

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

NASH N. CRONIN, ET AL.,

Respondent.

CASE NO. SC01-202

PETITIONER'S INITIAL BRIEF

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PRELIMINARY STATEMENT

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

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

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

STATEMENT OF THE CASE AND FACTS

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

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

Among the various motions filed by the defendants were motions to dismiss counts 2-24 of the information. (R2 347-356) The motion alleged that counts 2-24 of information did

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

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

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

This matter came before the Court on the joint Motion to Dismiss filed by Defendants pursuant to Florida Rule of Criminal Procedure 3.140. Defendants are charged with one count of violating §895.02(3), Florida Statutes, Participation in a

Corrupt Enterprise. The charge is based on twenty-two (22) separate counts of Insurance Solicitation, in violation of §817.234(8), Florida Statutes.

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

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

The Bradford Court was purporting to clarify its earlier opinion on Barr v. State, 731 So.2d 126 (Fla. 4th DCA 1999). In Barr, the Court held that the statute was constitutional and that it "targets only those persons who solicit business for the sole purpose of making motor vehicle tort or PIP benefits claims." Id. at 129. According to the Barr opinion, "...it only prohibits the chiropractor from soliciting a prospective patient for the purpose of receiving payment from that patient's PIP insurance." Id. at 130. Nowhere does Barr mention or set forth the requirement, discussed in Bradford, that subsection (8) be read in pari materia with

subsection (1) or that subsection (8) requires not simply that a defendant solicit business with the intent to file a claim for or be paid from PIP benefits, but that a defendant intends to file a fraudulent PIP claim.<sup>1</sup>

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

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

This Court recognizes that:

As a general rule, an information must allege each of the essential elements of a crime to be valid. However, because the legislature has the primary authority for defining crimes, it will be

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

the rare instance that an information tracking the language of the statute defining the crime will be found to be insufficient to put the accused on notice of the misconduct charged. Further...an information will not be dismissed on account of any defect in the information unless the court shall be for the opinion that the indictment or information is so vague, indistinct, and indefinite as to mislead the accused and embarrass him or her in the preparation of a defense or expose the accused after conviction or acquittal to substantial danger of a new prosecution for the same offense.

Chicone v. State, 684 So.2d 736 (Fla. 1996) (citations omitted). However, it is equally clear that the elements of an offense cannot be established by mere inference. State v. VonDeck, 607 So.2d 1388 (Fla. 1992). An information failing to allege an essential element of a crime does not charge an offense. Akins v. State, 691 So.2d 587 (Fla. 1st DCA 1978). Here, the Court is bound to accept the Bradford Court's pronouncement that subsection (8) requires an element of fraudulent intent. Since that element has not been alleged, and may not merely be inferred without significant prejudice to Defendants' ability to prepare their defense or insulate themselves from future prosecution for the same behavior, the Court is constrained to grant Defendant's Motion.

(R3 377-381)

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

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

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

### SUMMARY OF ARGUMENT

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

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

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

ARGUMENT

ISSUE I

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

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

**Jurisdiction**

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

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

FL CONST Art. 5 § 3, Supreme court

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

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

or that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

FL CONST Art. 5 § 3, Supreme court

Therefore, this Court has jurisdiction

### **Standard of Review**

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

### **The Statute and Pending Cases**

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

The statute in question provides:

817.234. False and fraudulent insurance claims

(1)(a) Any person who, with the intent to injure, defraud, or deceive any insurer:

1. Presents or causes to be presented any written or oral statement as part of, or in support of, a claim for payment or other benefit pursuant to an insurance policy, knowing that such statement contains any false, incomplete, or misleading information concerning any fact or thing material to such claim;

2. Prepares or makes any written or oral statement that is intended to be presented to any insurer in connection with, or in support of, any claim for payment or other benefit pursuant to an insurance policy, knowing that such statement contains any false, incomplete, or misleading information concerning any fact or thing material to such claim; or

3. Knowingly presents, causes to be presented, or prepares or makes with knowledge or belief that it will be presented to any insurer, purported insurer, servicing corporation, insurance broker, or insurance agent, or any employee or agent thereof, any false, incomplete, or misleading information or written or oral statement as part of, or in support of, an application for the issuance of, or the rating of, any insurance policy, or who conceals information concerning any fact material to such application commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(b) All claims and application forms shall contain a statement that is approved by the Department of Insurance that clearly states in substance the following: "Any person who knowingly and with intent to injure, defraud, or deceive any insurer files a statement of claim or an application containing any false, incomplete, or misleading information is guilty of a felony of the third degree." The changes in this paragraph relating to applications shall take effect on March 1, 1996.

(2) Any physician licensed under chapter 458, osteopathic physician licensed under chapter 459, chiropractic physician licensed under chapter 460, or other practitioner licensed under the laws of this state who knowingly and willfully assists, conspires with, or urges any insured party to fraudulently violate any of the provisions of this section or part XI of chapter 627, or any person who, due to such assistance, conspiracy, or urging by said physician, osteopathic physician, chiropractic physician, or practitioner, knowingly and willfully benefits from the proceeds derived from the use of such fraud, is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. In the event that a physician, osteopathic physician, chiropractic physician, or practitioner is adjudicated guilty of a violation of this section, the Board of Medicine as set forth in chapter 458, the Board of Osteopathic Medicine as set forth in chapter 459, the Board of Chiropractic Medicine as set forth in chapter 460, or other appropriate licensing authority shall hold an administrative hearing to consider the imposition of administrative sanctions as provided by law against said physician, osteopathic physician, chiropractic physician, or practitioner.

(3) Any attorney who knowingly and willfully assists, conspires with, or urges any claimant to fraudulently violate any of the provisions of this section or part XI of chapter 627, or any person who, due to such assistance, conspiracy, or urging on such attorney's part, knowingly and willfully benefits from the proceeds derived from the use of such fraud, commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(4) No person or governmental unit licensed under chapter 395 to maintain or operate a hospital, and no administrator or employee of any such hospital, shall knowingly and willfully allow the use of the facilities of said hospital by an insured party in a scheme or conspiracy to fraudulently violate any of the provisions of this section or part XI of chapter 627. Any hospital administrator or employee who violates this subsection commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. Any adjudication of

guilt for a violation of this subsection, or the use of business practices demonstrating a pattern indicating that the spirit of the law set forth in this section or part XI of chapter 627 is not being followed, shall be grounds for suspension or revocation of the license to operate the hospital or the imposition of an administrative penalty of up to \$5,000 by the licensing agency, as set forth in chapter 395.

(5) Any insurer damaged as a result of a violation of any provision of this section when there has been a criminal adjudication of guilt shall have a cause of action to recover compensatory damages, plus all reasonable investigation and litigation expenses, including attorneys' fees, at the trial and appellate courts.

(6) For the purposes of this section, "statement" includes, but is not limited to, any notice, statement, proof of loss, bill of lading, invoice, account, estimate of property damages, bill for services, diagnosis, prescription, hospital or doctor records, X ray, test result, or other evidence of loss, injury, or expense.

(7) The provisions of this section shall also apply as to any insurer or adjusting firm or its agents or representatives who, with intent, injure, defraud, or deceive any claimant with regard to any claim. The claimant shall have the right to recover the damages provided in this section.

(8) It is unlawful for any person, in his or her individual capacity or in his or her capacity as a public or private employee, or for any firm, corporation, partnership, or association, to solicit any business in or about city receiving hospitals, city and county receiving hospitals, county hospitals, justice courts, or municipal courts; in any public institution; in any public place; upon any public street or highway; in or about private hospitals, sanitariums, or any private institution; or upon private property of any character whatsoever for the purpose of making motor vehicle tort claims or claims for personal injury protection benefits required by s. 627.736. Any person who violates the provisions of this subsection commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(9) It is unlawful for any attorney to solicit any business relating to the representation of persons injured in a motor vehicle accident for the purpose of filing a motor vehicle tort claim or a claim for personal injury protection benefits required by s. 627.736. The solicitation by advertising of any business by an attorney relating to the representation of a person injured in a specific motor vehicle accident is prohibited by this section. Any attorney who violates the provisions of this subsection commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. Whenever any circuit or special grievance committee acting under the jurisdiction of the Supreme Court finds probable cause to believe that an attorney is guilty of a violation of this section, such committee shall forward to the appropriate state attorney a copy of the finding of probable cause and the report being filed in the matter. This section shall not be interpreted to prohibit advertising by attorneys which does not entail a solicitation as described in this subsection and which is permitted by the rules regulating The Florida Bar as promulgated by the Florida Supreme Court.

(10) As used in this section, the term "insurer" means any insurer, self-insurer, self-insurance fund, or other similar entity or person regulated under chapter 440 or by the Department of Insurance under the Florida Insurance Code.

FSA § 817.234, False and fraudulent insurance claims

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

(8) It is unlawful for any person, in his or her individual capacity or in his or her capacity as a public or private employee, or for any firm, corporation, partnership, or association, to solicit any business in or about city receiving hospitals, city and county receiving hospitals, county hospitals, justice courts, or municipal courts; in any public institution; in any public place; upon any public street or highway; in or about private hospitals, sanitariums, or any private institution;

or upon private property of any character whatsoever for the purpose of making motor vehicle tort claims or claims for personal injury protection benefits required by s. 627.736. Any person who violates the provisions of this subsection commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

§ 817.234(8)

There are only a few decisions which interpret this statute. See State v. Marks, P.A. 698 So.2d 533, 540 (Fla. 1997), Barr v. State, 731 So.2d 126 (Fla. 4th DCA 1999), Bradford v. State, 740 So.2d 569 (Fla. 4th DCA), State v. Falk, 724 So.2d 146 (Fla. 3rd DCA 1998), Hershkowitz v. State, 744 So. 2d 1268 (Fla.App. 3 Dist. 1999) and Hansbrough v. State, 757 So.2d 1282 (Fla. 4<sup>th</sup> DCA 2000) In each of these cases, the statute has been challenged on various grounds and has been held to be constitutional.<sup>2</sup>

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

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

## **Principles**

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<sup>2</sup> In Marks one small portion of statute was declared vague but the statute as a whole was held constitutional.

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

In construing section 365.16(1)(b), we are mindful of our responsibility to resolve all doubts as to the validity of a statute in favor of its constitutionality, provided the statute may be given a fair construction that is consistent with the federal and state constitutions as well as with the legislative intent. State v. Keaton, 371 So.2d 86 (Fla. 1979); White v. State, 330 So.2d 3 (Fla. 1976). The Court will not, however, abandon judicial restraint and invade the province of the legislature by rewriting its terms. State v. Keaton; Brown v. State, 358 So.2d 16 (Fla. 1978).

Id. at 690

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

### **Argument**

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

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

As such, the Supreme Court has developed a four-part analysis to determine whether the governmental restriction on such speech violates First Amendment protections. First, the court must determine that the expression concerns lawful activity and is not misleading. Second, it must ask whether the asserted state interest behind the restriction is substantial. Third, it must determine whether the regulation directly advances the interest so asserted, and, fourth, whether the regulation is not more extensive than necessary to serve that interest. Central Hudson, 447 U.S. at 566, 100 S.Ct. 2343. The Court later clarified that this last prong does not require the least restrictive means available for achieving the state's interest, but rather, just a reasonable fit between the means and the ends. Florida Bar v. Went for It, Inc., 515 U.S. 618, 632, 115 S.Ct. 2371, 132 L.Ed.2d 541 (1995).

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

#### **Otherwise lawful activity**

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

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

#### **Substantial State Interest**

Cronin concedes that the state has substantial interests in this arena but tries to limit the state's interest to insurance fraud. The state's substantial interests are not

limited to insurance fraud. The court in Barr held there are substantial interests to public relating to fraud and substantial interests relating to escalating the cost of mandatory PIP auto insurance coverage. The United States Supreme Court also recognized that there are significant privacy issues involved in decisions to limit professional contacts to accident victims. See Florida Bar v. Went for It, Inc., This is particularly true in Florida where citizens have a constitutional right to privacy. Yet they are required to file accident reports, which under open government provisions can be obtained and are now being used to first violate the citizen's privacy and then violate the citizen's pocketbook as mandatory insurance costs increase.

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

The substantive evils of solicitation have been stated over the years in sweeping terms: stirring up litigation, assertion of fraudulent claims, debasing the legal profession, and potential harm to the solicited client in the form of overreaching, overcharging, underrepresentation, and misrepresentation. (FN18) The American Bar Association, as amicus curiae, defends the rule against solicitation primarily on three broad grounds: It is said that the prohibitions embodied in DR2-103(A) and 2-104(A) serve to reduce the likelihood of overreaching and the exertion of undue influence on lay persons, to protect the privacy of individuals, and to avoid situations where the lawyer's exercise of judgment on behalf of the

client will be clouded by his own pecuniary self-interest. (FN19)

[436 U.S. 462] We need not discuss or evaluate each of these interests in detail as appellant has conceded that the State has a legitimate and indeed "compelling" interest in preventing those aspects of solicitation that involve fraud, undue influence, intimidation, overreaching, and other forms of "vexatious conduct." Brief for Appellant 25. We agree that protection of the public from these aspects of solicitation is a legitimate and important state interest.

Id. at 98 S.Ct. 1921

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

But appellant errs in assuming that the constitutional validity of the judgment below depends on proof that his conduct constituted actual overreaching or inflicted some specific injury on Wanda Holbert or Carol McClintock. His assumption flows from the premise that nothing less than actual proved harm to the solicited individual would be a sufficiently important state interest to justify disciplining the attorney who solicits employment in person for pecuniary gain.

Appellant's argument misconceives the nature of the State's interest. The Rules prohibiting solicitation are prophylactic measures whose objective is the prevention of harm before it occurs. The Rules were applied in this case to discipline a lawyer for soliciting employment for pecuniary gain under circumstances likely to result in the adverse consequences the State seeks to avert. In such a situation, which is inherently conducive to overreaching and other forms of misconduct, the State has a strong interest in adopting and enforcing rules of conduct designed to protect the public from harmful solicitation by lawyers whom it has licensed.

Id at 98 S.Ct. 1922-1923

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

### **Advances the States Interests**

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

### **Tailored to the Need**

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

The constitutional provision in this case is narrowly tailored. The state recognizes that absolute bans on all forms of solicitation will not generally withstand scrutiny. In Edenfield v. Fane, 507 U.S. 761, 113 S.Ct. 1792, 123

L.Ed.2d 543 (1993), the United States Supreme Court struck down a absolute ban on all solicitation by CPA's. The Court recognized that the state had legitimate and substantial interests, but, held that the state failed to establish that the ban would advance its legitimate interests in a material way. However, the Court found the balance was reached in Ohralik where Ohio permanently and totally banned in person solicitation by lawyers. The Court also found that the balance was reached in Went for It where Florida banned all solicitation of accident victims for thirty days. The lesson from these leading cases is that a ban that is more narrowly drawn than Edenfield and is related to the interest to be protected is valid.

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

Bradford as the ban is narrowly tailored to the state's substantial interests.

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

Furthermore, Texas offered no evidence as to need for such statute. Therefore, its analysis of the scope of the statute is dicta. It also would seem to be in conflict with the United States Supreme Court decision in Ohralik which approve a direct solicitation ban. In Florida there is substantial

evidence of the need for limits on solicitation. There are two grand jury reports, the Dade County 1977 report and the 2000 Second Interim Report of the Fifteenth Statewide Grand Jury to the Florida Supreme Court Case no. 95,746, plus the reports done by the Bar for the Went for it case. Thus, there exists significant evidence of continuing problem in Florida. Therefore, Bailey is neither controlling or instructive and the District Court wrongly relied upon it. See also National Funeral Service v. Rockefeller, 870 F.2d 136 (4<sup>th</sup> Cir. 1989)(upholding a ban on in person and phone solicitation)

The District Court also cited Gregory v. Louisiana Bd of Chiropractic Examiners, 608 So.2d 987 (1992), as support for its position, however, the case is distinguishable and in fact supports the state's position. The statute in Gregory, prohibited direct, phone, and mail contact. The decision disallowed only the prohibition against mail contact. The United States Supreme Court in Shapero v. Kentucky Bar Association, 486 U.S. 466, 108 S. Ct. 1916, 100 L. Ed. 2d 475 (1988) stated that the mode of the solicitation made the difference between the decision in Ohralik and Shapero. The Court noted that any regulation short of an outright ban would not be effective with certain types of solicitation and approved the direct solicitation ban but invalidated the indirect solicitation ban. Therefore, Gregory like Shapero decided on different facts does not provide authority for the

District Court's determination that Florida's statute is unconstitutional.

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

### **Limiting Construction**

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

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

totally banned, Orhlick a ban on direct solicitation for filing PIP claims is constitutional.

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

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

Id at. 690-691

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

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

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

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

District Court reversed this determination of the trial court.

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

(2) Any physician licensed under chapter 458, osteopathic physician licensed under chapter 459, chiropractic physician licensed under chapter 460, or other practitioner licensed under the laws of this state **who knowingly and willfully assists, conspires with, or urges any insured party to fraudulently violate any of the provisions of this section or part XI of chapter 627, or any person who, due to such assistance, conspiracy, or urging by said physician, osteopathic physician, chiropractic physician, or practitioner, knowingly and willfully benefits from the proceeds derived from the use of such fraud, commits insurance fraud,** punishable as provided in subsection (11). In the event that a physician, osteopathic physician, chiropractic physician, or practitioner is adjudicated guilty of a violation of this section, the Board of Medicine as set forth in chapter 458, the Board of Osteopathic Medicine as set forth in chapter 459, the Board of Chiropractic Medicine as set forth in chapter 460, or other appropriate

licensing authority shall hold an administrative hearing to consider the imposition of administrative sanctions as provided by law against said physician, osteopathic physician, chiropractic physician, or practitioner.

FSA § 817.234, False and fraudulent insurance claims

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

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

In Ohralik, an argument similar to Cronin's trial court argument was made. It was asserted that the solicitation could not be punished unless an actual injury was established. The Supreme Court of the United States utterly rejected the argument that injury was needed before the state could enact a solicitation ban. The Court held that the state could enact a prophylactic rule for the known dangers of direct solicitation. Therefore, there is no need to resort to other principles of statutory construction and this Court should reject Cronin's trial court arguments based on Bradford. See also State v. Summerlot, 711 So.2d 589 (Fla. 3<sup>rd</sup> DCA 1998), State v. Copher, 395 So.2d 635 (Fla. 2<sup>nd</sup> DCA 1981)

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

#### **Summary**

This Court should apply the test of Central Hudson and find that § 817.234 Florida Statutes is constitutional as there exists a substantial governmental interest in restricting the

commercial speech, the regulations directly advance the asserted interest, and the regulation is narrowly tailored.

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

### CONCLUSION

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

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

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

Respectfully submitted and served,

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CERTIFICATE OF COMPLIANCE

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

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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

NASH N. CRONIN, ET AL.,

Respondent.

CASE NO. SC01-202

INDEX TO APPENDIX

- A. Opinion to be reviewed
- B. Second Interim Report of the Fifteenth Statewide Grand Jury to the Florida Supreme Court, Case no. 95,746