NO. 124754

IN THE SUPREME COURT OF ILLINOIS

STATE OF ILLINOIS *ex rel.* DAVID P. LEIBOWITZ, Trustee of the Bankruptcy Estate of Marie A. Cahill, Plaintiff-Appellee, v. FAMILY VISION CARE, LLC, NOVAMED MANAGEMENT SERVICES, LLC, SURGERY PARTNERS, INC., and JENNIFER GULA, Defendants-Appellants.	On Petition for Leave to Appeal as from the Illinois Appellate Court, First District, No. 18-0697 On appeal from the Circuit Court, Cook County, Illinois, Law Division, No. 17 L 4200 Honorable John C. Griffin, Judge Presiding

THE COALITION AGAINST INSURANCE FRAUD'S *AMICUS CURIAE* BRIEF IN SUPPORT OF PLAINTIFF-APPELLEE STATE OF ILLINOIS EX REL. DAVID A. LEIBOWITZ, AS TRUSTEE OF THE BANKRUPTCY ESTATE OF MARIE A. CAHILL

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STATEMENT OF POINTS AND AUTHORITIES

INTERESTS OF *AMICUS CURIAE*

Established more than twenty-five years ago, the Coalition Against Insurance Fraud (the "Coalition") is a national organization that draws upon the combined energy and resources of consumers, government organizations, and insurers. The membership of the Coalition encompasses a broad array of consumer groups, governmental organizations (including insurance regulatory agencies and the offices of state Attorneys General), insurance providers, and related organizations. The Coalition's aims are to: (1) combat all forms of insurance fraud, (2) reduce costs for consumers, and (3) promote fairness and integrity in the insurance system. To this end, the Coalition has played an active role in advocating for laws, regulations, and policies that help detect, prevent, deter, and prosecute insurance fraud.

The issues before the Court implicate the Coalition's core interests—combatting insurance fraud, reducing costs for consumers, and promoting integrity in the insurance system. This case involves the proper interpretation of the Insurance Claims Fraud Prevention Act (740 ILCS 92/1 *et seq.* (West 2002)) ("ICFPA") —a law that the Illinois General Assembly enacted in its fight against insurance fraud. The ICFPA imposes civil penalties against perpetrators of insurance fraud directed at private payers, including kickback schemes and the submission of fraudulent claims. The ICFPA financially incentivizes concerned private citizens, as well as insurers, with information about insurance fraud to bring *qui tam* actions on behalf of the State and seek equitable remedies or penalties designed to detect, prevent, and expose those activities. In short, the ICFPA is a critical and effective tool that protects the State, its consumers, and insurers. Accordingly, upholding the Appellate Court's proper interpretation of the ICFPA—an interpretation that sufficiently empowers private citizens with information

about insurance fraud to enforce its provisions as the General Assembly contemplated—is of significant interest to the Coalition.[1]

[1] The appendix to Defendants' opening brief is cited as "A._" and the supplementary appendix to this brief is cited as "*Amicus* Coalition S.A._"

INTRODUCTION

As the Illinois General Assembly recognized in adopting the ICFPA, insurance fraud is a significant problem for the State, insurance companies, and consumers alike. Although Illinois-level estimates are not readily available, non-healthcare insurance fraud is estimated nationally at more than $40 billion a year.[2] Non-healthcare insurance fraud costs the average American family between $400 to $700 in increased insurance premiums per year. *Id.* Accounting for healthcare insurance fraud only increases these burdens. One estimate places the cost per family to be close to $1,400 per year.[3] Insurance fraud inevitably translates into higher premiums and out-of-pocket expenses for consumers, as well as reduced benefits or coverage.[4] Moreover, fraud accounts for roughly 5 to 10 percent of claim costs for U.S. and Canadian insurers. Nearly one-third of insurers say fraud is as high as 20 percent of claims costs.[5] The healthcare system is a $2.4 trillion-a-year industry, and the FBI estimates that insurance fraud accounts for 3 to 10% of these costs annually.[6]

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[2] FBI, *Insurance Fraud*, http://www.fbi.gov/stats-services/publications/insurance-fraud (last visited Mar. 16, 2020).

[3] Johnny Parker, *Detecting and Preventing Insurance Fraud: State of the Nation in Review*, 52 Creighton L. Rev. 293, 294 (2019) (citing Heather Brown, *Good Question: How Much Does Insurance Fraud Cost Us?*, CBS Minnesota (Jan. 8, 2014), https://minnesota.cbslocal.com/2014/01/08/good-question-how-much-does-insurance-fraud-cost-us/).

[4] National Health Care Anti-Fraud Association, *The Challenge of Health Care Fraud*, https://www.nhcaa.org/resources/health-care-anti-fraud-resources/the-challenge-of-health-care-fraud/ (last visited Mar. 16, 2020).

[5] Coalition Against Insurance Fraud, *By the numbers: fraud statistics*, https://www.insurancefraud.org/statistics.htm (last visited Mar. 16, 2020).

[6] FBI, Financial Crimes Report to the Public: Fiscal Years 2010–2011, available at https://www.fbi.gov/stats-services/publications/financial-crimes-report-2010-2011 (last viewed March 17, 2020).

The ICFPA was designed to combat insurance fraud. By Public Act 91-522, the Illinois Insurance Fraud Task Force, a group comprised of insurance regulators, insurance-industry leaders, consumer representatives, and federal, state, and local law-enforcement officials, was charged with making recommendations about methods for investigating and combatting insurance fraud. *Amicus* Coalition S.A.006. One of the Task Force's principal recommendations was to develop a civil statute that provided a strong monetary incentive for both governmental entities and private citizens to pursue civil cases against the perpetrators of insurance fraud, which ultimately became the ICFPA. *Id.* 016–025.

The ICFPA imposes civil penalties on perpetrators of insurance fraud, extending civil liability to kickback arrangements that lead to false claims for insurance benefits, (see 740 ILCS 92/5(a) (West Supp. 2013)), and violations of certain enumerated sections of the Criminal Code that constitute insurance fraud, (see *id.* § 92/5(b) (*i.e.*, "Section 17-8.5 or Section 17-10.5 of the Criminal Code," or "Article 46 of the Criminal Code")). Among the conduct for which civil liability attaches is "the making of a false claim or . . . causing a false claim to be made on any policy of insurance . . . ." 720 ILCS 5/17-10.5(a)(1) (West Supp. 2013). Under the ICFPA, individuals engaged in insurance fraud are liable for a "civil penalty of not less than $5,000 nor more than $10,000, plus an assessment of not more than 3 times the amount of each claim for compensation" under the private contract for insurance at issue in a given case. 740 ILCS 92/5(b).

Importantly, the General Assembly provided two mechanisms for enforcement of the ICFPA. First, the ICFPA authorizes the "State's Attorney of the county in which the conduct occurred or the Attorney General" to enforce Section 5(b). 740 ILCS 92/10

(West 2002). Second, in recognition that, on its own, the Executive Branch would not be fully capable of policing insurance fraud, the ICFPA also allows for enforcement by private citizens acting on behalf of the State. 740 ILCS 92/15(a) (West 2002). More specifically, Section 15(a) provides that any "interested person, including an insurer, may bring a civil action for a violation of this Act for the person and for the State of Illinois." *Id.* While the ICFPA does not define the term "interested person," the plain and ordinary meaning of the term identifies someone who has an interest in something or is concerned, an interpretation that is consistent with the ICFPA as a whole and the General Assembly's intent to enlist members of the public concerned about insurance fraud with an avenue to initiate civil actions on the State's behalf.

As one California appellate court recognized when addressing California's nearly identical statute,[7] the *qui tam* provisions in these statutes provide "for a system of enforcement incentives" that "enable and encourage the enforcement of regulatory provisions" by private citizens on the State's behalf, which "would otherwise be beyond the resources of public entities to enforce." *State of California ex rel. Wilson v. Super. Ct. of L.A. Cty.*, 174 Cal. Rptr. 3d 317, 328 (Ct. App. 2014). In adopting the ICFPA, the General Assembly recognized that without incentivizing potential whistleblowers to aid in the State's enforcement efforts, the State "would lack the evidence and the resources to discover violations and to prosecute action[s]" such as the one brought by Plaintiff here. *Id.*

ICFPA actions benefit the State, consumers, insurers, and others harmed by insurance fraud. The State benefits because concerned individuals and insurers with

[7] See A.12 ¶ 18.

valuable information about insurance fraud are empowered to expose such schemes and pursue recoveries on the State's behalf, among other relief. Amounts recovered on the State's behalf may be used to investigate and prosecute insurance fraud, and are allocated to appropriate State agencies for enhanced insurance-fraud investigation, prosecution, and prevention efforts. See 740 ILCS 92/25(f)–(h) (West 2018). By enlisting members of the public in the fight against insurance fraud, the ICFPA complements the State's enforcement efforts and reduces the burdens placed on government agencies, which have limited resources.

Insurers benefit—regardless of whether they are parties to an ICFPA action and receive remuneration for the payment of fraudulent claims—because costs are reduced when insurance fraud is exposed. Consumers benefit because they are protected from fraudulent practices and treatments, higher premiums, and reduced benefits and coverage. The ICFPA serves not only as a vehicle to protect insurance companies and consumers from fraudulent insurance claims, but Section 5(a) also tries to ensure that patients and clients will be referred to healthcare providers because it is in their best interests rather than for financial reasons. See *id.* § 92/5(a) ("it is unlawful to knowingly offer or pay any remuneration directly or indirectly, in cash or in kind, to induce any person to procure clients or patients to obtain services or benefits under a contract of insurance or that will be the basis for a claim against an insured person or the person's insurer."). And the individuals and insurers who "blow the whistle" on insurance fraud are also financially rewarded for initiating successful *qui tam* actions.

In this case, the Appellate Court recognized the General Assembly's laudable goals of combatting insurance fraud, holding that a private citizen has standing, through

partial assignment from the State, to enforce Section 5(b) of the ICFPA. The Appellate Court properly determined the State suffers an injury to its sovereignty when insurance fraud is perpetrated because the State's laws have been violated and the State may assign that interest to a relator regardless of whether the State itself has lost money. Moreover, the Appellate Court correctly ruled the trustee of the bankruptcy estate of Marie Cahill—a former employee who worked at Defendant Family Vision Care, LLC and possessed valuable information about an alleged insurance fraud scheme—was an "interested person" authorized under Section 15(a) of the ICFPA to bring suit on the State's behalf. In doing so, the Appellate Court appropriately rejected the view that an "interested person" under Section 15(a) must be personally injured by the alleged insurance scheme.

To that end, the Appellate Court recognized the purpose and the legislative history of the ICFPA—to encourage and empower private citizens with information about insurance fraud to bring on the State's behalf a civil suit against the perpetrators. To conclude otherwise would severely limit the scope of the ICFPA's *qui tam* provisions contrary to the General Assembly's intent. Because the Appellate Court's conclusions are consistent with well-established standing principles and with every indicia of legislative intent—the text, structure, purpose, and history of the ICFPA—the Appellate Court's judgment should be upheld.

ARGUMENT

The Appellate Court properly concluded that a person has standing to "bring a civil action for a violation of [the ICFPA] for the person and for the State of Illinois." See A.16 ¶ 29. In reaching its decision, the Appellate Court recognized the State has an interest sufficient to assign to a relator to bring an action under the ICFPA regardless of whether the State has suffered monetary damages as a result of the alleged fraud. In

addition, the Appellate Court correctly held that a private citizen with information about insurance fraud is an "interested person" authorized to bring an action under Section 15(a) of the ICFPA.

I. THE APPELLATE COURT CORRECTLY HELD THAT PRIVATE PERSONS WHO POSSESS INFORMATION ABOUT INSURANCE FRAUD HAVE STANDING TO ENFORCE THE ICFPA'S PROVISIONS.

The Appellate Court correctly determined that private citizens with information about insurance fraud have standing to bring a lawsuit on behalf of the State under Section 5(b) of the ICFPA, regardless of whether the State has suffered direct monetary damages as a result of the fraud.

A. The State suffers an injury when its insurance-fraud laws are violated, and it may assign standing to a relator under the ICFPA.

Standing in Illinois "requires only some injury in fact to a legally cognizable interest." *Greer v. Ill. Hous. Dev. Auth.*, 122 Ill. 2d 462, 492 (1988). Whether "actual or threatened," the claimed injury must be: (1) "distinct and palpable," (2) "fairly traceable" to the defendant's actions, and (3) "substantially likely to be prevented or redressed by the grant of the requested relief." *Id.* at 492–93 (citations and quotations omitted). The Appellate Court correctly concluded Plaintiff had standing as a *qui tam* plaintiff based on a partial assignment of the State's claim.

With respect to the State's injury, the Appellate Court observed that "[o]f course, the State suffers an injury to its sovereignty when its laws are violated." A.14 ¶ 23 (relying on *Scachitti v. UBS Fin. Servs.*, 215 Ill. 2d 484, 507 (Ill. 2005) (analyzing the Illinois False Claims Act ("FCA") through the lens of the U.S. Supreme Court's analysis of the federal FCA in *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, 529 U.S. 765 (2000))). Consistent with the ICFPA's express recognition of "the social costs

of increased insurance rates due to fraud," (740 ILCS 92/5(c)), the Appellate Court determined the State "has an interest in protecting the public from insurance fraud and the authority to enact laws to prevent it." A.14 ¶ 23. Indeed, not only does the State suffer an injury to its sovereignty when laws prohibiting insurance fraud are violated, but it also reaps financial and other benefits from the ICFPA's relief provisions and procedural requirements. For example, amounts recovered in successful ICFPA actions are to be used to investigate and prosecute insurance fraud, and must be allocated to appropriate State agencies for enhanced insurance-fraud investigation, prosecution, and prevention efforts. 740 ILCS 92/25(f)–(h). The ICFPA also provides courts with the power to grant equitable relief that may be necessary, *inter alia*, to protect the public. *Id.* § 92/5(b).

The Appellate Court next concluded the State's claim could be assigned to a *qui tam* plaintiff under the ICFPA. In reaching this conclusion, the Appellate Court looked to this Court's decision in *Scachitti v. UBS Financial Services*, which held that where the State suffers a cognizable injury, a *qui tam* plaintiff can acquire standing through "a partial assignment of the state's right to bring suit." 215 Ill. 2d at 508; *cf. Stauffer v. Brooks Brothers, Inc.*, 619 F.3d 1321, 1327 n.3 (Fed. Cir. 2010) (concluding "the United States may assign even a purely sovereign interest"). Applying the reasoning of the United States Supreme Court in *Vermont Agency*, 529 U.S. at 774, a case involving the federal FCA, this Court in *Scachitti* concluded a *qui tam* plaintiff had a "personal stake in the outcome" of an action in the form of an "interest . . . in a claim" under the Illinois FCA acquired "as a partial assignment of the state's right to bring suit. Accordingly, . . . a *qui tam* plaintiff is a 'real party in interest,' together with the state." *Scachitti*, 215 Ill. 2d at 508–09.

Here, it is undisputed that the State suffered an injury from the violation of its laws, and the State can assign an interest to a *qui tam* plaintiff. Nonetheless, Defendants challenge Plaintiff's standing because they contend the State has not itself suffered a monetary loss and it cannot assign a non-monetary injury based on the violation of the State's laws to a *qui tam* plaintiff under the ICFPA. But whether the State has suffered a monetary or non-monetary injury based on a violation of its laws is a distinction without a difference for purposes of establishing the relator's standing. In either scenario the State has suffered a cognizable injury that can be assigned to a *qui tam* plaintiff. Moreover, this assignment does not deputize private citizens to enforce criminal law, nor does it improperly delegate the State's law enforcement authority.

B. A *qui tam* plaintiff's standing under the ICFPA does not require the State to have suffered any monetary loss.

Standing arises by virtue of an injury in fact to a legally cognizable interest. *Greer*, 122 Ill. 2d at 492. It cannot be reasonably disputed that insurance fraud causes real injury to the State and its citizens, including financial loss. Insurance fraud not only violates the laws of the State, which results in injury to the State's sovereignty, but also imposes tremendous costs and burdens on the investigation and enforcement mechanisms of the State, as well as Illinois consumers and businesses. While the State is not alleged to have made a direct payment to Defendants as a result of the conduct described in Plaintiff's complaint, insurance fraud nonetheless produces substantial financial costs and societal harms about which the State has every interest in addressing. To approximate that harm, the ICFPA assigns a monetary amount to fraudulent claims in the form of per-claim penalties, which the statute then partially assigns to relators to recover. Thus, when a relator acts on behalf of the State in a *qui tam* proceeding, the relator has been

empowered by the legislature to advance and protect the State's interests and receive a portion of the State's recovery for the harm caused by those who commit insurance fraud. There is no legal or logical basis to require the State itself to have lost money directly before a *qui tam* plaintiff can be found to have standing to assist the State in exposing insurance fraud and seeking redress for its injury.

Neither *Scachitti* nor *Vermont Agency,* two decisions upon which the Appellate Court relied, suggests that the issue of standing turns on the presence of direct monetary damages, and Defendants did not proffer any authority that recognizes such a distinction. Instead, Defendants contend *Scachitti* and *Vermont Agency* imply such a distinction because these cases involved the Illinois and federal FCAs, which are "mechanism[s] to recover pecuniary loss[es] suffered by [government payors]" and this action involves the ICFPA under which the State does not suffer direct monetary loss. Defs.' Br., p. 25. However, neither the federal nor Illinois FCA requires the government to have suffered any direct monetary loss to confer standing on a relator. Because liability attaches upon the submission of the false claim, the Illinois and federal FCAs permit recovery of civil penalties against a defendant regardless of whether or not the government has suffered any damages. See, *e.g., Varljen v. Cleveland Gear Co., Inc.,* 250 F.3d 426, 429 (6th Cir. 2001) ("recovery under the FCA is not dependent upon the government's sustaining monetary damages"); *In re Schimmels*, 85 F.3d 416 (9th Cir. 1996) (noting that the FCA requires a court to award not less than $5,000 and not more than $10,000 for each false claim or statement submitted to the government, even if no damages were caused by the false submissions); *accord State ex rel. Schad v. Nat'l Business Furniture, LLC,* 2016 IL App (1st) 150526, ¶ 32 ("Because the language of the federal and Illinois [FCAs] are

virtually identical," Illinois courts look to the federal FCA in construing the Illinois FCA); *United States ex rel. Hagood v. Sonoma Cty. Water Agency*, 929 F.2d 1416, 1422 (9th Cir. 1991) ("A civil penalty of $5,000 and $10,000, and the costs of the civil action, are also recoverable under the [FCA]. No damages need to be shown in order to recover the penalty.").

Insurance fraud unquestionably impacts cognizable interests of the State. Indeed, the harm caused to the public and to the State itself was the impetus for the ICFPA—a harm that causes both direct and indirect monetary losses to the State, insurers, and consumers. If the General Assembly wanted to limit the category of individuals who could initiate *qui tam* actions under Section 15(a) of the ICFPA to only those individuals who were actually injured by the fraud, the statute would have used words to that effect, as other statutes have done. See, *e.g.*, 815 ILCS 505/10a (West 2000) (stating that "any person who suffers *actual damage* as a result of a violation of [the Illinois Consumer Fraud and Deceptive Business Practices Act] committed by any other person may bring an action against such person") (emphasis added); 815 ILCS 309/20 (West 2018) ("A person who suffers damages caused by a merchant's violation of [the Illinois Bedbug Inspection Act] . . . may bring an action pursuant to Section 10a of the Consumer Fraud and Deceptive Business Practices Act."); 770 ILCS 105/4.1 (West 2006) ("A toolmaker that suffers damages under [the Illinois Tool and Die Lien Act] may obtain appropriate legal and equitable relief, including damages, in a civil action."); 225 ILCS 410/3B-6 (West 1990) ("Any person who suffers damages as a result of a violation described or enumerated in [the Illinois Barber, Cosmetology, Esthetics, Hair Braiding, and Nail Technology Act] committed by any school or its representatives may bring an action

against such school."); see also 105 ILCS 426/85(m) (West 2012) ("Any person who suffers damages as a result of a violation of [the Illinois Private Business and Vocational Schools Act] may bring an action against the school" and a "court, in its discretion, may award actual damages . . . and any other relief that the court deems proper."). Accordingly, the Appellate Court got it right in recognizing that the State has a significant interest in protecting the public from insurance fraud, which the State may assign to a relator regardless of whether either has suffered a direct monetary loss.

C. The ICFPA is not a criminal statute and does not delegate the State's law-enforcement authority to private persons.

Defendants' argument—that allowing assignment of the State's non-monetary injuries to confer standing permits private citizens to enforce criminal law and improperly abdicates the State's law enforcement authority—rings hollow. In authorizing relators to bring actions on behalf of the State, the ICFPA does not assign the State's criminal-enforcement authority to private citizens. The ICFPA is a civil—not a criminal—statute and the enforcement assigned to relators under the ICFPA, as well as the remedies, are exclusively civil in nature, and "in addition to any other penalties that may be prescribed by law . . . ." 740 ILCS 92/5(b).

The language and placement of the ICFPA within the Illinois Code make this clear. The ICFPA predicates *civil liability* on its prohibition against certain kickback schemes addressed in Section 5(a) and conduct that violates enumerated criminal insurance fraud statutes. *Id.* Although the ICFPA references certain provisions of the Illinois Criminal Code, this does not render the ICFPA a criminal statute. It does not authorize private citizens to prosecute corporations or individuals criminally, seek incarceration for individuals found to have engaged in insurance fraud, nor impose

punitive criminal penalties. An ICFPA action simply allows the *qui tam* plaintiff to seek only civil remedies.

Moreover, the ICFPA does not transfer to a private citizen "the authority to investigate, charge, and prosecute offenses unique to the sovereign," as Defendants argue. Defs.' Br., p. 35. To the contrary, to preserve the State's ability to bring a separate criminal-enforcement action under any applicable statute, Section 5(c) of the ICFPA ensures "[t]he penalties set forth in subsection (b) are intended to be remedial rather than punitive, *and shall not preclude, nor be precluded by, a criminal prosecution for the same conduct*." 740 ILCS 92/5(c) (emphasis added). In this vein, the ICFPA is similar to other *qui tam* statutes, such as the federal FCA. See *AB-Tech Constr., Inc. v. United States*, 31 Fed. Cl. 429, 435 (1994) (penalties under the federal FCA "are intended not to punish the wrongdoer but rather to compensate the Government for the 'costs of corruption'"), *aff'd sub nom. Ab-Tech Const. v. United States*, 57 F.3d 1084 (Fed. Cir. 1995). Other provisions of the ICFPA expressly leave open the prospect of parallel criminal prosecutions by the State for the conduct at issue. See 740 ILCS 92/20(d) (West 2002) ("If at any time both a civil action for penalties and equitable relief pursuant to this Act and a criminal action are pending against a defendant for substantially the same conduct, whether brought by the government or a private party, the civil action shall be stayed until the criminal action has been concluded at the trial court level . . . . Whether or not the State's Attorney or Attorney General proceeds with the action, upon a showing by the State's Attorney or Attorney General that certain actions of discovery by the person initiating the action would interfere with a law enforcement or governmental

agency investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay discovery for a period of not more than 180 days.").

The ICFPA is comparable to other statutes that permit both civil enforcement by private persons and criminal prosecution by the government for the same or similar conduct. For example, the federal Racketeer Influenced and Corrupt Organizations Act (18 U.S.C. §§ 1961 *et seq.*) ("RICO"), authorizes both prosecutions by the government for criminal violations and private enforcement for civil violations. See, *e.g.*, *Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 411–12 (2003) (Ginsburg, J., concurring) ("RICO, which empowers both prosecutors and private enforcers, imposes severe criminal penalties and hefty civil liability on those engaged in conduct within the Act's compass."); *United States v. Palumbo Bros., Inc.*, 145 F.3d 850, 867 (7th Cir. 1998). Similarly, the federal Sherman Act, 15 U.S.C. §§ 1 *et seq.*, provides for both criminal prosecution of antitrust violations by the government and civil enforcement by private persons. See, *e.g.*, *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 438 (1978) ("Both civil remedies and criminal sanctions are authorized" for conduct proscribed by the Sherman Act.). Thus, the fact that the same activity proscribed by a statute may lead to both criminal prosecutions by the government and civil enforcement by private persons is unexceptional. That a statute, such as the ICFPA, makes certain violations of the criminal code actionable civilly does not turn the ICFPA into an improper delegation of the government's criminal-enforcement authority.

Equally unavailing is the argument that granting Plaintiff standing under the ICFPA would somehow usurp the Attorney General's law-enforcement authority. In *Scachitti*, this Court rejected the argument that the Illinois FCA unconstitutionally

authorized a usurpation of the Attorney General's authority to represent the State. 215 Ill. 2d at 510. Noting that "statutes enjoy a strong presumption of constitutionality," the Court upheld the statute. *Id.* It reasoned that the Attorney General maintains significant control over any litigation brought under the Illinois FCA, and a relator who brings an action under the Illinois FCA has an interest in the action because he or she is entitled to share in the recovery. *Id.* at 510–12. Indeed, the Court recognized the *qui tam* provisions of the Illinois FCA actually supported, rather than usurped, the Attorney General's law-enforcement duties, noting that "[i]n many instances, but for the efforts of these private citizens and their attorneys, the Attorney General would not have known" about these illegal fraud schemes. *Id.* at 513.

The same is true of the ICFPA. First, in a *qui tam* action brought by a private person under the ICFPA, the Attorney General (or State's Attorney) maintains significant control over the litigation, including the right to (1) bring a civil action under the ICFPA, (2) dismiss or settle an action or proceed with alternative actions, or (3) seek to limit the person's participation in the litigation. See 740 ILCS 92/10; § 92/15(a), (b); § 92/20(a)–(c). In addition, a *qui tam* plaintiff bringing suit under the ICFPA must first file the complaint *ex parte* and under seal and provide "a copy of the complaint and a written disclosure of substantially all material evidence and information the person possesses" to the State's Attorney and Attorney General. *Id.* § 92/15(b). Moreover, the sealed complaint shall not be served on the defendant for a period of at least 60 days and until the court so orders, which provides the State's Attorney and Attorney General with an exclusive window in which to investigate the alleged insurance fraud, evaluate whether the State desires to exercise its sole authority to intervene in the action, or seek a stay if

discovery in the action "would interfere with a law enforcement or governmental agency investigation or prosecution of a criminal or civil matter arising out of the same facts . . . ." *Id.* § 92/15(b), (c); § 92/20(d). Thus, similar to the Illinois FCA, the ICFPA does not usurp the Attorney General's authority to represent the State.

Like the Illinois FCA, the ICFPA's *qui tam* provisions support the State's law-enforcement duties. It enlists the public in helping the State combat insurance fraud, which complements the efforts of government agencies by allowing private citizens to "blow the whistle," enforce the anti-fraud provisions, and share in the proceeds. The State benefits from this framework because, among other things, a percentage of the monies recovered in successful *qui tam* actions may be allocated to State agencies to investigate, prosecute, and prevent insurance fraud. See *id*. § 92/25(f).

II. THE PLAIN LANGUAGE AND PURPOSE OF THE ICFPA ARE CLEAR THAT THE CATEGORY OF INDIVIDUALS AUTHORIZED TO BRING ACTIONS—"INTERESTED PERSONS"—SHOULD BE CONSTRUED BROADLY.

The Appellate Court properly determined that a private citizen who possessed valuable information about insurance fraud is an "interested person" under the ICFPA, and in doing so, recognized that a private person need not suffer financial harm to qualify as an "interested person" under the statute.

Section 15(a) addresses the scope of persons who may bring a civil action on behalf of the State of Illinois for violations of the ICFPA. Specifically, Section 15(a) states that "[a]n interested person, including an insurer, may bring a civil action for a violation of this Act for the person and for the State of Illinois." *Id*. § 92/15(a). The ICFPA spells out the limited requirements necessary to qualify as an interested person, none of which requires the individual to have suffered damages. *Id.* § 92/15(b). Instead,

the person must simply bring the action in the name of the State, and the "complaint shall be filed *in camera*, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders." *Id.* As noted above, the person initiating a *qui tam* action under the ICFPA must also serve a "copy of the complaint and a written disclosure of substantially all material evidence and information the person possesses . . . on the State's Attorney and Attorney General." *Id.* The person may not "bring an action . . . based upon allegations or transactions that are the subject of a civil suit or an administrative civil money penalty proceeding in which the State's Attorney or Attorney General is already a party." 740 ILCS 92/30(a) (West 2002). In addition, the person may not bring an action "based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a legislative or administrative report, hearing, audit, or investigation, or from the news media, unless the action is brought by . . . a person . . . who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the State's Attorney or Attorney General before filing an action . . . ." *Id.* § 92/30(b). In short, the ICFPA spells out very clearly the conditions and requirements for qualifying as an "interested person" under the statute, none of which requires the individual to have been personally harmed by the fraud.

Despite the statute's detailed requirements, Defendants seek to graft additional limitations on "interested persons" who seek to initiate an action under the ICFPA. Although the ICFPA does not expressly define the term "interested person," Defendants urge an interpretation that requires a person to have a personal, financial stake in the controversy beyond a claim to the proceeds of the action, which would preclude anyone

except an insurer damaged by the fraud from bringing civil actions under the ICFPA. This reading is impossible to square with the text, structure, history, and purpose of the ICFPA—or the purpose of *qui tam* statutes more generally.

A. The plain language of Section 15(a) demonstrates that the definition of "interested person" is not restricted to those who have suffered harm.

The issue of who may bring a civil action under the ICFPA is a question of statutory construction. The primary rule of statutory construction is to give effect to the legislature's intent. *In re Marriage of Murphy*, 203 Ill. 2d 212, 219 (2003). The best indication of such intent is the statute's language, which must be given its plain and ordinary meaning. *Sangamon Cty. Sheriffs Dep't v. Ill. Human Rights Comm'n*, 233 Ill. 2d 125, 136 (2009). It is a "fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." *Corbett v. Cty. of Lake*, 2017 IL 121536, ¶ 27. "The terms in a statute are not to be considered in a vacuum." *M.I.G. Investments, Inc. v. Environmental Protection Agency*, 122 Ill. 2d 392, 400 (1988). Rather, the words and phrases in a statute must be construed in light of the statute as a whole, "'with each provision construed in connection with every other section.'" *Eden Retirement Ctr., Inc. v. Dep't of Revenue*, 213 Ill. 2d 273, 291 (2004) (quoting *Paris v. Feder*, 179 Ill. 2d 173, 177 (1997)). In addition, when construing Illinois statutes, courts presume the legislature did not intend to create absurd, inconvenient, or unjust results. *Murphy*, 203 Ill. 2d at 219.

Although the ICFPA does not expressly define the term "interested person" as used in Section 15(a), the plain language of the statute and, as the Appellate Court correctly recognized, "its purpose in combatting insurance fraud" (A.8 ¶ 3) demonstrates

that concerned individuals who have information about insurance fraud and comply with certain procedural requirements when bringing an action under the statute have standing to bring an ICFPA action. See 740 ILCS 92/15(a)–(b); § 92/30(b). That the General Assembly contemplated a more expansive definition of "interested person" beyond those simply harmed by the fraud is clear from the language of the ICFPA as a whole. Under Defendants' view, which restricts interested persons to only those individuals who have a personal stake in the controversy, only insurers that actually paid fraudulent claims would qualify as "interested persons." But Section 15(a) itself expressly authorizes an "interested person, *including* an insurer," to initiate an action under the ICFPA. *Id.* § 92/15(a). "[I]ncluding" can only be construed as allowing actions by insurers *and others* with knowledge of insurance fraud. If the General Assembly had intended to restrict the ICFPA to insurers, there would have been little need to create the ICFPA in the first place. The criminal insurance-fraud statute (see 720 ILCS 5/17-10.5(e) (West 2013)), as well as claims for common-law fraud and unjust enrichment, among other theories of recovery, already enabled insurance companies defrauded by a fraudulent insurance claim to sue for damages and recover attorney's fees.

Other provisions in the ICFPA similarly do not support the interpretation that the relator must have a personal stake in the outcome of the litigation. For example, the ICFPA's retaliatory-discharge provision provides remedies to an employee who has been:

> discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer *because of lawful acts done by the employee* on behalf of the employee or others *in furtherance of an action under this Act, including* investigation for, *initiation of*, testimony for, or assistance in *an action filed* or to be filed *under this Act* . . . .

740 ILCS 92/40 (West 2002) (emphasis added). In other words, this provision of the ICFPA protects an employee for retaliation because of "lawful acts . . . by the employee . . . under this Act, including . . . initiation of . . . an action filed . . . under this Act . . . ." Thus, the ICFPA contemplates that an employee may bring (or, initiate) an ICFPA claim as an "interested person." In this way, the statute recognizes that employees of wrongdoers are likely to have the valuable information about fraud that the ICFPA is designed to access and expose. The ICFPA uses rewards to incentivize such insiders to step forward and bring these schemes to light, and provisions like Section 40 aim to protect these individuals from retaliatory conduct. But as this case demonstrates, employees themselves are unlikely to incur direct pecuniary loss from fraudulent activity. To exclude such individuals from the definition of an "interested person" because they themselves have not suffered a monetary harm would run contrary not only to the statutory goal of encouraging them to "blow the whistle" on fraud, but also the express language of the statute.

Similarly, Section 25(c) of the ICFPA states that "*[i]f* the person bringing the action as a result of a violation of this Act has paid money to the defendant or to an attorney acting on behalf of the defendant in the underlying claim, *then* he or she shall be entitled to up to double the amount paid to the defendant or the attorney if that amount is greater than 50% of the proceeds." *Id.* § 92/25(c) (emphasis added). The provision provides additional relief for persons who are authorized to bring actions. But importantly, in using conditional language—"*if* the person . . . paid money"—the provision makes clear that persons who did *not pay money* also are able to bring actions

under the ICFPA. Defendants' argument—that the interested person must be personally harmed by the insurance fraud—cannot be squared with these provisions.

As the Appellate Court noted, the ICFPA was modeled after California's Insurance Frauds Prevention Act ("IFPA"), (Cal. Ins. Code §§ 1871 *et seq.* (West 2003)) and the General Assembly adopted this statute "nearly word-for word . . . ." A.12 ¶ 18. Like the ICFPA, the IFPA provides that "[a]ny interested persons, including an insurer, may bring a civil action for a violation of this section for the person and for the State of California." Cal. Ins. Code 1871.7(e)(1). Although the IFPA similarly does not define the term "interested person," the Appellate Court found persuasive a decision from a California appellate court, which concluded that, "[a]s a true *qui tam* provision, Insurance Code section 1871.7 [*i.e.*, the IFPA] does not mandate that the relator has suffered his or her own injury." A.20–21 ¶ 41 (quoting *People ex rel. Alzayat v. Hebb*, 226 Cal. Rptr. 3d 867, 889 (Ct. App. 2017)). In *Alzayat*, the decision discussed by the Appellate Court, the relator filed a *qui tam* action under the IFPA against his employer and his supervisor for false statements made in a worker's compensation claim. 226 Cal. Rptr. 3d at 869. In a passage cited by the Appellate Court, the *Alzayat* court concluded the lawsuit was "based on an injury allegedly suffered by the People of the State of California, and was not filed for the purpose of remedying an injury suffered by [the relator] . . . ." A.20–21 ¶ 41 (quoting *Alzayat*, 226 Cal. Rptr. 3d at 888 (concluding that the worker's compensation exclusivity rule did not bar an IFPA claim filed by an employee against an employer)). This decision, based on a nearly identical law, further supports a determination that Section 15(a) of the ICFPA should not be interpreted to limit the scope of "interested

persons" to only those individuals who have been personally injured by the insurance fraud.

Moreover, the statutory framework urged by Plaintiff would not leave the term "interested person" open ended or unbounded. While the ICFPA deputizes concerned members of the public with information about insurance fraud to be private attorneys general and provides them with an avenue to seek recovery on the State's behalf against wrongdoers, the ICFPA by its own terms imposes specific limitations on such interested persons. See, *e.g.*, 740 ILCS 92/15(a)–(b); § 92/30(a)–(b). Such limitations were all the General Assembly believed were necessary to impose on *qui tam* actions brought under the ICFPA. For example, the statute requires the "interested person" to possess information about kickback arrangements associated with a claim for insurance benefits, (see *id*. § 92/5(a)), or violations of certain enumerated sections of the Criminal Code that constitute insurance fraud, (see *id.* § 92/5(b)). And, as discussed above, an "interested person" must also make the appropriate submissions of the "material evidence and information" to the State's Attorney and Attorney General, and comply with specific procedural requirements. See *id.* § 92/15(b)–(c). In short, interpreting the scope of "interested person" to include individuals like Ms. Cahill—individuals who have evidence of potential insurance fraud and properly initiate an action under the ICFPA—is consistent with "the reason for the [ICFPA], the problems sought to be remedied, [and] the purposes to be achieved . . . ." A.20 ¶ 39 (quoting *People v. Perez*, 2014 IL 115927, ¶ 9).

Equally unavailing is Defendants' argument that because civil penalties imposed pursuant to the ICFPA "are intended to be remedial rather than punitive," (740 ILCS

92/5(c)), an "interested person" must be restricted to someone who has suffered monetary damages. Defs.' Br., pp. 16–17. Defendants contend that if it were otherwise and a lawsuit is successful, the damaged party would receive no compensation, *i.e.*, receive no remediation. *Id.* This, Defendants argue, would be contrary to the ICFPA's purpose, which they say is to "remediat[e] harm to a defrauded insurer or self-insured entity[.]" *Id.* at 16. But reimbursing defrauded insurers for their losses is not the ICFPA's only purpose nor is it the only way the statute remedies the harms of insurance fraud. The same section Defendants cite expressly describes the "goals" of remediating harm through civil penalties as including "disgorging unlawful profit, restitution, compensating the State for the costs of investigation and prosecution, and alleviating the social costs of increased insurance rates due to fraud . . . ." 740 ILCS 92/5(c). These goals properly recognize that insurance fraud harms not only entities that pay fraudulent claims, but also (1) consumers who incur ever-increasing premiums as a result of the costs imposed by insurance fraud, and (2) the State, which is forced to devote significant resources, financial and otherwise, in an effort to curb insurance fraud. See also *Scott v. Ass'n for Childbirth at Home, Int'l*, 88 Ill. 2d 279, 288 (1981) (statutes can be remedial if they "are designed to grant remedies for the protection of rights, introduce regulation conducive to the public good, or cure public evils"). Indeed, some of the State's financial injuries would be remedied in this action from any civil penalties awarded.

Moreover, the ICFPA also recognizes that some forms of insurance fraud cause non-monetary injuries that cannot be remediated through financial reimbursement to an insurer that has paid claims. Specifically, Section 5(a) of the ICFPA makes actionable kickback arrangements in which healthcare providers and others make referrals based on

their own financial interests, rather than the best interests of their clients and patients. 740 ILCS 92/5(a)–(b). In prohibiting these types of arrangements, Section 5(a) recognizes that unlawful kickback schemes are a form of insurance fraud that can lead to poor quality or harmful treatment of vulnerable patients, among other concerns. See also *Wilson*, 174 Cal. Rptr. 3d at 330 (noting the legislature's concern that patient-brokering is "almost always a harbinger of fraud") (citations omitted); *United States v. Patel*, 778 F.3d 607, 612 (7th Cir. 2015) (concluding federal anti-kickback law was enacted to protect "from increased costs and abusive practices resulting from provider decisions that are based on self-interest rather than cost, quality of care or necessity of services," as well as to "protect patients from doctors whose medical judgments might be clouded by improper financial considerations") (citations omitted). In short, the ICFPA as a whole demonstrates that its purpose is not simply salving financial injury to insurers.

B. The term "interested person" does not have a "fixed meaning" under Illinois law and should be interpreted broadly consistent with the purpose of the ICFPA.

The plain and ordinary meaning of the term "interested" is "having an interest in something; concerned,"[8] and "showing curiosity or concern about something or someone; having a feeling of interest."[9] Affording "interested person" this plain, ordinary, and popularly understood meaning gives effect to the intent of the ICFPA to confer standing on concerned citizens with information about insurance fraud to initiate actions under Section 15(a). Defendants reject this plain and ordinary meaning of "interested" and

[8] Dictionary.com, https://www.dictionary.com/browse/interested (last viewed Mar. 5, 2020).

[9] Lexico.com, https://www.lexico.com/en/definition/interested (last viewed Mar. 5, 2020). Similarly, the primary definition of "interested" in Merriam-Webster's Dictionary is "having the attention engaged," Merriam-Webster, https://www.merriam-webster.com/dictionary/interested (last viewed Mar. 4, 2020).

argue that the term "interested person" can only mean someone who has a financial stake in the controversy because the term has a "fixed meaning" under Illinois law.

To support this position, Defendants point to a handful of Illinois statutes in which the term "interested" has been expressly defined or later construed by courts. However, as this Court has recognized, there are "limitations in importing definitions from other statutes, since the context in which a term is used obviously bears upon its intended meaning." *People ex rel. Ill. Dep't of Labor v. E.R.H. Enters.*, 2013 IL 115106, ¶ 29. It follows, therefore, that "[t]he definition or meaning of a word cannot be blindly transferred from one context to another." A.21 ¶ 42 (citing *Cohen v. Chicago Park Dist.*, 2017 IL 121800, ¶ 22). Here, a closer look at the cases and statutes cited by Defendants establishes that (1) there is, in fact, no fixed meaning for the term "interested," and (2) this Court should look to the "context in which [the] term is used," *E.R.H. Enters.*, 2013 IL 115106, ¶ 29, and to those statutory schemes that most closely resemble the ICFPA.

Defendants cite four statutes—the Probate Act, Dead-Man's Act, a provision of corporate law, and a provision on public-contracting law—and a series of cases regarding declaratory-judgment actions in support of their argument that "interested person" must mean an individual holding a financial stake in the litigation. But a closer examination makes clear that these statutes and actions involving declaratory judgments are inapposite to the circumstances here.

The Dead-Man's Act, the Probate Act, the provision of corporate law, and the provision on public-contracting law use the word "interested" but not the specific phrase "interested person." The corporate-law provision involves an "interested shareholder," while the public-contracting provision involves a "township officer or employee" who

may be "interested." Neither the corporate-law provision nor the public-contracting provision addresses an interest in litigation. The Probate Act and Dead-Man's Act provisions involve proceedings uniquely private and individual in nature and thus serve no point of comparison to the type of greater public harm at issue under the ICFPA. As the Appellate Court correctly observed, there is no indication that the General Assembly had these uses in mind when it used the phrase "interested person" in a statute designed to expose insurance fraud, A.21 ¶ 42 ("the question of who can sue as an interested person in probate proceedings has no bearing on who can be a relator in an ICFPA *qui tam* action"), and combat "the social costs of increased insurance rates due to [that] fraud." 740 ILCS 92/5(c).

Defendants fare no better in stating that the term "interested" has been construed narrowly in the context of declaratory-judgment actions to mean someone with a personal claim. Defs.' Br., pp. 13–14 (citing *Underground Contractors Ass'n v. City of Chicago*, 66 Ill. 2d 371, 375–76 (1977) (noting that "the party seeking the declaration must be 'interested in the controversy'")). As with the Dead-Man's Act and the Probate Act, actions for declaratory relief involve a different context from the ICFPA, as the words used by the operative provision for declaratory judgments, (735 ILCS 5/2-701(a)), reveal. The declaratory-judgment provision permits courts "in cases of actual controversy [to] make binding declarations of rights . . . at the instance of anyone interested in the controversy. . . ." *Id*. The provision does not involve an "interested person," but even its use of the word "interested" must be considered within its broader language and purpose of the remedy. It contemplates proceedings brought for the explicit purpose of declaring a party's rights about something in which the party has a private interest. It is far

different from the interests of the public at large that the General Assembly intended the ICFPA to address.

There is simply nothing to suggest that court decisions involving declaratory relief or the statutes Defendants cite, which have nothing more in common with the ICFPA than use of the word "interested," provide a universal, fixed definition of "interested" that mandates that one possess a private claim or financial stake in the outcome of litigation.

In fact, the use of the term "interested person" in other Illinois statutes is more closely analogous to the ICFPA's purpose, and the scope of these statutes has been interpreted broadly to encompass persons who simply have a concern about the subject of the proceedings without regard to whether they have suffered a financial injury. One such example is the Employee Classification Act (820 ILCS 185/1 *et seq.* (West 2008)) ("ECA"), which "address[es] the" broad public issue "of misclassifying employees as independent contractors." Similar to the ICFPA, the ECA enables both the government and private persons to enforce its provisions. See 820 ILCS 185/25 (West 2014); 820 ILCS 185/60 (West 2008). Specifically, the ECA provides that "*[a]n interested party* or person aggrieved by a violation of this Act . . . by an employer or entity may file suit in circuit court." *Id.* § 185/60(a) (emphasis added). Accordingly, "interested party" under the ECA has a "broad definition" and its use of the conjunction "or" means that "a person with an interest in compliance with [the ECA]," and not simply those individuals who have been aggrieved by the violation, can initiate an action in court. *Chicago Reg'l Council of Carpenters v. Joseph J. Sciamanna, Inc.*, 2009 WL 1543892, at *7 (N.D. Ill. June 3, 2009) (citing 820 ILCS 185/3 (West 2008)). Like the ICFPA, civil penalties

(among other things) are imposed for violations of the ECA, and an interested party who brings an action under the ECA is entitled to a portion of the proceeds. 820 ILCS 185/40 (West 2014). Indeed, the statute distinguishes between "interested parties" and "person[s] aggrieved by a violation of the [ECA]" in calculating how they share in the proceeds of the action, reinforcing that a person does not have to have been "aggrieved" (*i.e.*, injured) to be an "interested party." See *id.* § 185/60. Similar to the ICFPA then, this statutory scheme is specifically intended to incentivize a broad category of private persons to initiate actions to address a public harm—in the case of the ECA, the misclassification of employees.

Another example is the Employment of Illinois Workers on Public Works Act (30 ILCS 570/0.01 *et seq.* (West 2010)) ("EIWPWA"), the objective of which is "to promote the general welfare of the people of this State by ensuring that Illinois laborers are utilized to the greatest extent possible on public works projects or improvements for the State of Illinois or any political subdivision, municipal corporation or other governmental units thereof." 30 ILCS 570/1.1 (West 2010). Like the ICFPA and ECA, the EIWPWA permits the government to initiate actions for the public good, (see 30 ILCS 570/7 (West 2010)), and also allows private persons, including "interested parties," to initiate actions. See 30 ILCS 570/7.15 (West 2010). The EIWPWA defines "interested party" as "a person or entity with an interest in compliance with this Act." 30 ILCS 570/1 (West 2010). As with the ECA, the term "with an interest" means something akin to having a concern about compliance with the statute because the EIWPWA provides that "[a]ny interested party *or person aggrieved* by a violation of this Act . . . may file suit in circuit court." *Id.* § 570/7.15 (emphasis added). Thus, the plain language of the EIWPWA

makes clear that an "interested party" includes persons who have not been harmed by a violation of the EIWPWA.

Other statutes addressing public issues also use the term "interested person" broadly. For example, Illinois's Annexation Statute authorizes "any interested person" to file objection to an annexation petition, (65 ILCS 5/7-1-3 (West Supp. 1967)), although like the ICFPA it does not define "interested person." However, the term "interested person" in the annexation statute has been construed broadly "to mean *any individual or any corporate or other entity recognized by law*." *In re Vill. of Harvester*, 37 Ill. App. 2d 255, 260 (1962) (emphasis added); see also 65 ILCS 5/11-102-4c (West Supp. 1969) ("At the hearing the airport authorities shall make a full disclosure of the proposed plan. *All interested persons and municipalities* may appear and testify for or against any plan. The hearing may be continued from time to time at the discretion of the airport authorities to allow necessary changes in any proposed plan, or to hear or receive additional testimony from *interested persons or municipalities*") (emphasis added); 20 ILCS 3960/6.2 (West 2018) ("When an application for a permit is initially reviewed by State Board staff, as provided in this Section, the State Board shall, upon request *by the applicant or an interested person,* afford an opportunity for a public hearing within a reasonable amount of time after receipt of the complete application . . . ." (emphasis added). Along with the ICFPA, these statutes all involve matters of public concern, and each views the term "interested person" broadly.

It follows that there is no fixed definition of the term "interested," and that any comparison to other statutes should consider the "context in which [the] term is used" and evaluate language in statutory schemes that most closely resemble the ICFPA. When this

is done, it becomes clear that "interested person" must be read to include persons with information about insurance fraud who have an interest in initiating an action under the ICFPA, regardless of whether they have been personally injured.

C. The legislative history confirms that the ICFPA was designed to address a public harm and to enable concerned private citizens with information about insurance fraud to enforce the ICFPA's provisions.

Although the legislative history of the ICFPA does not directly address the term "interested person," it nonetheless confirms the ICFPA was enacted to address the significant public harm caused by insurance fraud. The legislative history makes clear the ICFPA aims to enlist the public, including insiders and others in a unique position to possess valuable information about insurance fraud schemes, in the State's efforts to expose insurance fraud by financially incentivizing concerned private citizens with information about insurance fraud to bring civil actions against wrongdoers. To that end, the ICFPA's legislative history must inform any interpretation of the language and ensure that relators include those citizens considered most capable of advancing the statute's goals.

As discussed above, the General Assembly appointed an Insurance Fraud Task Force, established through the passage of Senate Bill 359, to make recommendations to the General Assembly. Ill. Pub. Act 91-522 (codified at 20 ILCS 1405/56.3 (West Supp. 2001)); see also *Amicus* Coalition S.A.006. After investigating insurance fraud and methods designed to combat it, one of the Task Force's principal recommendations was to develop a civil statute to provide a strong monetary incentive for both governmental entities and private citizens to pursue civil cases against the perpetrators of insurance fraud. *Amicus* Coalition S.A.016–025. That recommendation became the genesis for the ICFPA that the legislature passed several years later. See *id.*

As noted during the discussion of then-Senate Bill 879 on the floor of the House of Representatives, Representative Dave Winters stated that the purpose of the ICFPA was to provide an incentive for individuals and the government alike to bring indistinguishable civil enforcement actions against those who seek to defraud insurers: "[Senate Bill 879 includes a] whistle-blower provision that would allow for civil suits and [provides financial] incentives to go to [the] insurance companies, *individuals*, state's attorney, or the attorney general who brings a civil suit against persons who seek to defraud insurance companies." 92nd Ill. Gen. Assem., House Proceedings, May 9, 2001, at 54 (statements of Representative Winters) (emphasis added). Immediately thereafter, the bill was passed with 114 "yes" votes and zero "no" votes.

Plainly, it was understood in the House of Representatives that the legislation was to provide a cause of action to private parties—individuals and insurance companies—to pursue a set of civil penalties on behalf of the State against persons who defraud insurance companies. Indeed, there is nothing in the legislative history to suggest the legislation was intended to limit the enforcement power to insurance companies.

The Senate, which originated the bill that became the ICFPA, had a similar understanding of the broad scope of the legislation's remedial scheme. On March 27, 2001, in presenting Senate Bill 879 for a vote, Senator Patrick O'Malley stated that the purpose of the ICFPA was to provide the same monetary incentive for the government and private parties to bring civil actions against the perpetrators of all forms of insurance fraud:

> [Senate Bill 879] would create the Illinois Insurance Claims Fraud Prevention Act, modeled after a similar law that is in existence in the State of California. [It w]ould provide a *significant monetary incentive to* insurance companies,

> *individuals*, and local State's attorneys and the Attorney General to bring civil suit against persons who seek to defraud insurance companies. It would also provide protections and recompense to *any employee* who is discharged or otherwise discriminated against by his employer because of lawful acts he has done in the seeking action under this law.

92nd Ill. Gen. Assem., Senate Proceedings, May 27, 2001, at 17 (statements of Senator O'Malley) (emphasis added). After opening the floor to questions, of which there were none, the Senate passed the bill by a unanimous vote. 92nd Ill. Gen. Assem., Senate Bill 879, 2001–2002. Thus, the impetus behind the passage of the ICFPA was to address the significant public harm caused by insurance fraud and to provide "monetary incentives" to individuals, not just insurance companies, to enforce the statute's provisions. Moreover, this history confirms the General Assembly understood that the ICFPA would provide express statutory protections to employees who "blow the whistle" on insurance fraud by "seeking action under [the ICFPA]." 92nd Ill. Gen. Assem., Senate Proceedings, May 27, 2001, at 17

D. Any interpretation of the ICFPA must be consistent with the purpose of *qui tam* statutes generally, which are designed to use 'private Attorneys General' to achieve benefits for the State.

Lastly, any interpretation of the phrase "interested person" should be guided by an appreciation of the well-recognized goals of whistleblower statutes generally. Such statutes are meant to empower "private Attorneys General" to bring, on behalf of the State, civil actions to root out fraud.[10] The concept of the private Attorney General originated in a 1943 decision of the United States Court of Appeals for the Second Circuit. In that decision, Judge Frank recognized that, through the passage of the federal

[10] See generally William B. Rubenstein, *On What a "Private Attorney General" is—and Why It Matters*, 57 Vand. L. Rev. 2129 (2004).

FCA, Congress could lawfully authorize a private person to file suit on behalf of the government. See *id.* at 2134 (citing *Associated Indus. of N.Y. State v. Ickes*, 134 F.2d 694, 704 (2d Cir. 1943)). As Judge Frank famously explained: "Such persons, so authorized, are, so to speak, private Attorney Generals." *Ickes*, 134 F.2d at 704.

Insurance fraud places significant costs on society as a whole, not just on insurance carriers and governmental entities who are duped into paying fraudulent claims. It results in higher insurance premiums, which are ultimately borne by consumers and taxpayers. And it requires significant governmental resources to investigate and prosecute (both civilly and criminally) those who commit insurance fraud.

Through substantial experience, policymakers have come to learn that some of the most effective tools against fraud are civil penalties, which enhance and complement criminal enforcement. See, *e.g.*, U.S. Dep't of Justice, *Justice Department Celebrates 25th Anniversary of False Claims Act Amendments of 1986*, (Jan. 31, 2012) (available at https://www.justice.gov/opa/pr/justice-department-celebrates-25th-anniversary-false-claims-act-amendments-1986) (describing the federal FCA as "the single most important tool that American taxpayers have to recover funds when false claims are made to the federal government"). Moreover, policymakers have learned, through extensive experience, that monetary incentives are particularly effective at detecting and deterring fraud. See *id.* (explaining that, since Congress amended the FCA to "increase the incentives for whistleblowers to come forward with allegations of fraud," the government has recovered more than $30 billion); see also U.S. Dep't of Justice, *Justice Department Recovers Over $3 Billion in False Claims Act Cases in Fiscal Year 2019*, (January 9, 2020) ("In 1986, Congress strengthened the [FCA] by increasing incentives for

whistleblowers to file lawsuits alleging false claims on behalf of the government. These . . . *qui tam* actions comprise a significant percentage of the False Claims Act cases that are filed. If the government prevails in a *qui tam* action, the whistleblower, also known as the relator, typically receives a portion of the recovery . . . . Whistleblowers filed 633 qui tam suits in fiscal year 2019, and this past year the department recovered over $2.1 billion in these and earlier filed suits.") (available at https://www.justice.gov/opa/pr/justice-department-recovers-over-3-billion-false-claims-act-cases-fiscal-year-2019). For more than 150 years, the federal FCA has served as a model for effective civil enforcement of frauds committed against the United States. The modern FCA provides for equal enforcement by the government and private parties alike. 31 U.S.C. §§ 3729, 3730. Indeed, the entire purpose of the federal FCA is to allow individuals to bring the same civil actions that could have been brought by the United States. See *id.* § 3730(a), (b). It incentivizes these individuals by authorizing them to collect a percentage of any recovery, (*id.* § 3730(d)), allows the government to intervene and assume control of such private litigation at the government's complete discretion, (*id.* § 3730(c)), and protects employee-whistleblowers from retaliatory action, (*id.* § 3730(h)).

The ICFPA operates in similar fashion. Like the federal FCA, it allows private persons with information about insurance fraud to bring actions on behalf of the State, (740 ILCS 92/15(a)), grants the State the opportunity to intervene in that action, (*id.* § 92/15(b)), entitles the private plaintiff to a percentage of any recovery, (*id.* § 92/25), and protects employees who expose insurance fraud from retaliatory discrimination, (*id.* § 92/40). The ICFPA also shares a common purpose with its federal counterpart; it encourages private persons to "blow the whistle" on perpetrators of fraud. It achieves

this purpose by creating standing for any interested party to bring an action against those responsible for presenting false insurance claims to private payers. And it incentivizes members of the public to do so by creating substantial remedies (*e.g.*, $5,000 to $10,000 per false insurance claim, plus up to three times the amount of each such claim, and attorney's fees) and entitling the person who brings the action to share in at least 30% of any actual recovery, with the remainder going either to the State or local government for the purpose of combatting insurance fraud.

In this way, the ICFPA enhances the resources of the State by authorizing non-governmental actors to pursue actions on its behalf. As a practical matter, government and law-enforcement agencies have broad responsibilities but finite resources. They cannot possibly investigate and prosecute every instance of alleged insurance fraud, and they are often not in the best position to detect the fraud. As a result, the ICFPA serves an important and unique function in enlisting the public to help combat insurance claims fraud, which complements the efforts of government agencies by unilaterally "blowing the whistle," enforcing the State's laws, and recovering on the State's behalf. Moreover, insurance companies often lack the invaluable information possessed by insiders and others with intimate knowledge of insurance fraud schemes to combat all forms of insurance fraud effectively. Now, through the ICFPA's *qui tam* provision, private citizens with information about fraud schemes are incentivized to step forward and bring the fraudulent conduct to light, thereby benefitting consumers and insurers alike. The State too benefits because the amounts recovered in successful *qui tam* actions are to be used to investigate and prosecute insurance fraud, and allocated to appropriate State

agencies for enhanced insurance fraud investigation, prosecution, and prevention efforts. See 740 ILCS 92/25(f)–(h).

Limiting the scope of private persons who can bring civil actions under the ICFPA would not serve these purposes and, in fact, would create a substantial absurdity nowhere replicated in other statutes authorizing private Attorneys General. Under Defendants' interpretation, many private persons with unique and valuable knowledge of fraudulent insurance conduct would lack the authority to enforce the ICFPA in the name of the State. This, in turn, would limit the government's ultimate authority—both directly and indirectly—to seek civil penalties and equitable relief against the perpetrators of a wide array of fraudulent conduct where that conduct is first reported by an insider who files a lawsuit under the ICFPA. In allowing concerned individuals to initiate suit on the State's behalf, the ICFPA recognizes the government does not have all of the information nor does it possess the unlimited resources required to police insurance fraud, and members of the public willing to "blow the whistle" must be financially encouraged to do so. Defendants' interpretation would mean that fewer lawsuits would be presented to the government, because private parties would not be incentivized to investigate and bring suit against wrongdoers engaged in insurance fraud. Accordingly, Defendants' interpretation is not only inconsistent with the text of the ICFPA, but also with its purpose, which is to incentivize a broad category of individuals to assist the State in combatting insurance fraud.

CONCLUSION

If the allegations in the complaint prove true, Plaintiff will have notified the government of a significant fraud and pursued a remedy that will benefit the State's efforts to combat insurance fraud. That is the very purpose and design of the ICFPA.

The Appellate Court appropriately concluded that (1) the ICFPA's *qui tam* enabling provision is constitutionally sound and that a private person, including Plaintiff, has standing to enforce the ICFPA regardless of whether the State has suffered monetary damages, and (2) the text, purpose, and history of the ICFPA reflect that the term "interested person" should be read descriptively to achieve the ICFPA's goal, which is to assist the State in combatting insurance fraud, and should include concerned individuals who possess valuable information about insurance fraud. The judgment of the Appellate Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief conforms to the requirements of Rule 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 38 pages.

/s/ John W. Reale

SUPPLEMENTAL APPENDIX

REPORT OF THE ILLINOIS INSURANCE FRAUD TASK FORCE

OCTOBER, 2000

CONTENTS

MEMBERS

Nathaniel S. Shapo, Illinois Department of Insurance, Chairman

Larry Barry, Illinois Life Insurance Council

Charles Burhan, Liberty Mutual Insurance Company

Ed Carter, Office of the Attorney General

Betty Cordial, Vista Consulting Group, Inc.

John Eager, National Association of Independent Insurers

Michele Ernst, CNA Insurance Company

Rodney Fisher, State Farm Insurance Companies

Judy Fitzgerald, National Insurance Crime Bureau

Donna Ginther, AARP

Arthur Hannus, American Heritage Protective Services, Inc. (first alternate)

Arthur Hill, Jr., Cook County State's Attorney's Office

Edward Moran, Allstate Insurance Company

Sam Nolen, Illinois State Police

Michael Parrillo, United Automobile Insurance Company

Donald Pebworth, Blue Cross/Blue Shield of Illinois

William Raines, Fremont Compensation Insurance Group

Kenneth Ryan, Illinois State Medical Society

Gene Sacco, Cook County Sheriff's Department

Ross Silverman, Katten, Muchin and Zavis

Donald Whitehead, Federal Bureau of Investigation

AN ACT to amend the Civil Administrative Code of Illinois by adding Section 56.3.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 5. The Civil Administrative Code of Illinois is amended by adding Section 56.3 as follows:

(20 ILCS 1405/56.3 new)

Sec. 56.3. Insurance Fraud Task Force.

(a) The Insurance Fraud Task Force is hereby established and shall consist of the following:

(1) The Director of Insurance or his or her designee.

(2) The Director of State Police or his or her designee.

(3) The Attorney General or his or her designee.

(4) Nine representatives appointed by the Governor by September 1, 1999 as follows:

(A) One representative of a county sheriff's department.

(B) One representative of a United States criminal investigative department or agency.

(C) One representative of a prosecuting authority of a city, a village, an incorporated town, a county, or this State.

(D) Two insurance consumers.

(E) Four persons at the discretion of the Governor.

(5) Seven representatives of insurers appointed by the Director of Insurance by September 1, 1999, representing large, medium, and small property, casualty, disability, life, and health insurers in this State, and

Secretary of the Senate

Originated in the Senate

PUBLIC ACT 91-522

one representative of a health maintenance organization appointed by the Director of Insurance by September 1, 1999.

(b) The Insurance Fraud Task Force shall do all of the following:

(1) Investigate the issue of organized insurance fraud and methods to combat organized insurance fraud.

(2) Examine ways to unite the resources of the insurance industry with the appropriate components of federal and State criminal justice systems so that organized insurance fraud schemes are identified and thoroughly investigated and the perpetrators are prosecuted in the best interests of justice.

(3) Examine the concept of creating a private agency to assist in combating organized insurance fraud and all ways to fund the agency, including current funding of insurance mechanisms related to insurance crimes.

(4) Report to the Governor and the General Assembly no later than July 1, 2000 on its findings and recommendations.

(c) This Section is repealed on July 1, 2000.

Section 99. Effective date. This Act takes effect upon becoming law.

President of the Senate

Speaker, House of Representatives

APPROVED

this 13th day of August, 1999 A.D.

GOVERNOR

STATUTORY AUTHORITY

The Illinois Insurance Fraud Task Force was created by Public Act 91-522. The Act was signed into law by Governor Ryan on August 13, 1999. The Task Force was charged with doing the following:

(1) To investigate the issue of organized insurance fraud and methods to combat organized insurance fraud;

(2) To examine ways to unite the resources of the insurance industry with the appropriate components of federal and state criminal justice systems so that organized insurance fraud schemes are identified and thoroughly investigated and the perpetrators are prosecuted in the best interests of justice;

(3) To examine the concept of creating a private agency to assist in combating organized insurance fraud and all ways to fund the agency, including current funding of insurance mechanisms related to insurance crimes;

(4) To report to the Governor and the General Assembly on its findings and recommendations.

DIRECTION OF THE TASK FORCE

The Task Force in its initial meetings engaged in protracted discussions regarding the purpose and goals of the group. A wide variety of issues were discussed and it became apparent early on that the subject of insurance fraud in Illinois generated many more questions than it did answers. Questions raised by the members were varied and included the following:

What is the scope and cost of insurance fraud in Illinois?

Does insurance fraud occur consistently across lines of insurance or are some lines more affected than others?

Are current laws and state agency regulations sufficient to combat fraud in Illinois?

What is being done in other states to combat fraud and how do their laws and regulations compare and contrast to those in Illinois?

Should a fraud bureau be set up in Illinois? If so, under whose control and how should it be funded?

Who should pay to fight fraud?

Is there a public awareness problem with insurance fraud?

How do the various law enforcement agencies in Illinois currently deal with insurance fraud? Is insurance fraud a priority for law enforcement?

While opinions differed greatly among the members about the answers to these questions, a consensus was reached by the group on where to start. A majority of the members believed that a significant insurance fraud problem existed in Illinois. The members also agreed that

while much work has been done in Illinois by the insurance industry, regulators and law enforcement to combat insurance fraud, that efforts have not been coordinated and responses to the problem have been inconsistent, and as a result, the scope of the problem in Illinois is unknown.

Early in its deliberations the Task Force considered whether to recommend the creation of a fraud bureau in Illinois. The Task Force considered what such a bureau would look like. Discussions were held regarding under whose jurisdiction the bureau would be placed, the scope of the bureau's authority, information gathering mechanisms, funding mechanisms, bureaus in other states and required legislative reforms. A plethora of ideas were put forth by the members on all of these subjects. Funding and jurisdictional issues were areas of particular concern. Individual members stated opinions that the proper place for the bureau to function was the Attorney General's Office, the Department of Insurance or the Office of the State Police. Discussions on funding mechanisms ranged from insurance industry assessments to general revenue funding to specially created legislative revolving funds.

CONCLUSIONS

Due to the above stated concerns and the need to gain a better understanding of the extent of insurance fraud in Illinois, the Task Force concluded that the creation of a fraud bureau was premature.

Before recommending a new arm of government be established, the Task Force makes the following recommendations:

- The Task Force believes that the reporting of potential fraud to the Illinois Department of Insurance should be increased from current requirements to include additional lines of insurance and should be expanded to include application and premium fraud. (See recommendation #1, p. 10).

- The enactment of a strong whistle blower statute (see recommendation #2, p. 16) would immediately bring existing resources to bear on the problem and will also develop a large body of experience and beneficial civil case law. Such information would be of great use in evaluating the necessity of a fraud bureau.

- While fraud bureaus have been successful in some jurisdictions, others have been less effective. The Insurance Research Council is currently conducting a study on fraud bureaus due out in the Spring of 2001. A review of that study prior to creating a fraud bureau in Illinois would allow a more informed decision.

- The creation of a fraud bureau necessarily requires the dedication of large sums of resources. Delaying the establishment of a fraud bureau would provide an enhanced opportunity to maximize the effective use of scarce resources to a problem we better understand.

- This Task Force recommends a new task force be created by the Director of Insurance to assist in studying the collected data. The task force shall meet upon the call of the Director but not less than every six months after the date that data collection is commenced.

- The investigation and prosecution of insurance fraud will require some level of resources to provide for effective law enforcement. Due to unavailability of relevant data, the Task Force is not recommending a dedicated funding source at this time. It is important, however, to revisit the issue of a dedicated source of funding to support the investigation and prosecution of insurance fraud as soon as relevant data becomes available.

SPECIFIC RECOMMENDATIONS

The Task Force has two recommendations for immediate consideration.

Recommendation # 1 - Fraud Reporting

Section 155.23 of the Illinois Insurance Code (215 ILCS 5/155.23) allows the Department of Insurance to promulgate administrative rules to require insurance companies licensed in Illinois to report casualty and property insurance claims in order to detect fraud. The Task Force recommends that Section 155.23 be amended to require that insurers selling any line of insurance must report factual information to the Department regarding potential fraud against the insurer. The Task Force has discussed and is fully cognizant of the fact that claims processing, and what would constitute a "fraudulent or suspicious claim", does vary by line of insurance. The Task Force specifically discussed how an insurer would make the determination that a claim was suspicious and how this process would be different from line to line. Concern was expressed that the reporting requirements for accident and health lines could be especially problematic. For example, many managed care contracts cover only medically necessary services. What constitutes a medically necessary service is open to a wide interpretation under the contract. The definition of a suspicious claim under these contracts would have to allow for the difference between a bona fide contract or billing dispute and an attempt to defraud.

The reporting of potential fraud would extend not only to claims fraud but also to premium fraud or application fraud.

Section 155.23 provides that the Director of Insurance may promulgate administrative regulations to further the purpose of the statute. Specific reporting requirements for insurers, by line of insurance can be worked out by interested parties in the administrative rule making process.

Proposed Revisions to 215 ILCS 5/155.23 Claims Reporting and 5/155.24 Motor Vehicle Theft and Motor Insurance Fraud Reporting and Immunity Law

Section 154.23 Revision

Section. 155.23 *Fraud ~~Claims~~ Reporting*. (1) The Director of Insurance is authorized to promulgate reasonable rules requiring ~~insurance companies~~ insurers, as defined in 215 ILCS 5/155.24, doing business ~~licensed~~ in the state of Illinois to report factual information in their possession which is pertinent to ~~casualty and property~~ suspected fraudulent insurance claims, fraudulent insurance applications or premium fraud ~~including claims involving the theft of automobiles.~~ after ~~he~~ the Director has made a determination that such information is necessary to detect fraud or arson. ~~This c~~Claim information may include:

(a) Dates and description of accident or loss.

(b) Any insurance policy relevant to the accident or loss.

(c) Name of the insurance company claims adjustor and claims adjustor supervisor processing or reviewing any claim or claims made under any insurance policy relevant to the accident or loss.

(d) Name of claimant's or insured's attorney.

(e) Name of claimant's or insured's physician or any person rendering or purporting to render medical treatment.

(f) Description of alleged injuries, damage or loss.

(g) History of previous claims made by the claimant or insured.

(h) Places of medical treatment.

(i) Policy premium payment record.

(j) Material relating to the investigation of the accident or loss, including statements of any person, proof of loss, and any other relevant evidence.

(k) Any facts evidencing fraud or arson.

Application and premium fraud reporting information will be established by rules promulgated by the Director of Insurance.

(2) The Director of Insurance may designate one or more data processing

organizations or governmental agencies to assist ~~him~~ the Director in gathering such information and making compilations thereof, and may by rule establish the form and procedure for gathering and compiling such information. Such rule ~~shall~~ may name any organization or agency designated by the Director to provide this service, and ~~shall~~ may in such case provide for a fee to be paid by the reporting ~~companies~~ insurers directly to the designated organization or agency to cover any of the costs associated with providing this service. After determination by the Director of substantial evidence of false or fraudulent claims~~,~~ or fraudulent applications or premium fraud, the information shall be forwarded by the Director or ~~his~~ the Director's designee to the proper ~~State's Attorney and U.S. Attorney~~ law enforcement agency or prosecutor. ~~Insurance companies~~ Insurers shall have access to, and may use, ~~claims~~ the information compiled under the provisions of this Section. ~~Insurance companies~~ Insurers shall release the required information ~~concerning claims against them~~ to, and shall cooperate with, any law enforcement agency requesting such information.

In the absence of malice, no ~~insurance company~~ insurer or person, who furnishes information on its behalf, is liable for damages in a civil action or subject to criminal prosecution for any oral or written statement made or any other action taken that is necessary to supply information required pursuant to this Section. (Source: P.A. 83-851.)

Section 155.24 Revision

Sec. 155.24 Motor Vehicle Theft and Motor Insurance Fraud Reporting and Immunity and Law.

(a) As used in this Section: (1) "authorized governmental agency" means the Illinois Department of State Police, a local governmental police department, a county sheriff's office, a State's Attorney, the Attorney General, a municipal attorney, a United States district attorney, a duly constituted criminal investigative agency of the United States government, the Illinois Department of Insurance, the Illinois Department of Professional Regulation and the office of the Illinois Secretary of State; (2) "relevant" means having a tendency to make the existence of any information that is of consequence to an investigation of motor vehicle theft or insurance fraud

investigation or a determination of such issue more probable or less probable than it would be without such information; and (3) information will be "deemed important" if within the sole discretion of the authorized governmental agency such information is requested by that authorized governmental agency. (4) "Illinois authorized governmental agency" means an authorized governmental agency (as defined in (1) above) which is a part of the government of the state of Illinois or any of the counties or municipalities therein or any other authorized entity. (5) For the purposes of this Section and 215 ILCS 5/155.23 "Insurers" or "Insurer" means insurance companies, insurance support organizations, self insured entities, and other providers of insurance products and services doing business in the state of Illinois.

(b) Upon written request to an insurer by an authorized governmental agency, an insurer or agent authorized by an insurer to act on its behalf shall release to the requesting authorized governmental agency any or all relevant information deemed important to the authorized governmental agency which the insurer may possess relating to any specific motor vehicle theft or motor vehicle insurance fraud. Relevant information may include, but is not limited to:

(1) Insurance policy information relevant to the motor vehicle theft or motor vehicle insurance fraud under investigation, including any application for such a policy.

(2) Policy premium payment records which are available.

(3) History of previous claims made by the insured.

(4) Information relating to the investigation of the motor vehicle theft or motor vehicle insurance fraud, including statements of any person, proofs of loss and notice of loss.

(c) When an insurer knows or reasonably believes to know the identity of a person whom it has reason to believe committed a criminal or fraudulent act relating to a motor vehicle theft or a motor vehicle

insurance claim or has knowledge of such a criminal or fraudulent act which is reasonably believed not to have been reported to an authorized governmental agency, then for the purpose of notification and investigation, the insurer or an agent authorized by an insurer to act on its behalf shall notify an authorized governmental agency of such knowledge or reasonable belief and provide any additional relevant information in accordance with paragraph (b) of this Section. When the motor vehicle theft or motor vehicle claim which gives rise to the suspected criminal or fraudulent act has already generated an incident report to an Illinois authorized governmental agency, the insurer shall report the suspected criminal or fraudulent act to that agency. When there has been no prior incident report made, the insurer shall report the suspected criminal or fraudulent act to the Attorney General or State's Attorney in the county or counties where the incident is claimed to have occurred. When the incident which gives rise to the suspected criminal or fraudulent act is claimed to have occurred outside the state of Illinois, but the suspected criminal or fraudulent act occurs within the state of Illinois, the insurer shall make the report to the Attorney General or State's Attorney in the county or counties where the suspected criminal or fraudulent act occurred. When the fraud occurs in multiple counties the report shall also be sent to the Attorney General.

(d) When an insurer provides any of the authorized governmental agencies with notice pursuant to this Section it shall be deemed sufficient notice to all authorized governmental agencies for the purpose of this Act.

(e) The authorized governmental agency provided with information pursuant to this Section may release or provide such information to any other authorized governmental agency.

(f) Any insurer providing information to an authorized governmental agency pursuant to this Section shall have the right to request and receive relevant information from such authorized governmental agency, and receive within a reasonable time after the completion of the investigation, not to exceed 30 days, the information requested.

(g) Any information furnished pursuant to this Section shall be privileged and not a part of any public record. Except as otherwise provided by law, any authorized governmental agency, insurer, or an agent authorized by an insurer to act on its behalf which receives any information furnished pursuant to this Section, shall not release such information to public inspection. Such evidence or information shall not be subject to subpoena duces tecum in a civil or criminal proceeding unless, after reasonable notice to any insurer, agent authorized by an insurer to act on its behalf and authorized governmental agency which has an interest in such information and a hearing, the court determines that the public interest and any ongoing investigation by the authorized governmental agency, insurer, or any agent authorized by an insurer to act on its behalf will not be jeopardized by obedience to such a subpoena duces tecum.

(h) No insurer, or agent authorized by an insurer on its behalf, authorized governmental agency or their respective employees shall be subject to any civil or criminal liability in a cause of action of any kind for releasing or receiving any information pursuant to this Section. Nothing herein is intended to or does in any way or manner abrogate or lessen the common and statutory law privileges and immunities of an insurer, agent authorized by an insurer to act on its behalf or authorized governmental agency or any of their respective employees.

(Source: P.A. 85-1292.)

Recommendation #2 - Whistle Blower Statute

The Task Force discussed the concept of whistle blower statutes and their impact on insurance fraud in the various states where such statutes exist. The state of California has a whistle blower statute that has been used successfully in that state to combat insurance fraud in the civil courts. These statutes provide a significant monetary incentive to both governmental entities and private citizens to pursue civil cases against the perpetrators of insurance fraud. The Task Force has developed a proposed Illinois whistle blower statute which is heavily based on the California model. The Task Force recommends the enactment of this statute.

A PROPOSAL TO CREATE
THE ILLINOIS INSURANCE CLAIMS FRAUD PREVENTION ACT

(a) Except as permitted under the Illinois Rules of Professional Conduct and Illinois Medical Practices Act, it is unlawful to knowingly offer or pay any remuneration directly or indirectly, in cash or in kind, to induce any person to procure clients or patients to obtain services or benefits under a contract of insurance or that will be the basis for a claim against an insured person or his, her or its insurer.

(b) Every person who violates any provision of this Section or 720 ILCS 5/46-1 *et seq.* shall be subject, in addition to any other penalties that may be prescribed by law, to a civil penalty of not less than five thousand dollars ($5,000) nor more than ten thousand dollars ($10,000), plus an assessment of not more than three times the amount of each claim for compensation under a contract of insurance. The court shall have the power to grant other equitable relief, including temporary injunctive relief, as is necessary to prevent the transfer, concealment, or dissipation of illegal proceeds, or to protect the public. The penalty prescribed in this paragraph shall be assessed for each fraudulent claim presented on behalf of a person in which the defendant participated.

(c) The penalties set forth in subdivision (b) are intended to be remedial rather than punitive, and shall not preclude, nor be precluded by, a criminal prosecution for the same conduct. If the court finds, after considering the goals of disgorging unlawful profit, restitution, compensating the state for the costs of investigation and prosecution, and alleviating the social costs of increased insurance rates due to fraud, that such a penalty would be punitive and would preclude, or be precluded by, a criminal prosecution, the court shall reduce that penalty appropriately.

(d) The State's Attorney or Attorney General may bring a civil action under this section. Before the Attorney General may bring that action, the Attorney General shall be required to present the evidence obtained to the appropriate local State's Attorney for possible criminal or civil filing. If the State's Attorney elects not to pursue the matter, then the Attorney General may proceed with the action.

(e) (1) Any interested person, including an insurer, may bring a civil action for a violation of this section for the person and for the state of Illinois. The action shall be brought in the name of the state. The action may be dismissed only if the court and the State's Attorney or the Attorney General, whichever is participating, gives written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the State's Attorney and Attorney General. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The local State's Attorney or Attorney General may elect to intervene and proceed with the action within 60 days after he or she receives both the complaint and the material evidence and information. If more than one governmental entity elects to intervene, the State's Attorney shall have precedence.

(3) The State's Attorney or Attorney General may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). The motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the State's Attorney or Attorney General shall either:

(A) Proceed with the action, in which case the action shall be conducted by the State's Attorney or Attorney General;

(B) Notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person or governmental agency brings an action under this section, no person other than the State's Attorney or Attorney General may intervene or bring a related action based on the facts underlying the pending action unless that action is authorized by another statute or common law.

(f) (1) If the State's Attorney or Attorney General proceeds with the action, he or she shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. That person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2) (A) The State's Attorney or Attorney General may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the State's Attorney or Attorney General of the filing of the motion, and the court has provided the person with an opportunity for a hearing on the motion.

(B) The State's Attorney or Attorney General may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, the hearing may be held in camera.

(C) Upon a showing by the State's Attorney or Attorney General that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the State's Attorney's or Attorney General's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, including, but not limited to, the following:

(i) Limiting the number of witnesses the person may call;

(ii) Limiting the length of the testimony of those witnesses;

(iii) Limiting the person's cross-examination of witnesses;

(iv) Otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the State's Attorney or Attorney General elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the State's Attorney or Attorney General so requests, he or she shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts, at the State's Attorney's or Attorney General's expense. When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the State's Attorney or Attorney General to intervene at a later date upon a showing of good cause.

(4) If at any time both a civil action for penalties and equitable relief pursuant to this section and a criminal action are pending against a defendant for substantially the same conduct, whether brought by the government or a private party, the civil action shall be stayed until the criminal action has been concluded at the trial court level. The stay shall not preclude the court from granting or enforcing temporary equitable relief during the pendency of the actions. Whether or not the State's Attorney or Attorney General proceeds with the action, upon a showing by the State's Attorney or Attorney General that certain actions of discovery by the person initiating the action would interfere with a law enforcement or governmental agency investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay discovery for a

period of not more than 180 days. A hearing on a request for the stay shall be conducted in camera. The court may extend the 180-day period upon a further showing in camera that the agency has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subdivision (e), the State's Attorney or Attorney General may elect to pursue its claim through any alternate remedy available to the State's Attorney or Attorney General.

(g) (1) If the State's Attorney or Attorney General proceeds with an action brought by a person under subdivision (e), that person shall receive an amount that the court determines is reasonable based upon the extent to which the person contributed to the prosecution of the action. Subject to subparagraph (g) (4), the amount awarded to the person who brought the action shall not be less than 30 percent of the proceeds of the action or settlement of the claim, and shall be paid from the proceeds.

(2) If the State's Attorney or Attorney General does not proceed with an action brought by a person under subdivision (e), that person shall receive an amount that the court decides is reasonable for collecting the civil penalty and damages. Subject to subparagraph (g) (4), the amount shall not be less than 40 percent of the proceeds of the action or settlement, and shall be paid from the proceeds.

(3) If the person bringing the action as a result of a violation of this section has paid money to the defendant or to an attorney acting on behalf of the

defendant in the underlying claim, then he or she shall be entitled to up to double the amount paid to the defendant or the attorney if that amount is greater than 50 percent of the proceeds.

(4) Where the action is one that the court finds to be based primarily on disclosures of specific information, other than information provided by the person bringing the action under subdivision (e), relating to allegations or transactions in a criminal, civil, or administrative hearing, in a legislative or administrative report, hearing, audit, or investigation, or from the news media, the court may award those sums that it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation.

(5) Any payment to a person under subparagraph (g) (1) (2) (3) or (4) shall be made from the proceeds. The person shall also receive an amount for reasonable expenses that the court finds to have been necessarily incurred, plus reasonable attorney's fees and costs. All of those expenses, fees, and costs shall be awarded against the defendant.

(6) If a local State's Attorney has proceeded with an action under this section, the Treasurer of the County where the action was brought shall receive an amount for reasonable expenses that the court finds to have been necessarily incurred by the State's Attorney, including reasonable attorney's fees and costs, plus one-half of the funds not awarded to a private party. Those amounts shall be used to investigate, prosecute insurance fraud, augmenting existing budgets rather than replacing them. All remaining funds shall go to the state and be deposited in the General

Revenue Fund and, when appropriated by the Legislature, shall be allocated to appropriate state agencies for enhanced insurance fraud investigation, prosecution and prevention efforts.

(7) If the Attorney General has proceeded with an action under this section, all funds not awarded to a private party, shall go to the state and be deposited in the General Revenue Fund and, when appropriated by the Legislature, shall be allocated to appropriate state agencies for enhanced insurance fraud investigation, prosecution and prevention efforts.

(8) If neither a local State's Attorney or the Attorney General has proceeded with an action under this section, one-half of the funds not awarded to a private party shall be deposited with the Treasurer of the County where the action was brought and shall be disbursed to the State's Attorney of the County where the action was brought. Those funds shall be used by the State's Attorney solely to investigate, prosecute and prevent insurance fraud, augmenting existing budgets rather than replacing them. All remaining funds shall go to the state and be deposited in the General Revenue Fund and, when appropriated by the Legislature, shall be allocated to appropriate state agencies for enhanced insurance fraud investigation, prosecution and prevention efforts.

(9) Whether or not the State's Attorney or Attorney General proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of this section, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. The dismissal shall not prejudice the right of the State's Attorney or Attorney General to continue the action on behalf of the state.

(10) If the State's Attorney or Attorney General does not proceed with the action, and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorney's fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(h) (1) In no event may a person bring an action under subdivision (e) that is based upon allegations or transactions that are the subject of a civil suit or an administrative civil money penalty proceeding in which the State's Attorney or Attorney General is already a party.

(2) (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing in a legislative or administrative report, hearing, audit, or investigation, or from the news media, unless the action is brought by the State's Attorney, the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the State's Attorney or Attorney General before filing an action under this section which is based on the information.

(i) Except as provided in subdivision (j), the State's Attorney or Attorney General is not liable for expenses that a person incurs in bringing an action under this section.

(j) In civil actions brought under this section in which the Attorney General or a State's Attorney is a party, the court shall retain discretion to impose sanctions otherwise allowed by law, including the ability to order a party to pay expenses as provided in the Code of Civil Procedure.

(k) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. That relief shall include reinstatement with the same seniority status the employee would have had but for the discrimination, two times the amount of backpay, interest on the backpay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorney's fees. An employee may bring an action in the appropriate court for the relief provided in this subdivision. The remedies under this section are in addition to any other remedies provided by existing law.

(l) (1) An Action pursuant to this section may not be filed more than three years after the discovery of the facts constituting the grounds for commencing the action.

(2) Notwithstanding paragraph (1) no action may be filed pursuant to this section more than eight years after the commission of the act constituting a violation of this section or a violation of 720 ILCS 5/46-1 *et seq.*

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NOTICE OF FILING AND CERTIFICATE OF SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On March 18, 2020, the foregoing Motion for Leave to File Instanter an *Amicus Curiae* Brief in Support of Plaintiff-Appellee State of Illinois ex rel. David A. Leibowitz, as Trustee of the Bankruptcy Estate of Marie A. Cahill, proposed order, and brief of *amicus curiae* the Coalition Against Insurance Fraud were filed and served electronically on the Clerk of the Illinois Supreme Court, and that true and correct copies of the same were served by electronic mail on the following:

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/s/ John W. Reale