *Bradford* found that the statute was unconstitutional because, despite its good intentions, it prohibited all "solicitation" for any purpose, including "totally lawful conduct" such as constitutionally protected commercial speech, such as advertising. *Bradford*, 787 So.2d at 823, 825.

> While the statute, as drafted, may prevent or deter fraud, its criminal net also captures legitimate and otherwise lawful conduct, the State's semantics notwithstanding. As the First District's opinion in *Cronin* points out, "every solicitation of business from an accident victim ... has the potential of being funded by the proceeds of a tort settlement or PIP claim." [*State v. Cronin*, 774 So.2d 871, 876 (Fla. 1st DCA 2000).] There is, however, absolutely nothing sinister about presenting honest and legitimate requests for compensation from a PIP carrier or filing a tort claim based on damages sustained in an automobile accident. Absent the element of fraud, which we have already concluded is not part of this statute, this subsection criminalizes conduct which is entirely lawful and within the protections voiced by the United States Supreme Court.

Bradford, 787 So.2d at 824. The Court emphasized that the principal defect in the statute was its failure to "include fraudulent intent as an element of unlawful insurance solicitation." *Id*. at 814. *Accord State v. Cronin*, 801 So.2d 94 (Fla. 2001). *See also Bailey v. Morales*, 190 F.3d 320 (5th Cir. 1999) (invalidating Texas statute prohibiting

chiropractors from soliciting potential clients in person or by telephone). Sections 409.920(2)(e) and 409.920(1)(d) are unconstitutional as applied herein under *Bradford*. As the Circuit Court aptly concluded: "There is 'nothing sinister' about a Medicaid provider hiring employees to either solicit patients or provide the type of transportation services that the Medicaid Act contemplates." (R1: 188.) Nor can the State of Florida, consistent with the First Amendment, prevent businesses operating in the health care industry from hiring and paying employees "remuneration" – *i.e.*, their wages or salaries – to "solicit" business, simply because that business comes from Medicaid-eligible patients. Absent an element of "fraud," the Circuit Court properly found that such conduct was constitutionally protected under the First Amendment.

The State argues that it is free to criminalize all types of commercial marketing and advertising that might induce Medicaid-eligible patients to seek treatment because "the law requires [a provider] to waive any First Amendment right for its employees to solicit Medicaid clients on its behalf." State's Brief, at pp. 32-33. The State contends that this First Amendment "waiver" is implicit in a clause contained in the "provider agreement" which requires providers to adhere to "'all state and federal laws pertaining to the Medicaid program.'" State's Brief, at p. 33. Nothing in the provider agreement, however, even mentions the First Amendment. Waivers of constitutional rights are subject to heightened scrutiny and normally must be explicit, knowing, intelligent and voluntary. *See, e.g., Allen v. Butterworth*, 756 So.2d 52, 61 (Fla. 2003); *Johnson v. State*, 460 So.2d 954, 959 (Fla. 5th DCA 1984). First Amendment

waivers are no exception. *See In Re Halkin*, 598 F.2d 176, 190 (D.C. Cir. 1979). Since the State's "waiver" theory fails to satisfy any of these requirements, it should be soundly rejected by this Court. If Sections 409.920(2)(e) and 409.920(1)(d) ban the solicitation of business through paid employees, they are unconstitutional under *Bradford* and *Cronin*, as the Circuit Court correctly found.

B. The Due Process/Vagueness Violation

The Circuit Court also correctly concluded that the State's ever-changing definitions of what constituted an unlawful "remuneration" rendered Sections 409.920(2)(e) and 409.920(1)(d) unconstitutionally vague. *See Healthscript, Inc. v. State*, 770 N.E.2d 810 (Ind. 2002) (holding Indiana Medicaid fraud statute unconstitutional because it failed to define unlawful "claims" to specifically include claims that exceeded a provider's "usual and customary charges"). Due process requires that before a citizen is held to answer for violating a criminal statute, especially one not derived from the common law, the statute ***itself*** must give fair warning of the precise conduct deemed unlawful. *Connally v. General Construction Co.*, 269 U.S. 385 (1926); *State v. Buchanan*, 191 So. 2d 33 (Fla. 1966). Two distinct, fundamental values are protected by the void-for-vagueness doctrine.

First, the doctrine recognizes that "notice" is in and of itself a value deserving of protection.

> [B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning.

Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972) (footnotes omitted). In promoting "notions of fair play and the settled rules of law," the Constitution voids those laws which "either forbid or require the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939). *Accord Warren v. State*, 572 So.2d 1376 (Fla. 1991); *State v. Ashcraft*, 378 So.2d 284 (Fla. 1979).

Second, and perhaps most importantly in light of the State's shifting arguments, a vague law is inherently dangerous to a democratic society because it "impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned*, 408 U.S. at 108-09 (footnotes omitted). Indeed, the United States Supreme Court considers the danger of arbitrary law enforcement "the more important aspect of the vagueness doctrine" because of the potential for harm inflicted by statutes permitting a "standardless sweep [that] allows policemen, prosecutors and juries to pursue their personal predilections." *Kolender v. Lawson*, 461 U.S. 352, 358 (1983).

The degree and specificity of the notice a statute must provide also partly "depends in part on the nature of the enactment." *Hoffman Estates v. Flipside*, 455 U.S. 489, 498 (1982). One crucial distinction is between civil and criminal statutes. *Id.* Because the "consequences of imprecision are qualitatively less severe" in the civil context, the Supreme Court has "expressed greater tolerance of enactments with civil rather than criminal penalties." *Id.* 499. Analyzing an enactment, thus, in terms of the

"consequences" of its violation, due process demands greater precision from laws authorizing criminal liability. *Id.* *Accord State v. Wershow,* 343 So. 2d 605, 610 n. 1 (Fla. 1977); *State v. Buchanan*, 191 So.2d 33 (Fla. 1966); *State v. Llopis*, 257 So.2d 17 (Fla. 1971). Finally, courts are much more willing to tolerate otherwise vague terminology in criminal statutes where the statutes in question require intent on the part of the violator. *See, e.g., United States v. United States Gypsum Co.*, 438 U.S. 422, 434-443 (1978) (citations omitted).

On its face, Section 409.920(2)(e) fails to define the specific "crime" charged in this case, much less define that crime with sufficient precision that "ordinary people can understand what conduct is prohibited," at least in the context of a criminal prosecution. *Kolender*, 461 U.S. at 357. There is no guidance in the State statutory scheme for when payments would be considered unlawful "remuneration." It certainly is not intuitive that "fraud" occurs when a provider bills Medicaid for medically necessary dental treatments rendered to Medicaid-eligible children – treatment the State of Florida is required to (but does not) provide under its contract with Medicaid – and pays employees to transport the children to its facilities. In such a situation, there is an obvious and real "danger of convicting individuals engaged in apparently innocent activity," *Bryan*, 524 U.S. at 195.

The State's ever-changing arguments about what is "probably" legal and what is "probably" not before the Circuit Court (see pp.7-8 *supra*) graphically underscore both the "standardless sweep" of the statute and the unbridled discretion the State is asking this Court to confer upon "policemen, prosecutors and juries to pursue their

personal predilections" in deciding what constitutes an unlawful "remuneration." *Kolender*, 461 U.S. at 358. Accordingly, the Circuit Court properly held that if Sections 409.920(2)(e) and409.920(1)(d) were not unconstitutional under the Supremacy Clause and the First Amendment, they were unconstitutional under the Due Process Clause of the Fourteenth Amendment.

CONCLUSION

WHEREFORE, the Court should affirm the Third District's opinion and/or the Circuit Court's opinion and order the dismissal of the Information.

Respectfully submitted,

_____

ANTHONY C. VITALE
(Fla. Bar No. 249841)
ANTHONY C. VITALE, P.A.
799 Brickell Plaza, Suite 700
Miami, FL 33131
Telephone: (305) 358-4500
[*Attorney For Gabriel Harden]*

_____

G. RICHARD STRAFER
(Fla. Bar No. 389935)
G. RICHARD STRAFER, P.A.
2400 South Dixie Highway, Suite 200
Miami, FL 33133
Telephone: (305) 857-9090
[*Attorney For Gabriel Harden*]

_____

RONALD J. MANTO
(Fla. Bar No. 014941)
MANTO & KASSEBAUM, L.L.P.
Grove Forest Plaza, Suite 107
Coconut Grove, FL 33133
Telephone: (305) 445-2985
[*Attorney For Elsa Cortorreal*]

CERTIFICATE OF TYPE SIZE AND STYLE

I HEREBY CERTIFY that the foregoing Brief was prepared in Times New Roman 14-point font.

_____
G. Richard Strafer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief was mailed this 10th day of August 2004 to:

CHRISTOPHER M. KISE
Solicitor General
CHARLES J. CRIST, JR.
Attorney General
Suite PL-01
The Capitol
Tallahassee, FL 32399

CARLOS GONZALEZ
Office of the Public Defender
1320 N.W. 14th Street
Miami, FL 33125
[*Attorney For F. Johnson, B. Madison, B. Smith*]

MICHAEL BAND
2601 S. Bayshore Dr., Suite 1600
Miami, FL 33133
[*Attorney For Maria Rodriguez*]

AUBREY RUDD
7901 S.W. 67th Avenue, Suite 206
Miami, FL 33143
[*Attorney For Herbert Lee Goss*]

TONY MOSS
851 N.E. 118th Street
Miami, FL 33161
[*Attorney For V. Carter*]
ROBERT COLUMBE
19 West Flagler Street, Suite 720
Miami, FL 33130
[*Attorney For Flora Johnson*]

ANNETTE GOMEZ
644 N.W. 17th Avenue
Miami, FL 33125
[*Attorney For Bruce Eric Smith*]

CHARLES WENDER, ESQ.
190 West Palmetto Park Road
Boca Raton, FL 33432
[*Attorney for Dr. Edward Polsky*]

M. STEPHEN TURNER, P.A.
KELLY A. O'KEEFE
BROAD & CASSEL
215 S. Monroe Street, Suite 400
P.O. Drawer 11300
Tallahassee, FL 32302
[*Attorneys For DaVita, Inc., Fresenius Medical Care Holdings, Inc. d/b/a Fresenius Medica Care North America and Gambro Healthcare, Inc.*]

GABRIEL L. IMPERATO, P.A.
BROAD & CASSEL
500 East Broward Blvd., Suite 1130
Ft. Lauderdale, FL 33394
[*Attorneys For DaVita, Inc., Fresenius Medical Care Holdings, Inc. d/b/a Fresenius Medica Care North America and Gambro Healthcare, Inc.*]

JANE HYATT THORPE, ESQ.
SONNENSCHEIN, NATH & ROSENTHAL, LLP
1301 K Street, N.W.
Suite 600, East Tower
Washington, D.C. 20005
[*Attorneys as Amicus Curiae in Support of Appelle Gabriel Harden, et al.*]

_____
G. Richard Strafer