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State of Florida v. Gabriel Harden

MARSHAL: PLEASE RISE . HEAR YE.HEAR YE.HEAR YE.THE SUPREME COURT OF THEGREAT STATE OF FLORIDA ISNOW IN SESSIO N.ALL WHO HAVE CAUSE TO P LEA , DRAW NOOER , GIVE ATTENT ION DRAW NEAR , GIVE ATTENTION AND YOU SHALL BE HEARD. GOD SAVE THESE UNITED STATES , THE GREAT STATE OF FLORIDA AND THIS HONORA BLE COURT. LADIES AND GENTLEMEN, THE FLORIDA SUPREME COURT. PLEASE BE SE ATED .

CHIEF JUSTIC E: GOOD MORNING LADIES AND GENTLEMEN, AND WELC OME TO THE FLORIDASUPREME COURT.THE FI RST CASE ON TODAY'SDOCKET IS STATE OF FL ORIDA VERSUS GABRIEL HARDEN ANDJUSTICE CANT ERO I S RECUSED ON THIS CASE. PARTIES READ Y? YOU MAY PROCEED.

MAY IT PLEASE THE COURT . I AM L OUIS HUBENER WITH THE OFFICE OF THE ATTORNEY GENERAL , REPRESENTING THESTATE OF FLORIDA IN THIS CASE . THE FACTS OF THIS CASE ARE SIMPLE. D ENTAL EXPRESS PROVIDED DENTAL SERVICES TO MEDICAID ELIGIBLE CHILDREN ANDVARIOUS OF ITS EMPLOYEES P AID VAN DRIVERS \$ 25 FOR EACH MEDI CAID ELIGIBLE CHILD.

WOULD YOU, AS A PART OF Y OUR EXPLANATION OF THIS , TELL US WHAT , EXACTLY , HAPPENED IN THE TRIAL COURT , IN REGARDS TO THE IS SUE OF WHETHER THESE PEOPLE WERE EMPLOYEES.

WELL , THE DEFENDANTS FILED A MOTION TO DISMISS AN UNSWORN MOTION , RAISING THE , SEVERAL LE GAL ISSUES , AND SUBSEQUENTLY FI LED A SWORN M OTION TO DISMISS, ASSERTING THAT THEY WERE EMPLOYEES U NDER THE , AS CONTEMPLATED BY THE FEDERAL SAFE HARBOR.

AND YOU AS THE STATE, YOU FILED A RESPONSE IN OPPOSITION TO THE MOTION TODISMISS, AND YOU ACTUALLY RAISED THE ISSUE OF WHETHER THEY WERE BONA FIDE EMPLOYEES?

WE DENIED THAT BUT WE ALSO FILED A MOTION TO STRIKE THE MOTION TO DISMISS , FOR VARI OUS REASONS, BE CAUSE WE DIDN'T THINK IT PROPERLY S WORE TO ANYTHING. THAT WAS NEVER RULED ON , SO IN FACT , IT WAS NOT DECIDED BY THE JUDGE WH ETHER THESE PEOPLE WERE

I AM SOR RY FOR INTERRUPTING YOU, BUT THAT WAS IN MY M IND.

BUT J USTICE QUINCE RAISES THE PO INT THAT , FOR PURPOSES OF DECIDING WHETHER THIS STATUTE IS UNCONSTITUTIONAL , ARE WE TO AS SUME THAT THEY ARE BONA FIDE EMPLOYEES?

IT VIOLATED S E CTION 9.2-E OF 9.240 , AND THE COURTFFOUND THAT IT WAS EXEMPTED TO THE FEDERAL ANTI-KICKBACK STATUTE.

IS THE STATE CONTENDING THAT ANY SOLICITATION AND PAYMENT OF A REFERRAL FE E SO TO SPEAK, IS UNLAWFUL , UNDER FLORIDA'S ANTI-KICKBACK STATUTE , AS WELL AS UNDER THE FEDERAL STATUTE?

IT IS UNLAWFUL UNDER THEFLORIDA , A ND IT IS UNLAWFUL UNDER THE FEDERAL.

NOW, IS THERE A CASE, BUTOF COURSE , IF IT IS UNLAWFUL , THE RE IS NO T AN ISSUE A BOUT , IF THE SAME CONDUCT IS UNLAWFUL , THEN THERE IS NOT AN ISSUE OF CONFLICT , AT LEAST ON THAT ISSUE .

I DON'T THINK YOU NECESSARILY EVEN NEED TO GET TO THE PREEMPTION ISSUE, TO REVERSE THE LOWER COURTS IN THIS CASE .

WHAT IS YOUR STRONGEST CASE FOR STATING THAT , UNDER , EVEN UNDER THE FEDERAL STATUTES, THAT KICKBACKS OR REFERRALS , I GUESS KICKBACKS SOUNDS LIKE SUCH A SINISTER WORD BUT REFERRAL PAYMENT FOR BRINGING SOMEBODY IN IS ILLEGAL?

WELL, FIRST OF ALL , THE SAFE HARBOR PROVISION THE SAFE HARBOR PROVISION PROTECTS PAYMENTS MADE IN A BONA FIDE EMPLOYMENT RELATIONSHIP TO AN EMPLOYEE, FOR THE PROVISION OF COVERED ITEMS OR SERVICES, FOR WHICH PAYMENT MAY BE MADE, IN WHOLE OR IN PART UNDER THE MEDICAID PROGRAM. IN OTHER WORDS, YOU HAVE TO BE AN EMPLOYEE, AND YOU HAVE TO BE PROVIDING SERVICES FOR WHICH PAYMENT MAY BE MADE IN WHOLE OR PART , UNDER THE MEDICAID PROGRAM . AND THE CONTENTION HERE, IS THAT THESE DRIVERS WERE GOING OUT , AND INFORMING PARENTS AND CHILDREN IN THE COMMUNITY, THAT THEY WERE ELIGIBLE FOR DENTAL SERVICES UNDER MEDICAID , OR LOCATING THOSE WHO WERE , TELLING THEM THAT THIS HARDEN ENTERPRISE PROVIDED DENTAL SERVICES AND THEN TRANSPORTING THEM FOR TREATMENT, AT WHICH POINT THE DRIVERS WERE PAID \$25 PER HEAD.

SO THERE WOULD BE NOTHING WRONG WITH EVERYTHING UP TO THE POINT OF THEM PAYING \$25 PER HEAD. IN OTHER WORDS NOTHING WRONG WITH SOLICITING TO SHOW THAT THIS PROVIDER ACCEPTS MEDICAID , THESE ARE THEIR SERVICES.

APPARENTLY NOT UNDER THE KICKBACK STATUTE ITSELF. THERE IS ANOTHER STATUTE, AND THIS WHOLE AREA IS DISCUSSED IN HIS ADVISORY OPINION 07 , WHICH IS IN THE APPENDIX TO OUR REPLY BRIEF , AND IT POINTS OUT THAT OFFERING SOMEBODY SOMETHING OF VALUE TO INDUCE A SELF REFERRAL , IS, ALSO , A CIVIL OFFENSE UNDER ANOTHER PROVISION OF THE LAW. SO IT IS NOT SOMETHING THAT YOU REALLY SHOULD BE DOING.

WHAT I SAID IS PAYMENT OF IT, BUT THERE IS CERTAINLY THE FIRST AMENDMENT SITUATION , WHICH

PAYMENT FOR A REFERRAL IS THE KEY.

RATHER THAN JUST SOLICITATION THAT THIS IS AVAILABLE.

RIGHT.

SO IF THESE SAME PEOPLE WENT OUT AND TALKED TO THE SAME MEDICAID ELIGIBLE CLIENTS TO TELL THEM ABOUT THE HARDEN DENTAL CLINIC, AND THEN THE PEOPLE CAME IN WITHOUT THESE EMPLOYEES ACTUALLY TRANSPORTING THEM THERE, AND SAID MR . SO-AND-SO CAME BY AND TOLD ME I WAS ELIGIBLE FOR THESE MEDICAID PAYMENTS .

THAT IS FINE.

THEY CAME IN AND GOT THE SERVICES, AND THEN REMUNERATION THAT HARDEN WOULD THEN GET FROM THESE EMPLOYEES IS BASED ON THE NUMBER OF PEOPLE WHO CAME IN. THAT WOULD BE ILLEGAL , ALSO.

RIGHT . RIGHT.

SO HOW FAR DOES THIS GO? WHAT COULD A PERSON LAWFULLY DO, IN THE SOLICITATION OF BUSINESS BY EMPLOYEES?

THEY CAN ADVERTISE THEIR SERVICES. I THINK THEY CAN TELL PEOPLE THAT DR . HARDEN TR

EATS , NOT DR. HARDEN BUT HARDEN DENTISTRY OPERATION , TREATS MEDICAID -HE WILL
JIBLING CHILDREN AND MEDICAID CHILDREN AND ADULTS, IF THAT IS THE CASE. THEY CAN
ADVERTISE. THEY CAN PUT OUT FLIERS IN THE COMMUNITY. BUT YOU CAN NOT

GO DOOR TO DOOR?

I AM SORRY.

COULD THEY GO DOOR TO DOOR WITH THOSE LEAVELETS ? LEAFLETS?

I THINK SO.

YOU COULD PAY TO HAVE SOMEONE DO THAT.

I THINK YOU COULD PAY TO HAVE SOMEONE GO AND HAND OUT FLIERS TO THE COMMUNITY.

AND THAT PERSON YOU COULD PAY TO TAKE THE FLIERS , COULD DRIVE THE PERSON DOWN TO
THE CLINIC .

AND HE IS NOT PAID FOR THAT REFERRAL?

WELL , HE IS PAID TO TAKE THE FLIERS OUT.

WELL , IF YOU COULD DRAW A CONNECTION BETWEEN, I DON'T KNOW , I THINK

WHAT IS THE EVIL THAT

THE EVIL IS PAYING SOMEBODY FOR REFERRAL , PAYING SOMEBODY TO BRING IN A PATIENT.

I UNDERSTAND THAT , BUT WHAT IS THE REASON THAT

POLICY?

FOR THE POLICY.

O K AY. THAT IS , ALSO , EXPLAINED IN THE ADVISORY OPINION 07. YOU HAVE TO UNDERSTAND
THAT WE ARE NOT JUST CONCERNED WITH A DENTAL OFFICE HERE , AN ISOLATED DENTIST
OFFICE OR DENTAL SERVICES AT ALL. YOU HAVE TO LOOK AT THE , THIS APPLIES TO THE WHOLE
SPECTRUM OF MEDICAID PROVIDERS AND MEDICAL SERVICES. NOT JUST DENTAL SERVICES. AND
WHEN YOU HAVE AN OPERATION LIKE THIS , THAT GOES OUT AND BRINGS IN ALL OF THESE
PATIENTS AND IS PAID , HHS HAS SAID THAT THIS , THAT ARRANGEMENTS OF THIS SORT ARE
FREQUENTLY PART OF ABUSIVE SCHEMES . THEY CAN BE UNDERTAKEN BY HOSPITALS , DOCTORS
, DENTISTS , ANYBODY WHO IS PROVIDING SERVICES, AND IT LEADS TO INAPPROPRIATE STEERING
OF PATIENTS, OVER UTILIZATION OF SERVICES.

WHAT IF HARDEN , INSTEAD OF OBTAINING THESE DRIVERS , THE WAY THAT THEY DID , GAVE A
GRANT TO A LOCAL COMMUNITY ORGANIZATION, TO BUY A BUS AND TO TRANSPORT THE IDEA
THE GRANT WAS TO USE THE BUS, THEN , TO TRANSPORT PATIENTS IN A LOCAL HOUSING
PROJECT, TO THE HARDEN CLINIC, AND THEY GAVE THEM A GRANT SPECIFICALLY FOR THAT
PURPOSE AND THEY GAVE THEM A GRANT SPECIFICALLY FOR THAT PURPOSE AND THEY
SUBSIDIZED THE TRANSPORTATION OF ALL OF THE ELIGIBLE FROM THE HOUSING PROJECT TO THE
HARDEN CLINIC . NOW, A CONDITION OF THE GRANT WAS

I THINK THAT IS PAYING FOR A REFERRAL

SO THAT WOULD BE ILLEGAL , UNDER THIS STATUTE.

WHAT MR. HARDEN COULD HAVE DONE OR A MEDICAID PROVIDER COULD DO , I DON'T KNOW OF ANY IMPEDIMENT TO THAT PROVIDER , ALSO, BEING A TRANSPORTATION PROVIDER , IF HE OR SHE ENROLLS IN THE PROGRAM AND GETS A PROVIDER NUMBER FOR THAT SERVICE AND PROVIDES TRANSPORTATION TO THE MEDICAID ELIGIBLE , BUT YOU KNOW, THE THING IS THERE , AND MAYBE THIS IS WHY IT WASN'T DONE , IS THAT THE UNIVERSE OF TRANSPORTATION MEDICAID RECIPIENTS , IS SMALL OF TRANSPORTATION ELIGIBLE MEDICAID RECIPIENTS IS SMALL , COMPARED TO BEING ELIGIBLE , BECAUSE TRANSPORTATION, AND THAT IS WHAT THIS SAFE HARBOR IS TALKING ABOUT , SOMETHING THAT IS PAID FOR , AND TO BE ELIGIBLE FOR TRANSPORTATION , YOU HAVE TO HAVE NO OTHER MEANS OF GETTING TO THE DOCTORS OR DENTIST'S OFFICE. NOBODY CAN TAKE YOU. YOU DON'T HAVE YOUR OWN TRANSPORTATION. YOU ARE NOT ABLE TO USE PUBLIC TRANSPORTATION. SO IN THAT CASE , THE STATE WILL PAY A TRANSPORTATION PROVIDER TO BRING THESE PEOPLE .

BUT WE DON'T HAVE A QUESTION HERE OF WHETHER OR NOT THE HARDEN CLINIC OR ANY OF THESE PEOPLE , ACTUALLY BILLED MEDICAID FOR ANY TRANSPORTATION SERVICES.

NO. THERE IS NO CLAIM THEY DID THERE. IS NO CLAIM THAT HE WAS A TRANSPORTATION PROVIDER . BUT IF HE HAD WANTED TO DO THIS, THEN HE SHOULD HAVE COMPLIED WITH THE LAW AND BEEN ENROLLED IN THE PROGRAM AS A TRANSPORTATION PROVIDER.

BUT THERE IS, ALSO, NO CLAIM THAT THERE WAS OVER UTILIZATION OF SERVICES.

WELL , THAT IS IN THIS CASE. BUT AS HHS POINTS OUT , ARRANGEMENTS OR SCHEMES OF THIS NATURE ARE FREQUENTLY ASSOCIATED WITH ABUSIVE PRACTICES.

AND YOU KEEP ON REFERRING TO THIS ADVISORY OPINION. I AM STILL CONCERNED THAT THERE , REALLY, ISN'T ANYTHING DIRECTLY IN THE MEDICAID LAW THAT WOULD PROHIBIT THIS , BUT YOU ARE SAYING THE PLAIN LANGUAGE OF THE SAFE HARBOR PROVISION , IF READ IN CONTEXT , WOULD NOT ALLOW IT. IS THAT

RIGHT. BECAUSE THE EMPLOYEE HAS TO BE PROVIDING A SERVICE FOR WHICH PAYMENT MAY BE MADE IN WHOLE OR PART UNDER THE MEDICAID PROGRAM. NOW, IF HE HAD BEEN A TRANSPORTATION PROVIDER , THEN HE COULD HAVE BEEN PAID FOR THAT , AND THE EMPLOYEE COULD HAVE BEEN PAID ANY WAY HE WANTED TO BE PAID.

WELL, THEN , UNDER THAT THEORY, IF THE EMPLOYEE , THESE PEOPLE WHO WENT AND SOLICITED AND DROVE THE PEOPLE, IF THEY IN FACT , HAD OTHER DUTIES AT THE CLINIC, WHICH INCLUDED MAYBE DENTAL , THEY WERE A DENTAL ASSISTANT OR SOMETHING TO THAT EFFECT , WOULD THE SCHEME BE OKAY THEN?

NO. ABSOLUTELY NOT .

ON THE , ASSUMING THAT WE DON'T GET TO THIS ISSUE AND THE BASIS THAT THE TRIAL COURT, APPELLATE COURT FOUND THEIR TO BE AN UNCONSTITUTIONAL STATUTE, ON THE SECOND ISSUE OF THE MENS REA , DO YOU AGREE THAT THE AMENDMENT THAT THE STATUTE WOULD APPLY TO THESE INDIVIDUALS?

NO.

WHAT WOULD BE THE DIFFERENCE AS TO THE - -

ONE ELEMENT , IN THE U .S. VERSUS STAR KES CASE AND THE YOU-CON CASE, YOU WILL SEE THAT THE AND THE U-CON CASE, YOU WILL SEE THAT IN ONE CASE THE DOCTORS WERE BEING PAID BECAUSE THEY WERE RENDERING SERVICES THAT WERE COMPREHENSIBLE UNDER MEDICARE,

MEDICAID , WHICHEVER IT WAS , AND THAT THEY WERE PAID FOR THE VALUE OF THE SERVICES NOT FOR THE VALUE OF THE REFERRALS THAT THEY WERE ONLY TO PROVIDE TO THE HOSPITAL. AS TO THE MENS REA ARGUMENT, THE LOWER COURT CONCLUDED THAT FLORIDA LAW WOULD ALLOW PROSECUTION OF NEGLIGENT OR INADVERTENT CONDUCT AND THAT WOULD BE AN OBSTACLE TO THE ACHIEVEMENT OF THE FULL PURPOSES AND OBJECTIVES OF CONGRESS AND THEREFORE THE LAW WAS PREEMPTED. WELL, IN THE FIRST PLACE , I AM NOT SURE YOU EVEN NEEDED TO GET TO THE PREEMPTION QUESTION AGAIN HERE , BECAUSE THE DEFENDANTS WERE NOT CHARGED WITH NEGLIGENT OR INADVERTENT CONDUCT . THEY DO NOT CLAIM THEY WERE ACTING NEGLIGENTLY OR INADVERTENTLY. THEY HAVE ADMITTED THAT, THROUGHOUT THESE PROCEEDINGS THEY KNEW WHAT THEY WERE DOING. THEY WERE PAYING \$25 TO THE VAN DRIVERS FOR EVERY ELIGIBLE CHILD THAT WAS BROUGHT IN. THAT IS NOT NEGLIGENT CONDUCT . SO THAT HAS NEVER BEEN AT ISSUE. I DON'T KNOW HOW IT GOT TO BE TREATED AS A SERIOUS MATTER IN THIS CASE, BECAUSE THAT IS NOT WHAT WE ARE DOING, AND WE WEREN'T TRYING TO PROSECUTE THEM ON THE BASIS THAT THEY HAD DONE SOMETHING THAT WAS NEGLIGENT . SECOND, HOWEVER , IF THERE IS EMPLIED PREEMPTION , ITS IF THERE IS IMPLIED PREEMPTIONS , ITS EFFECT IS NEGLIGENT , AND IN THIS CASE , THE CASE LAW THAT WE WERE WE HAVE CITED IN OUR BRIEF , IF A STATUTE IS PREEMPTED, IT IS ONLY TO THE EXTENT OF THE CONDUCT, SO IF YOU LOOK AT THE PREVIOUS DEFINITION AND TAKE OUT THE WORDS "SHOULD BE AWARE" , WHICH IS ALL THE PREEMPTION WOULD REQUIRE IF THERE IS PREEMPTION , IF THAT LANGUAGE IS DISREGARDED, THEN THE TERM "KNOWINGLY" MEANS SOMEONE WHO WAS AWARE OF THE NATURE OF HIS CONDUCT, AND THAT IT IS UNLAWFUL.

WHAT DOES WILLFUL ADD TO KNOWING?

WHAT DOES WILLFUL ADD TO IT?

YES.

THAT IS A GOOD QUESTION. I HAVE READ A LOT OF CASES , AND I AM NOT SURE THAT I HAVE A GOOD EASY ANSWER TO THAT QUESTION. BASICALLY WHAT IT MEANS IS THAT YOU INTENDED TO DO SOMETHING UNLAWFUL . THAT IS THE U.S. VERSUS STARKES CASE, AND IT IS , IF YOU LOOK AT FOOTNOTE 13 , THEY CITE A HOST OF CASES THAT DO THE SAME THING. YOU INTENDED TO DO SOMETHING UNLAWFUL.

THAT WOULD BE THIS CASE, BECAUSE THEIR DEFENSE WOULD BE THAT WE THOUGHT IT WAS LAWFUL , UNDER THE MEDICAID SCHEME.

YES. I SUPPOSE THEY CAN PUT THEIR INTENT IN AS AN ISSUE , BUT I THINK IF YOU TAKE OUT THOSE THREE WORDS AND YOU ARE LEFT WITH SOME BODY WHO KNOWS THE NATURE OF HIS CONDUCT , WHICH IS UNLAWFUL , AND THAT FITS PERFECTLY WITH WHAT THE ELEVENTH CIRCUIT SAID IN THE U.S. VERSUS STARKES CASE ABOUT THE FEDERAL LAW . IT MEANS YOU KNOW YOU ARE DOING SOMETHING UNLAWFUL. I DON'T CONCERN FOR A MOMENT, HOWEVER, THAT PREEMPTION APPLIES HERE OR SHOULD APPLY . FIRST OF ALL, BECAUSE IN 1972, WHEN THE FEDERAL ANTI-KICKBACK LAW WAS ENACTED , CONGRESS EXPRESSLY SAID OR IT WAS SAID IN A HOUSE REPORT , THAT THE FEDERAL PROVISIONS WERE IN ADDITION TO AND NOT IN LIEU OF PROVISIONS OF STATE LAW , AND THEY HAVE NEVER CHANGED THAT. THEY HAVE NEVER GONE BACK AND SAID SPECIFICALLY , THAT , WELL , WE INTENDED FOR THE STATE TO PROSECUTE THEM BUT WE ARE LIMITING THEM NOW. AN MATTER OF FACT, WHEN THEY AN MATTER OF FACT, WHEN THEY AMEND AND , MATTER OF FACT WHEN THEY AMENDED THE LAW AND ADDED SAFE HARBOR , THEY PUT IN THAT THERE IS NO INTENTION TO AMEND STATE LAW AND THEY PUT IN THAT MEDICAID LAW REQUIRES THAT STATES HAVE MEDICAID FRAUD UNITS , WHOSE PURPOSE IS TO PROSECUTE VIOLATIONS OF ALL APPLICABLE STATE LAWS REGARDING ANY AND ALL ASPECTS OF FRAUD! NOW , THAT IS ABOUT AS , THAT IS REMARKABLY CLEAR AND BROAD STATEMENT THAT THAT IS WHAT THE STATES ARE INTENDED TO DO , PROSECUTE THEIR OWN FRAUD LAWS. THE

FEDERAL AGENCY, HHS , HAS ALSO SAID THAT STATE LAW IS NOT PREEMPTED.

LET ME ASK B E FORE YOU GET TOO FAR AW AY . I SEE THAT YOU ARE IN YOUR REBUTTAL TIME HERE. IF THES E, I F THESE TRANSPORTATION PEOPLE O R EMPLOYEES IN THIS CASE , ARE , REALLY , B ONA FIDE EMPLOYEES AS DEFINED BY THE FEDERAL STATUTE , AND THAT THERE IS NO PROHIBITION IN THE FEDERAL STATUTE FOR THIS KIND OF SOLICITATION , IT WOULD STILL BE A VIOL ATION OF THE STATE STATUTE , CORRECT?

ABSOLUTELY.

AND SO IS THERE, YOUR ARGUMENT IS, THEN , THAT THERE IS NO PROBLEM WITH THE FACT THAT THE STATE STATUTE DOES NOT INCORPORATE ANY OF THE SAFE HARBOR PROVISIONS OF THE FEDERAL STATUTE.

YES . CONGRESS HAS SIMPLY ALLO WED , IF YOU ACCEPT THEIR AR GUMENT , THAT THE STATES MAY PROSECUTE, WHERE THE FEDERAL GOVERNMENT DOESN'T.

AND SO A PROVIDER WHO IS LEGITIMATELY OPERATING UNDER THE FEDERAL STATUTE , CAN STILL BE PROSECUTED IN STATE COURT, FOR THE SAME CONDUCT THAT IS LEGITIMATE UNDER FEDERAL STATUTE.

YES. AND I DON'T THINK THAT I S A BIG PROB LEM , BECAUSE YOU HAVE 50 STATES. I DON'T KNOW HOW MANY ARE IN THE MEDICAID PROGRAMS, BUT YOU HAVE TO ASSUME THAT THERE ARE VARIATIONS AND DIFFERENCES AM ONG ALL THE STATE LAWS, AND WE HAVE TRIED TO POINT THAT OUT IN THE APPEND IX , TO OUR REPLY BRIEF, SO THAT A PROVIDER IS S IMPLY OBLIGATED TO BE AWARE OF THE LAW IN THE STATE IN WHICH HE IS OPERATING . YOU CAN'T EXPECT

YOU ARE IN YOUR REBUTTAL, IF YOU WANT TO SAVE YOUR T IME.

THANK YOU.

MAY IT PLEASE THE COURT. RICHARD ST RAFER FOR GABRIEL HARDEN THE APPELLEE.

I UNDERSTAND YOU ARE GOING TO GIVE MR . TURNER FIVE MINUTES.

CORRECT.

AND THE LIGHT WILL COME O N. I WILL LEAVE IT T O YOU ALL TO MAKE SURE YOU K EEP TRACK OF TIME .

THE STATE HAS MADE TWO ALTERNATIVE ARGUMENT. FIRST , THE STATE CONTENDS THAT STATE LEGISLATURES ARE FREE T O CRIMINALIZE ALL THE CONDUCT EXCLUDED FR OM CRIMINAL AND CI VIL SANCTIONS BY SIX STATUT ORY EX EMPTIONS AND NOW 22 SAFE HARBOR S THAT THE FEDERAL SYSTEM HAS , OVER THE COURSE OF YEARS , DEVELOPED TO DEFINE WHAT KIND OF FINANCIAL ARRANGEMENTS ARE BENEFICIAL TO THE PROGRAM ARE BENEFICIAL TO THE PROGRAM AND THEREFORE SHOULD BE ENCOURAGED . SECOND, THE STATE ASS ERTS THAT, EVEN IF THE STATE CAN'T DO THAT, THAT HARDEN DOES NOT FIT WITHIN THE EMPLOYEE/EMPLOYER EXCE PTION .

TO ME , THE MOST INTERESTING PART OF HIS ARGUMENT , AND HE IS BASICALLY SA YING THAT, IN ORDER TO FIT INTO THE EMPLOYER /EMPLOYEE RELATIONSHIP, THAT THE EMPLOYEE HAS TO BE EN GAGED IN SERVICES THAT ARE CO VERED BY MEDICAID , AND WHAT IS YOUR ANS WER TO THAT?

THAT IS A TOTAL MISREADING OF THE LANGUAGE. THE LANGUAGE OF THE , BOTH THE EXCE

PTION IN THE SAFE HARBOR SAY THAT THE EMPLOYEE MUST BE HELPING ASSISTING IN FURNISHING COVERED SERVICES. WHAT THEY P R I E S T W I S T H A T T O M E A N I N A W H A T T H E Y T W I S T T H A T T O M E A N I N A V E R Y N A R R O W W A Y I S T O S A Y T H A T O N L Y T H E N U R S E S A N D D O C T O R S W H O C A N B I L L T H E I R S E R V I C E S T O M E D I C A I D , C A N B E C O V E R E D A S E M P L O Y E E S . T H E R E I S N O T H I N G I N T H E R E G U L A T I O N T H A T S A Y S T H A T I T S H O U L D B E T H A T N A R R O W . I N F A C T , B O T H T H E P R O P O S E D S A F E H A R B O R F O R E M P L O Y E E , A N D T H E F I N A L O R D E R , F I N A L R U L E S T H A T C A M E O U T , I N B O T H O F T H O S E , T H E O I G E X P R E S S L Y S T A T E D T H A T T H E E M P L O Y E R ' S S A F E H A R B O R W A S T O , Q U O T E , P E R M I T A N E M P L O Y E R T O P A Y A N E M P L O Y E E I N W H A T E V E R M A N N E R H E O R S H E C H O S E F O R H A V I N G T H A T E M P L O Y E E A S S I S T I N S O L I C I T A T I O N O F P R O G R A M B U S I N E S S . N O W , A N E M P L O Y E R P A Y S A N E M P L O Y E E T O S O L I C I T E D P R O G R A M B U S I N E S S , I T I S N O T P R O H I B I T E D . S O I T I S D I R E C T L Y C O N T R A R Y T O T H E L A N G U A G E I N B O T H T H E S A F E H A R B O R A N D T H E F I N A L C O M M E N T A R Y . I T I S A L S O C O N T R A R Y T O , I N 2 0 0 3 T H E O I G P A S S E D A R E G U L A T I O N O R P R O M U L G A T E D A R E G U L A T I O N F O R P H A R M A C E U T I C A L M A N U F A C T U R E S , I N W H I C H T H E Y S A I D T H A T S A L E S A G E N T S C O U L D B E , C O U L D F A L L W I T H I N T H E E M P L O Y E R S A F E H A R B O R . N O W , S A L E S A G E N T S O B V I O U S L Y A R E N O T B I L L I N G T H E I R S E R V I C E S T O M E D I C A I D , S O T H E I R C O N S T R U C T I O N O F T H I S S A F E H A R B O R I S T O T A L L Y C O N T R A R Y T O T H E O I G ' S O W N S T A T E M E N T S A B O U T I T . N O W , E V E N I F Y O U I G N O R E T H E L A N G U A G E O F T H E O I G , Y O U G E T T O T H E A B S U R D C O N T Q U E N C E S H E R E . W H A T I F A D O C T O R W E R E T O S E N D O U T C A R D S R E M I N D I N G P A T I E N T S T O G E T T H E I R F L U S H O T S . I A M S U R E T H E D O C T O R I S N ' T T Y P I N G T H O S E C A R D S O U T . T H E Y A R E P A Y I N G A R E C E P T I O N I S T O R S E C R E T A R Y T O T Y P E T H O S E C A R D S A N D M A I L T H E M T O P E R S P E C T I V E P A T I E N T S A N D S O L I C I T T H E M T O C O M E I N A N D G E T T H E I R F L U S H O T . U N D E R T H A T , P A Y I N G T H E E M P L O Y E E I S A C R I M E .

I F T H E Y W E R E P A I D B A S E D O N H O W M A N Y P A T I E N T S C A M E I N , B U T I D I D N ' T H E A R H I S A R G U M E N T T O B E T H A T I T W A S U N L A W F U L T O S O L I C I T . I T W A S T H A T I T S H O U L D N ' T B E O N A K I C K B A C K B A S I S , T H A T I S O N A P E R - H E A D B A S I S , B E C A U S E T H A T C O U L D L E A D T O , Y O U K N O W , T H E P O T E N T I A L , Y O U S E E T H A T

I T H I N K T H E Y A R E A R G U I N G B O T H T H O U G H . T H E Y A R E T R Y I N G T O C O N S T R U E T H E S A F E H A R B O R A S O N L Y C O V E R I N G T H E E M P L O Y E E , I F T H E E M P L O Y E E I S , C A N B I L L T H E I R S E R V I C E S . T H E Y A R E A L S O , T H E I R F A L L B A C K P O S I T I O N I S T H A T Y O U C A N N O T P A Y O N A C O M M I S S I O N B A S I S , W H I C H , A L S O , I S C O N T R A R Y T O T H E C O M M E N T A R Y I N T H E O I G F I N A L R U L E , B E C A U S E T H E R E W A S A S P E C I F I C Q U E S T I O N A S K E D A B O U T W H E T H E R Y O U C O U L D P A Y A P A R T - T I M E E M P L O Y E E S O L E L Y O N A C O M M I S S I O N B A S I S , A N D T H E O I G S A I D Y E S .

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Y O U R H O N O R , I T H I N K T H E R E I S R O O M F O R T H E S T A T E T O P R O H I B I T S P E C I F I C T Y P E S O F A B U S I V E E M P L O Y E R / E M P L O Y E E R E L A T I O N S H I P S F O R T Y P E S O F P A Y M E N T S . T H E Y C O U L D , P R O B A B L Y , P A S S L A W S - -

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L E T ' S B A C K U P . T H I S I S A C R I M I N A L C A S E . R U L E O F L I N I T Y A P P L I E S . T H E R E I S N O R E G U L A T I O N I N P L A C E , O T H E R T H A N T H E I R B R O A D

YOU ARE SAYING IT IS PROHIBITED. WE ARE NOT DISCUSSING WHETHER IT IS IN PLACE. THAT IS WHAT WE ARE DISCUSSING, THAT THEY CANNOT

THAT IS WHAT I AM SAYING. IF THERE ISN'T A SPECIFIC STATE REGULATION THAT INCLUDES A SPECIFIC PRACTICE AND THERE IS A BROAD FEDERAL SAFE HARBOR THAT FITS THE CONDUCT IN A CRIMINAL CASE, THEN WE ARE PROTECTED. IF THE STATE WANTS TO PASS A LAW THAT SAYS YOU CAN'T GO INTO A NURSING HOME AND SOLICIT FACE TO FACE WITH AN ELDERLY PERSON OR GO TO A KID AND SOLICIT THE CHILD, THOSE KINDS OF LAWS, I THINK, WOULD BE PROPER.

LET ME GO BACK AND ASK ME QUESTION, THEN, THAT COMMISSION PAYMENT, IN THE HYPOTHETICAL THAT I JUST RELATED TO YOU, IS THAT COMMISSION PAYMENT PROTECTED, AND THAT IS WHAT YOUR ANSWER IS?

A COMMISSION PATIENT CURRENTLY ARE PROTECTED.

PROTECTED.

THE BIGGER QUESTION IS COULD, OR ANOTHER QUESTION IS, COULD THE STATE PRECLUDE CERTAIN SPECIFIC TYPES OF PROGRAMS, AND THEY COULD.

YOUR SUBMISSION, I AM SORRY. I JUST WANTED TO MAKE SURE I FOLLOW-UP ON THIS. DOESN'T THE COMMISSION, HOWEVER, HAVE TO BE PAID TO SOMEONE IN AN EMPLOYEE /EMPLOYER RELATIONSHIP?

CORRECT.

SO JUST ANY JOE BLOW WHO YOU HAVE NO EMPLOYEE EMPLOYER RELATIONSHIP WITH, YOU COULD NOT PAY THEM ON A COMMISSION BASIS, COULD YOU?

THAT'S CORRECT. NOT ONLY YOU COULD PAY AN EMPLOYEE

HERE APPARENTLY THERE IS A CONCESSION OF THAT RELATIONSHIP, SO THAT GOES AN AWFUL LONG WAY IN WHAT WE ARE TALKING ABOUT THIS MORNING, DOESN'T IT?

YES.

IT IS ALMOST CONTROLLING, ACTUALLY, WHEN YOU COME RIGHT DOWN TO IT.

I BELIEVE SO, AND HONESTLY THERE IS LOTS OF LEGISLATIVE HISTORY ABOUT NOT, THE SAFE HARBORS WERE NOT MEANT TO EXTEND NECESSARILY TO INDEPENDENT CONTRACTORS. THE OIG WAS NOT PREPARED TO DO THAT, BUT THEY WERE PREPARED TO DO IT FOR EMPLOYEES, BECAUSE EMPLOYEES WERE DEEMED TO BE UNDER ENOUGH SUPERVISION BY THE EMPLOYER, TO MAKE THE SAFE HARBOR BENEFICIAL.

MY QUESTION IS, ARE YOU SAYING THAT, UNDER THE FEDERAL MEDICAID STATUTE, THAT THIS TYPE OF CONDUCT IS ACTUALLY ENCOURAGED? THAT IS WHAT THE HARDEN CLINIC WAS ENGAGED IN.

YES. EMPLOYEE/EMPLOYER PARTS TO SOURCE OF BUSINESS IS - - PAYMENTS TO SOURCE OF BUSINESS IS DIRECTLY PERMITTED, AND LET ME TALK BRIEFLY BECAUSE I THINK THIS WILL ANSWER YOUR QUESTION THE STATE RELIES ON ADVISORY OPINION 007 THAT HAS A COMMENT ABOUT PAYING DRIVERS ON A PER-HEAD BASIS, SOMETIMES COULD BE AN ABUSIVE PROCEDURE AND WE AGREE WITH THAT, BUT THE SAME OPINION SAYS THAT FREE TRANSPORTATION IS AN IMPORTANT AND BENEFICIAL THING FOR THE PROGRAM, AND IN THE FACTS OF THIS CASE, THERE IS NO, THERE IS NO RISK OF OVER UTILIZATION OF SERVICES. WHICH WOULD BE A RISK. IF

SOMEONE WE NT IN AND COULD GO IN AND PAY SOMEONE TO GO INTO A NURSING HOME AND SELL WHEELCHAIRS ON A PER COMMISSION BASIS, THERE IS ARISK OF OVER UTILIZATION. IN THIS C ASE, THE CHILDREN THAT ARE , THE OBBASE , THE PATIENT BASE IN THIS CASE , ARE CHILD REN THAT THE STATEIS REQUIRED TO PROVIDE PERIODIC CLEANING , T EETH CLEANING SERVICES , SO THEREIS, YOU CANNOT HAVE OVER UTILIZATION . THEY ARE REQUIRED TO PROVIDE THE SERVICE, AND IF THEY DON'T DO, IT WHICH I S WHAT IS HAPPENING HERE AND TH ER E IS A 19 96 OIG REPORT THAT SAYS IT IS NOT HAP PENING , THERE SIMPLY IS NOT RISK OF OVER UTILIZATION OF A SERVICE THAT THE STATE ISREQUIRED TO PROVI DE, SO THE OIG ADV ISORY OPI NION THAT THEY RELY ON , SPECIFICALLY SAYS THAT WE SHOULD LOOK A T THESE CASES ON ACASE-BY-CASE BASIS, TO SEE WHETHER THE TYPE OF PAYMENT PRACTICE , WH ATEVER , HAS ARISK OF AB USE. IN THIS CASE , IT HAS NO RISK OF ABUSE , BECAUSE OF THETYPE OF SERVICE THAT IS B EING PROVIDED . NOW , BACK UP T O THEIR BROADER ARGUMENT THAT THE STATE CAN HAVE THE RIGHT TO CRIMINALIZE THE SAFE HARBORS , I THINK THAT IS A CLEAR CONFLICT PREEM PTION. WE CANNOT HAVE 51 B O SSES DEFINING WHAT TYPE OF COMMERCIAL PRA CTICES ARE LEGITIMATE AND BENEFICIAL IN THIS ERA O F NATIONWIDE HEALTH CARE PRACTICE.

COULD WE ASK OR MAKE AN INQUIRY. IT SEEMS AS THOUGH AT MULTIPLE P LACES , CERTAINLY FED ERAL LAW WITH REGAR D TO HEALTH CARE AND STATE LAW WITH REGARD TO HEALTH CARE, COME INTO CONFLI CT. IT IS NOT JUST IN THIS SITUATION.IT IS WHAT IS COVERED, WHAT IS NOT COVERED, WHAT THE STATES HAVE TO COVER. HOW FAR DOES YOUR PRINCIPLE GO THAT FEDERAL LAW M UST BE CONSIDERED AS AT L E AST IMPLIEDLY PREEMPTING WHAT THE STATE CAN DO?

I THINK WHERE THERE IS A DIRECT CONFLI CT BETWEEN A PROVISION IN THE FEDERAL STATUTE , L IKE THERE IS HERE, THEN THE STATE PROCEDURE HAS TO GIVE WAY. THE CASES THAT THE STATE RELIES ON ARE IN SITUATIONS WHERE THERE IS FEDERAL ANDSTATE LAW BUT THERE ISN'T SUCH A DIRECT CON CONNFLICT , AND THAT IS THE THERE IS SUCH A DIRECT CONFLICT , AND THAT IS THE LAW OF PREEMPTION SPECIFICALLY. THEY DEFINE WHAT THE F EDERALGOVERNMENT WANTS TO S AY IS LEGITIMATE, AND THE WAY TO LOOK AT THIS , I THINK THEBEST EXAMPLE IS IN THE MANDATORY EXCLUSION PROVISION, BECAUSE IF YOU , I F A DEFENDANT IS CONVICTED OF A STATE OFFENSE FOR ESSENTIALLY CONDUCT THAT IS PROPER UNDER THE FEDERAL SAFE HARBOR , IF THEY ARE CONVICTED OF THE STATE CRIME , THE FEDERAL GOVERNMENT MANNED TO RL LY MANNEDTORILY BARS YOU FROM THE FEDERAL PROGRAM T CONVICTS YOU AND THEN BARS YOU FROM THE FEDERAL PROGRAM FOR THE SAME CONDUCT. IT CAN'T BE A PART OF THE LAW .

IT WOULD AT LEAST HE LP YOUR CLIENT, MAYBE NOT TO THE EXTENT THAT YOU WOULD WANT, IS IF THE MENS REA INCLUDED WILLFULLY, WHICH WOULD MEAN THAT THERE WAS A S PECIFIC INTENT TO VIOLATE THE LAW.

CORRECT.

AND YOUR CLIENT SAID , LISTEN, THIS I S NOTSOMETHING THAT WE DID THIS IN THE FRONT. WE DID IT FOR ALL THESE REASONS.THEN FOR THAT , THAT WOULD BE AWAY TO BASI CALLY GIVE SOME BENEFIT TO WHAT THE STATE IS TRYING TO DO IN THE LONG-RUN, BUT IF YOU ARE OP ERATING WITH THE STATE , IT WOULD NOT BE SUBJECT TO PROSECUTION.

I THINK THE PO INT IS THE WILLFULNESS IS KNOWINGLY VIOLATING THE LAW , AND THE RECORD IN T HIS CASE BELOWSHOWS THAT JU DGE M ILLER WASGIVEN AN EMPLOYMENT PACKAGE TO SHOW THE EXTENT TO WHICH HARDEN'S COMPANY WENT TO MAKE SURE THAT THE DR IVERS WERE EMPLOYEES AND DID BACKGROUND CHECKS , WH ETHER THEY HAD CHILD ABUSE PROBLEMS. THEY DID EXTENSIVE BACKGROUND FOR THE PREC ISE REASON THAT THEY WERE TR YINGTO FIT WITHIN WHAT THEY THOUGHT WAS THE EXCEPTION.

WERE THEY PAID FOR OTHER THINGS THAN FOR THE PICKING UP OF THE MEDICAID -ELIGIBLE CHILDREN?

THEY WERE PAID FOR , ALSO , EXPLAINING TO THE PARENT WHAT THE PROGRAM WAS.

SO THEY WEREN'T REALLY, I MEAN, NOW , EVEN THOUGH HE HAS CONCEDED FOR THE PURPOSE OF THIS CONSTITUTIONAL CHALLENGE , THEIR BONA FIDE EMPLOYMENT RELATIONSHIP , IT WASN'T AS IF THEY WERE PEOPLE THAT WERE ACTUALLY EMPLOYED DOING OTHER THINGS IN THE HARDEN CLINIC THAT WERE SENT OUT THINGS IN THE HARDEN CLINIC THAT WERE ALSO SENT OUT TO DO THIS?

NO. THIS IS THEIR JOB FUNCTION. THE STATE ALSO RELIED ON A PREEMPTION ABOUT THE OIG REPORT. I THINK THE STATE POINTS OUT THAT THE STATE LAWS IN THIS AREA SIMPLY RECOGNIZE THAT THERE IS ROOM FOR A STATE, IF THEY CHOOSE , TO PRECLUDE SPECIFIC TYPES OF ABUSIVE PRACTICES , SUCH AS THE PERSON GOING TO THE HOSPITAL AND GOING TO SOMEBODY'S BED AND TRYING TO SELL THEM SOMETHING. THOSE TYPES OF THINGS COULD BE PASSED BY THE STATE , BANNING EMPLOYEE/EMPLOYER PARTS BUT IT WOULD NOT NECESSARILY PRODUCE PAYMENTS, BUT IT WOULD NOT NECESSARILY PRODUCE THE SAME TYPE OF CONFLICT THAT WE HAVE HERE.

SO IT IS NOT REALLY THAT THE STATE IS PROHIBITED FROM VARYING FROM THE FEDERAL MEDICAID STATUTE. IT IS THE EXTENT TO WHICH THEY VARY , AND THAT BECOMES A MUCH MORE DIFFICULT ARGUMENT , BECAUSE AGAIN , YOU ARE NOT SAYING THAT THE TWO STATUTES HAVE TO BE IDENTICAL.

NO. THE PROBLEM IN THIS CASE IS THE STATE DIDN'T DO THAT. THE STATE JUST GOT RID OF ALL OF THE SAFE HARBORS , ALL OF THE EXEMPTIONS AND IS PROSECUTING, DESPITE THE BROAD FEDERAL EXEMPTIONS , AND THIS IS A CRIMINAL CASE WHERE THE STATE SHOULD HAVE TO, IF THEY WANT TO LIMIT THIS , GO THROUGH TO PASS LAWS AND NOT RELY ON SOME OBLIQUE LANGUAGE IN SOME ADVISORY OPINION LETTER.

THE STATE STATUTE COULDN'T BE CLEARER THAT THIS IS NOT ALLOWED.

I THINK IT IS VERY , VERY BROAD.

THERE IS NO AMBIGUITY IN THE STATE STATUTE.

CORRECT. IT WOULD PROHIBIT EVERY TYPE OF PRACTICE.

SO THE HARDEN CLINIC , SO THE RULE OF LITIGATION THAT YOU ARE SPEAKING ABOUT, DOESN'T APPLY TO THE STATE STATUTE.

IT APPLIES TO THE EXTENT THAT, IF YOU ARE OPERATING UNDER PARALLEL SYSTEMS AND THE FEDERAL GOVERNMENT IS SAYING THIS IS LEGAL AND THE STATE HAS A BROAD STATUTE, HOW DO YOU KNOW WHETHER THE STATE INTENDED TO COVER YOUR CONDUCT , ESPECIALLY WHERE YOU HAVE , BY THE WAY , THE PATIENT BROKERING STATUTE , WHICH WOULD , ALSO , COVER THE CONDUCT IN THIS CASE, BUT EXPRESSLY DOES INCORPORATE THE FEDERAL STATUTE . SO EVEN IF YOU HAVE A STATE LAW, YOU HAVE A DIRECT CONFLICT BETWEEN STATUTES. THE STATE BROKERING STATUTE DOES SPECIFICALLY INCORPORATE THE FEDERAL PROTECTIONS.

WHAT IS THE STATUTE NUMBER YOU ARE REFERRING TO?

18.505 SUB SECTION 3 , DISCUSSED BY JUDGE MILLER, IN FACT , IN HIS OPINION.

YOU ARE IN YOUR TIME.

I SEE. THANK YOU .

AS I SEE THIS CASE, IT IS NOT A QUESTION OF F I ELD PRO EMTION. I THINK THIS IS PRE EMTION FORM I THINK THIS IS A POSSIBILITY OF COMP LIES F IELD PREE LMS. YOU CANNOT E X PECT PROVIDERSTO BE PROHIBITED IN A FELONY SENSE FROM FEL ONY CONVICTION, FROM DOING THAT IN A FEDERAL PROGRAM, A FED ERALLY FU NDED PROGRAMWHICH THE FEDERALLY FUNDED PROGRAM ALLOWS. THERE IS A DIRECT INABILITY TO COMPLY WITH BO TH STATE LAW AND FEDERAL LAW. THAT IS THE PROB LEM.

IS THIS PROGRAM SOLELY FEDERALLY FUND ED?

NO, SI R.IT IS 60 PER CENT FLORIDA , FEDERALLY FUNDED, BUT THE FEDERAL HARBORS APPLY WHEN YOU HAVE ANY FEDERALLY F UNDED PROGRAM.

SO HOW DOES THAT RELATE TO THE PREEMPTION PROGRAM AND A FACT THAT A SIGNIFICANT PORTION OF THE MONIES FOR THE PROGRAM ARE STATE?

BECAUSE THE FEDERAL LAWS APPLY TO ANY FEDERALLY FUNDED PROGRAM.

THERE IS A POSSIBILITY OF DUAL COMPLIANCE . ALL THEY HAVE TO DO IS NOT DO THIS AND THEY ARE IN COMPLIANCE WITH BOTH STATUTES. ANOTHER PROBLEM IS , OURCLIENTS, THIS IS WH Y WE ARE H ERE, OUR CLIENTS ARE IN 50 STATES. WE COMPLY WITH FEDERAL LAW , PAYMENT PRACTICES THAT ARE SANCTIONED AND APPROVED. AND IF YOU HAVE GO T TO COME INTO EVERY STATE AND HAVE DIFFERENT PAYMENT PRACTICE APP ROVED , THAT IS A M A JOR PRO BLEM. WE HAVE A RI GHT T O RELY ON CONTROLLING THE PARAMOUNT FEDERAL LAW THAT T ELLS US WHAT WE CAN DO IN A PAYMENT PRACTICE. I THINK THIS GOES TO JUDGE LEWIS'S IN QUIRY . JUDGE , WE ARE NOT TAKING THE POSITION THAT THE STATE CAN NOT HAVE A BRO ADER LAW THAT, FOR EX AMPLE , WOULD COVER AN ABUSIVE SCHEME. THAT, IF THIS IS AN ABUSIVE SCHEME THAT WAS BEING CHARGED HERE, T HERE WOULD BE NO PROBLEM. STATE LAW WOULD CONT ROL. YOU WOULD HAVE IT BE YOND THE PARAMETER OF THE EXP RESS ALL OWED SAFE HARBOR. WHAT WE HAVE GOT IS A PAYMENT PRACTICE , PURE AND SIMPLE! A PERMISSIBLE PAYMENT PRACTICE , UNDER FEDERAL LAW, IN A FEDERAL PROGRAM, THAT IS NOW SUDDENLY CONVERTED , BECAUSE THE STATE LAW IS NOT SENSITIVE TO THE STATE HARBORS , I NTO A FELO NY. THAT IS WRONG, AND I THINK THAT THE EXPLANATION THAT YOU HAVE GOT HERE , IS WHEN YOU TURN TO THE FACT THAT THERE IS A LA CK OF SENSITIVITY. WHAT YOU HAVE GOT IS AN OLDER STATE STATUTE THAT IS NOT SENSITIVE TO THESE NEWER FEDERAL LAWS, WHEN THE PATIENT BROK ERING ACT STATUTE THAT IS PLIK ABLE TO ALL HEALTH CARE PROVIDER S IN FLORIDA.

GIVE THAT IS APPLICABLE TO ALL HEALTH CARE PROVIDERS IN FLORIDA.

GIVE ME THE HISTORY. WAS THE STATE STATUTE PASSED A S IT IS CURRENTLY , THAT IS A DDING THE ADDITIONAL WILLFUL BEFORE THE SAFE HARBOR PROVISION WERE ADDED?

THE STATUTE WE ARE DEALING WITH TODAY , THE STATE STATUTE WAS PASSED BEFORE THE RECENT CHANGE INSTHE SAFE HARBOR STATUTES CAME INTO PLAY. I THINK IF YOU GO TO THE C URRENT FLORIDA LAW, A VERY INTERESTING POINT AND ODDITY IN THIS WH OLE THING T HAT SORT OF EXPOSES THE WHOLETHING WE ARE TALKING ABOUT , IF YOU GO TO THE FLORIDA ANTI-KICKBACK STATUTE I N 456.054 THAT IS APP LICABLE TO ALL HEALTH CARE PROVIDERSIN THE STATE, NOT JUST MEDICAID OR MEDICA RE, THAT SAYS THAT REMUNERATION FOR SOLICITING A PA TIENT IS CONSIDERED PATIENT BROKERING UNDER FS 817.505. BUT WHEN YOU GO TO 817.505, THESE ARE RECENT STATUTES IN THE '9 0s AND 2000 , WHEN YOU GO TO THAT STATUTE, IT SAYS THE PAYMENT PRACTICE , ANY PAYMENT PRACTICE NOT PROHIBITED BY OUR STATUTE , THAT IS 1320-A -7 -BB, AND REGULATIONS THERE UNDER , ARE NOT PROHIB ITED. SO YOU HAVE STATE

LAW. THIS IS THE MOST FRUSTRATING THING TO ME OF FELLNIZING OF HEALTH CARE PROVIDERS FOR DOING WHAT IS PERMISSIBLE NOT ONLY UNDER STATE LAW FOR FOLLOWING A PAYMENT PRACTICE THAT IS NOT ONLY PERMISSIBLE UNDER FEDERAL LAW BUT IS PERMISSIBLE UNDER GENERAL STATE LAW DEALING WITH ALL HEALTH CARE PROVIDERS ON THIS SAME MATTER. WHAT THEY WANT TO DO IS TAKE AN OLDER STATUTE THAT DOESN'T HAVE THIS SENSITIVITY TO THE FEDERAL LAWS, AND MAKE A FELONY OUT OF IT. AND THAT IS WRONG.

BUT THIS STATUTE THAT WE ARE DEALING WITH, SPECIFICALLY REFERS TO MEDICAID, AND WOULDN'T THAT SPECIFIC STATUTE BE CONTROLLING IN THE MEDICAID SITUATION?

IT WOULD BE EXCEPT IT IS IN CONFLICT WITH FEDERAL STATUTE. IN OTHER WORDS

THE FEDERAL STATUTE DID NOT APPLY, ASSUMING, AND WE STILL HAVE THE STATE BROKERING STATUTE THAT YOU ARE TALKING ABOUT, BUT SINCE WE ARE TALKING ABOUT MEDICAID, WOULDN'T THE STATUTE UNDER MEDICAID, THE SPECIFIC STATUTE, CONTROL OVER THE GENERAL STATUTE?

I WOULD THINK YOU WOULD BE ABLE TO MAKE IT, THIS IS NOT IN THE RECORD BUT I THINK YOU WOULD BE ABLE TO MAKE A VERY SUCCESSFUL ARGUMENT THAT THE GENERAL BROKERING ACT BEING MORE RECENT IN TIME AND DEALING WITH THE EXACT SAME PAYMENT PRACTICE, WOULD APPLY TO ME AS A PROVIDER, WHETHER I WAS DOING IT GENERALLY OR WHETHER I WAS DOING IT IN THE MEDICAID OR MEDICARE PROGRAM.

BUT ISN'T THERE A DIFFERENCE, THOUGH, BECAUSE YOU HAVE STATE MONEY AND FEDERAL MONEY GOING TO THE MEDICAID PROGRAM, AS OPPOSED TO WHAT IS HAPPENING WITH AN ARM'S LENGTH TRANSACTION BETWEEN PATIENT AND PHYSICIAN? I THINK THAT IS THE POINT THAT SHE IS TRYING TO MAKE. ISN'T THERE REALLY A DIFFERENCE BETWEEN

NO, SIR, TO ME THERE IS NOT A DIFFERENCE, BECAUSE THE PATIENT IS, THE STATUTE THAT WE ARE TALKING ABOUT, THE PATIENT BROKERING STATUTE, IS SAYING THOSE PAYMENT PRACTICES UNDER FEDERAL LAW, ARE NOT INCLUDED HERE. THEY ARE PROTECTED UNDER FEDERAL LAW ARE NOT INCLUDED, AND THAT SAME FEDERAL LAW IS THE LAW WE ARE TALKING ABOUT FOR MEDICARE AND MEDICAID, SO IT WOULD NOT MAKE ANY SENSE TO INTERPRET IT THAT WAY. I SEE MY TIME IS UP. THANK YOU VERY MUCH.

CHIEF JUSTICE: THANK YOU.

JUST A COUPLE OF POINTS. THE DEFENDANTS HAVE NOT RELIED ON SECTION 817.505 AND NEITHER HAVE THE COURTS BELOW DISCUSSED IT AND IT HASN'T BEEN BRIEFED BY THE COURT. I DON'T RECALL IT EVEN BEING MENTIONED IN THE AMICUS BRIEF THAT WAS FILED.

THAT IS THE PATIENT BROKER STATUTE?

RIGHT.

BUT DO YOU AGREE THAT THIS STATUTE WE ARE DEALING WITH, PRECEDED IN TIME, THE AGENCY TO THE MEDICAID STATUTE?

YES. RIGHT.

FEDERAL MEDICAID STATUTE.

BUT, AGAIN, CONGRESS HAD SPECIFICALLY STATED THAT AT THE BEGINNING, THAT THAT EXPRESS PROVISION WAS AN ADDITION TO AND NOT IN LIEU OF STATE LAW.

BUT I AM CONCERNED WITH THE IDEA THAT , EVEN ASSUMING THAT THE STATE IS STILL INTENDING TO PROSECUTE THIS KIND OF BEHAVIOR , THAT BEFORE WE MAKE SOMETHING LIKE THIS A FELONY, THAT THE DEFENDANT SHOULD AT LEAST BE SUBJECT TO THE KNOWING AND WILLFUL REQUIREMENT THAT THEY WILLFULLY INTENDED TO VIOLATE THE LAW

JUST AS A MATTER OF STATE LAW.

AS A MATTER OF STATE LAW .

WE WERE NOT GOING TO PROSECUTE THEM FOR NEGLIGENCE. WE DON'T PROSECUTE THINGS LIKE THIS FOR NEGLIGENCE.

BUT THERE IS A DIFFERENCE BETWEEN SAYING I AM DOING THIS AND I AM HIM DOING THIS BECAUSE I BELIEVE THAT THIS WAS PROPER UNDER STATE AND FEDERAL LAW.

THEY CAN ASSERT THAT AS A DEFENSE AND WE WILL SEE WHERE IT GOES , BUT I AM BUT I MEAN, THIS COURT HAS SAID IN THE CONTEXT OF STATE LAWS THAT, THE LEGISLATURE CAN ELIMINATE AND , INTENT FROM THE CRIME. IT DOESN'T HAVE TO BE , IT IS NOT CONSTITUTIONALLY REQUIRED. IF THEY WANT TO MAKE THAT ARGUMENT, THEY WILL CERTAINLY BE HAPPY TO ADDRESS IT IN THE MAKE THAT ARGUMENT , THEN WE WILL CERTAINLY BE HAPPY TO ADDRESS IT IN THE TRIAL COURT. THANK YOU VERY MUCH .

THANK YOU. WE WILL ADDRESS THE AREA IN THE LAW , DEFINITELY ONE THAT NEEDS FURTHER EXPLANATION.

THANK YOU.