No. 124754

IN THE SUPREME COURT OF ILLINOIS

STATE OF ILLINOIS *ex rel*. DAVID P. LEIBOWITZ, as 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 from the
Illinois Appellate Court, First District, No. 18-08697

On appeal from the Circuit Court of Cook County, Illinois, Law Division
Circuit Court Case No. 17 L 4200
The Honorable John C. Griffin, Judge Presiding

BRIEF OF PLAINTIFF-APPELLEE

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POINTS AND AUTHORITIES

NATURE OF THE ACTION

This case presents the legal question of who can sue under the *qui tam* provision of the Illinois Insurance Claims Fraud Prevention Act ("ICFPA" or "Act"), 740 ILCS 92/1 *et seq.*, both as a matter of statutory interpretation to discern the intent of the General Assembly and as a matter of whether any constitutional provision limits the authority of the General Assembly to enact a *qui tam* statute. The ICFPA provides civil penalties to combat insurance fraud and incentivizes private whistleblowers—those with information about fraud—to come forward to enforce the ICFPA with the State as a relator in *qui tam* litigation. Relator here was an office administrator who exposed a scheme by her former employer to defraud a national insurance company over several years. Pursuant to a Section 2-619 motion, the trial court dismissed the complaint on standing grounds. A.030-40.[1] The appellate court reversed and correctly held that "in the *qui tam* context, a whistleblower employee like Cahill, who has personal, nonpublic information of possible wrongdoing, is an 'interested person' under the statute and need not have a personal injury to have standing." 2019 IL App (1st) 180697 ("Op.") ¶ 3; A.008.

ISSUES PRESENTED

1. Whether, as a matter of statutory interpretation, the General Assembly intended to allow an individual whistleblower—not just the insurance company that was defrauded—to pursue *qui tam* litigation to combat insurance fraud as an "interested person" under the ICFPA.

2. Whether any provision of the Illinois Constitution prohibits the General Assembly from providing standing to a relator to seek civil penalties—under the control of the Attorney General—through the *qui tam* provision of the ICFPA.

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[1] The one-volume record on appeal is cited as "C.__"; the appendix to Defendants' opening brief is cited as "A.__"; the supplemental appendix to this brief is cited as "Supp.A.___."

BACKGROUND

The General Assembly adopted the ICFPA to further the State's interest in protecting insurance markets from fraud, the cost of which is ultimately borne by the public at large. A.043, ¶ 4. The goals of the Act include "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). The ICFPA was written by the Illinois Insurance Fraud Task Force, which had been created by the General Assembly in 1999 to study "organized insurance fraud and methods to combat organized insurance fraud," including "the concept of creating a private agency *** and all ways to fund the agency." Pub. Act 91-522 (eff. Aug. 13, 1999). The Task Force recognized "a significant insurance fraud problem," yet declined to recommend creating and funding a new government agency to address the problem. Supp.A.008, 010.

Instead, the Task Force recommended a *qui tam* statute to harness the information and resources of the private sector to cost-effectively fight insurance fraud. The Task Force proposed statutory language copied from an equivalent California *qui tam* statute, Insurance Code § 1871.7 ("Section 1871.7"). Supp.A.017. The General Assembly adopted the Task Force's proposed language and enacted the ICFPA to create an "incentive" for relators "to bring civil suit against persons who seek to defraud insurance companies," because the cost of insurance fraud is paid for by "the law-abiding consumers of this country." 92d Ill. Gen. Assem., Senate Proceedings, Mar. 27, 2001, at 43 (statements of Senator O'Malley). The *qui tam* provision of the ICFPA enables private whistleblowers who have information about fraud to sue with the State to seek civil penalties. 740 ILCS 92/15(a) ("An 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.").

Under the *qui tam* provision of the ICFPA, the Bankruptcy Estate of Marie A. Cahill ("Relator") filed this lawsuit in the name of the State of Illinois. The State is the real plaintiff in interest, and it is beyond dispute that the State's interest is substantial: protecting the integrity of the insurance market for the public at large by stopping fraud and enforcing the ICFPA. A.044, ¶ 7. Ms. Cahill was the office administrator for Defendant Family Vision Care, which is an optometry clinic in LaGrange, Illinois. A.044, ¶¶ 8-9. About 90% of Family Vision Care's revenue comes from claims to the Vision Service Plan ("VSP") insurance company. A.045, ¶ 16. VSP covers claims only from optometrists who have "'majority ownership and complete control'" of their medical practices. A.045, ¶ 17. This rule enacts VSP's core philosophy about medical care and seeks to protect "patients' interests" by ensuring their medical care is provided by qualified, independent medical professionals and untainted by corporate profiteering. A.045-46, 054, ¶¶ 17-18 and Ex. A at sec. B.1.a. For VSP to make any insurance payment, the practice must certify that it complies with VSP's optometrist-ownership and "complete control" rule. A.009, ¶ 7.

Family Vision Care was in fact owned and controlled by Defendants NovaMed Management Services, LLC and Surgery Partners, Inc. A.044-45, ¶¶ 10-11. NovaMed and Surgery Partners are not optometrists nor eligible for VSP payments; they have combined into a multi-billion dollar publicly traded company, majority-owned by a private equity firm. *Id.* Indeed, Surgery Partners executive Frank Soppa specifically instructed Ms. Cahill to lie to VSP about Family Vision Care's eligibility. A.047, 059, ¶¶ 27-28, and Ex. B. Defendants thus knowingly and falsely certified to VSP that Family Vision Care was optometrist-owned and controlled to submit fraudulent insurance claims.

Relator filed her complaint under seal pursuant to the ICFPA procedures. A.042. The circuit court eventually granted Defendants' Section 2-619 motion to dismiss for lack of standing.

The circuit court erroneously held that the General Assembly could not confer standing to a relator unless the State had suffered an "injury in fact" that is generally assignable, that the State had not suffered such an injury, and that the ICFPA contains "limiting language" that requires a relator to personally have "suffered an injury related" to the insurance fraud. A.011-12. The trial court also denied Defendants' motion to dismiss based on a release and insufficient pleading. A.040.

The appellate court reversed and held that a relator has standing pursuant to the *qui tam* provision of the ICFPA under *Scachitti v. UBS Financial Services*, 215 Ill. 2d 484 (2005). 2019 IL App (1st) 180697 ("Op."); A.007-025. The appellate court recognized that "[o]f course, the State suffers an injury to its sovereignty when its laws are violated *** [and] has an interest in protecting the public from insurance fraud." Op. ¶ 23; A.014. Thus, "the State need not have suffered monetary damages to confer standing on a relator." Op. ¶ 3; A.008. Further, "[a] '*qui tam* plaintiff' or 'relator' is generally likened to private attorneys general who stand in the shoes of the state." Op. ¶ 22; A.013 (citations omitted). "[I]n the *qui tam* context, a whistleblower employee like Cahill, who has personal, nonpublic information of possible wrongdoing, is an 'interested person' under the statute and need not have a personal injury to have standing." Op. ¶ 3; A.008. Any other conclusion would undermine the purpose of the ICFPA and use of a *qui tam* provision. Op. ¶ 29; A.016-17. The appellate court also affirmed denial of Defendants' motion to dismiss for insufficient pleading under Section 2-615 and on a release, which Defendants have not appealed. Op. ¶¶ 52-53, 58; A.024-25.

ARGUMENT

Defendants seek to write the *qui tam* provision out of the ICFPA through the guise of purported statutory and constitutional challenges to Relator's standing. Neither challenge has any merit, nor basis in legal authority. Defendants simply want to limit ICFPA private actions to insurance companies—and only insurance companies who realize they are being defrauded. This is not what the General Assembly intended when it chose to fight insurance fraud with a *qui tam* statute, nor what the Illinois Constitution requires. The statutory standing issue is at core a question of legislative intent. *People v. Perez*, 2014 IL 115927, ¶ 9. When the statute is read as a whole, there is no doubt the General Assembly intended to allow an individual person with information about fraud—and not just an insurance company—to seek ICFPA civil penalties. The legislature obviously chose to write a *qui tam* statute to extend the enforcement resources of the government by allowing whistleblowers to uncover hidden fraud. Anyone with information who complies with the requirements of the ICFPA, not just insurers, can effectively play that whistleblower role.

On the constitutional challenge, Defendants cannot escape the fact that this court already upheld the standing of a relator under *qui tam* statutes in *Scachitti v. UBS Financial Services*, 215 Ill. 2d 484 (2005) (upholding the Illinois False Claims Act). Though Defendants try mightily, they cannot invent a distinction between the False Claims Act and the ICFPA of any constitutional significance. Both Acts include a *qui tam* mechanism, which authorizes a relator to seek civil penalties for fraud for the State. That mechanism poses no constitutional problem. Nor, as Defendants suggest, does it imprudently authorize rogue criminal prosecutions. The ICFPA is a decidedly *civil* statute, passed to cost-effectively extend the government's ability to deter and detect insurance fraud through civil enforcement actions, all of which remain firmly and fully under the control of the Attorney General. The Act should be upheld.

I. The General Assembly Intended to Allow Individual Whistleblowers—Not Just Insurance Companies—to Use the *Qui Tam* Provision of the ICFPA.

On statutory standing, the question is whether the General Assembly *intended* to allow individual whistleblowers to use the *qui tam* provision of the ICFPA, or to limit that provision to insurance companies. The overriding objective of statutory interpretation "is to ascertain and give effect to the legislature's intent." *People v. Perez*, 2014 IL 115927, ¶ 9. Legislative intent is identified through the "language of the statute" and the "statute as a whole," as well as the context and history. *In re Application of County Treasurer*, 214 Ill. 2d 253, 258 (2005). Courts also "presume that the legislature did not intend to enact a statute that leads to absurdity, inconvenience, or injustice." *Lutkauskas v. Ricker*, 2015 IL 117090, ¶ 36. "Legislative intent is ever paramount" and "traditional rules of statutory construction are merely aids in determining legislative intent and must yield to such intent," even to the point of changing the "literal language of a particular clause of the statute." *County Treasurer*, 214 Ill. 2d at 259.

The language, history, and purpose of the Act all leave no doubt that the General Assembly intended to allow individual whistleblowers to bring *qui tam* actions. As the appellate court correctly concluded, the phrase "interested person" in the ICFPA refers to a person with information to bring a claim and "is descriptive rather than restrictive" of who can use the *qui tam* provision. Op. ¶ 43, A.022.

Yet Defendants continue to advance the illogical position that the General Assembly wanted to limit *qui tam* claims to relators who personally "actually suffered a cognizable injury," Br. at 17, in other words, only an insurance company. Defendants claim that their definition of "interested person" covers more than just an insurance company, because a "self-insured entity" could also sue. Br. at 19, n.8. This point only highlights the absurdity of Defendants' position. A self-insured entity is no different. Under Defendants' reading, only corporate entities—and only corporate entities who realize they are being defrauded—could use the law because natural persons are not defrauded in insurance fraud. This reading would drastically restrict who could be a whistleblower, excluding even the classic insider employee. If no individual whistleblower can be a relator, then the *qui tam* provision of the ICFPA is a practical nullity.

The General Assembly did not intend this absurd result. The very purpose of every *qui tam* provision is to incentivize and empower individual whistleblowers who have no claim of their own, especially insiders with non-public information of fraud, to come forward to expose and combat fraud. The language of the statute itself unambiguously establishes that the phrase "interested person, including an insurer," includes individual whistleblowers, as the history of the statute and purpose of the *qui tam* provision confirm. Defendants' desperate efforts to avoid that plain conclusion all fail. They grasp a flimsy claim of surplusage, but then propose an interpretation that itself writes "person" out of the ICFPA. Defendants point to other instances of the word "interested" in Illinois law, yet words cannot be plucked from context or interpreted in isolation. *Corbett v. County of Lake*, 2017 IL 121536, ¶ 27. Nor can it be disputed that the language actually came from a similar insurance fraud law in California. It is not a reference to the Illinois probate code; it is not a reference to the Illinois declaratory judgment statute (or any other Illinois law); it is not a contrast with the Illinois False Claims Act. The phrase "interested person" simply describes a relator who has the information to bring an ICFPA claim.

A. The Text of the ICFPA Unambiguously Provides That Individual Whistleblowers May Bring *Qui Tam* Claims.

The very text of the ICFPA clearly precludes Defendants' narrow interpretation, because the language of the Act plainly contemplates *qui tam* actions by individuals as well as insurance companies. "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*, 2017 IL 121536, ¶ 27 (citations omitted). "[T]he 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.'" *Id.* "In determining the plain meaning of the statutory terms, [courts] consider the statute in its entirety, keeping in mind the subject it addresses and the apparent intent of the legislature in passing it." *People v. Chapman*, 2012 IL 111896, ¶ 23; *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) ("Our duty, after all, is 'to construe statutes, not isolated provisions.'"). Here, the language of the ICFPA conclusively demonstrates that "interested person" cannot be synonymous with the insurance company who was personally defrauded, because it also includes individual whistleblowers.

First, if "an interested person" refers only to insurance companies, then the phrase "including an insurer" would be redundant and meaningless. 740 ILCS 92/15(a). The very canon of statutory construction upon which Defendants largely rely, that against surplusage, dictates that an "interested person" must include persons beyond an insurer—whether an insurance company or a self-insured entity—with a personal injury.

Second, the ICFPA protects from retaliation an employee who initiates an ICFPA *qui tam* action as an "interested person." 740 ILCS 92/40 ("An employee who is discharged" for the "initiation of *** an action filed *** under this Act" may bring a claim for retaliation). Thus the retaliation provision recognizes that employees can bring ICFPA *qui tam* claims, and an insurance company cannot be an "employee."

Third, the ICFPA precludes *qui tam* claims by a "person who planned and initiated the violation" of the ICFPA. 740 ILCS 92/25(i). A defrauded insurance company could not plan or initiate a scheme to defraud itself.

Fourth, the ICFPA provides an enhanced whistleblower award to "the person bringing the action" if that person happens to be the insurance company who was defrauded. 740 ILCS 92/25(c) (a relator who "has paid money to the defendant *** in the underlying claim *** shall be entitled to up to double the amount paid to the defendant"). Thus, some claims must be brought by relators *other than* the defrauded insurer, who get the regular whistleblower award.

Fifth, the ICFPA original source provisions refer to the relator as the "individual" with "direct and independent knowledge" of the information underlying the complaint. 740 ILCS 92/30(b). An insurance company is not an "individual."

These provisions of the ICFPA only make sense if an individual whistleblower can be the "interested person." Yet Defendants attempt to escape the plain language of the ICFPA by focusing only on the retaliation provision, Section 40, and pointing out that the retaliation provision "has far broader application than merely protecting an ICFPA *relator* against retaliation." Br. at 19. Certainly the retaliation provision protects others (such as witnesses), but Defendants cannot ignore or explain then why the retaliation provision *also* protects a person who "initiates" a *qui tam* action as the relator. "Section 40's protections plainly apply to an employee of a health care provider, who, as a whistleblower, identifies potential fraud by his or her employer, and risks the possibility of retaliation." Op. ¶ 38, A.019. This provision makes no sense if the relator must be an insurance company. And Defendants' point about Section 40 is no response to all of the other provisions. "Interested person" must include individual whistleblowers.

Further, the General Assembly knows how to create a cause of action for an insurance company that was defrauded—it already did so. See 720 ILSC 5/17-10.5(e) (authorizing "the insurance company or self-insured entity that paid the claim" to sue for double damages). *E.g. Allstate Insurance Co. v. St. Anthony's Spine & Joint Institute, P.C.*, 691 F. Supp. 2d 772, 776 (N.D. Ill. 2010) (claim brought by insurer under predecessor to section 10.5). The General Assembly did not use that language in the ICFPA, but rather chose the broader "interested person."

The term "interested person" describes the relator who brings the *qui tam* action under the procedures of the ICFPA, or as the statute says, "the person" who "possesses" the "material evidence and information" to bring an ICFPA case. 740 ILCS 92/15(b). It is no more a limitation than, for example, saying "interested persons" can participate in the administrative rulemaking process. 5 ILCS 100/5-40. "Interested" is descriptive, not restrictive, and in the ICFPA statute, it refers to a person with non-public information about insurance fraud. It is that simple.

B. The History of the ICFPA Confirms That the General Assembly Intended Individual Whistleblowers to Bring *Qui Tam* Claims.

Beyond the plain language of the Act, the history of the ICFPA also makes it clear that "interested person, including an insurer" must include individual whistleblowers. The General Assembly expressly adopted the *qui tam* provision of the ICFPA to "provide a significant monetary incentive to insurance companies, [and] *individuals* *** to bring civil suit." 92d Ill. Gen. Assem., Senate Proceedings, Mar. 27, 2001, at 43 (emphasis added). Likewise, the history of California Insurance Code Section 1871.7 ("Section 1871.7"), after which the ICFPA was modeled, confirms that both the Illinois and California legislatures intended individual whistleblowers to bring *qui tam* actions. Across states and sources, nothing in the history of the ICFPA suggests individual whistleblowers are prohibited from bringing *qui tam* claims; everything suggests they are the prototypical relators.

1. *The Legislative History of the ICFPA Specifically Discusses Individual Relators.*

The legislative history of the ICFPA conclusively demonstrates that the General Assembly intended to empower individual whistleblowers and did not intend to limit who can use the *qui tam* mechanism to aid State enforcement. The ICFPA was written by the Illinois Insurance Fraud Task Force, which was created in 1999 to study insurance fraud, and proposed the language of the ICFPA in a report dated October 2000. Pub. Act 91-522 (eff. Aug. 13, 1999) (codified as 20 ILCS 1405/56.3 (West 2000)); Supp.A.001 (Task Force report). The General Assembly accepted the Task Force recommendation and adopted the ICFPA unanimously with little discussion and just one amendment (which does not implicate the "interested person" provision). See 92d Ill. Gen.

Assem., Senate Journal, Mar. 21, 2001, at 20 (reporting a minor amendment to Senate Bill 879); Pub. Act 92-233 (eff. Jan. 1, 2002) (also expanding insurance fraud reporting requirements). The two statements in the legislative history that do discuss the ICFPA, however, both confirm that "interested persons" are not limited to insurers. When the Illinois Senate unanimously adopted the ICFPA, the sponsor Senator Patrick O'Malley explained:

> [The Act] would 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 had done in the seeking action under this law.

92d Ill. Gen. Assem., Senate Proceedings, Mar. 27, 2001, at 43-44 (emphasis added). Likewise, when the Illinois House unanimously adopted the ICFPA, the sponsor Representative Dave Winters explained that:

> It also created a whistle-blower provision that would allow for *civil suits and the incentives* to go to insurance companies, *individuals*, state's attorney, or the attorney general who brings a civil suit against persons who seek to defraud insurance companies.

92d Ill. Gen. Assem., House Proceeding, May 9, 2001, at 99 (emphasis added).

Accordingly, since 2002, nearly every unsealed ICFPA *qui tam* case to produce a reported decision was filed by an individual whistleblower, such as the one here, who sued for fraud in the healthcare industry based on information obtained during employment. *E.g. United States ex rel. Zverev v. USA Vein Clinics of Chicago, LLC*, 244 F. Supp. 3d 737 (N.D. Ill. 2017) (individual analyst's claims against former healthcare employers); *United States ex rel. Radke v. Sinha Clinic Corp.*, No. 12 CV 6238, 2015 WL 4656693 (N.D. Ill. Aug. 5, 2015) (office manager sued employer, a medical clinic, for fraud in health insurance claims); *United States ex rel. Helfer v. Associated Anesthesiologists of Springfield, Ltd.*, No. 10-3076, 2014 WL 4198199 (C.D. Ill. Aug. 25, 2014) (individual doctor's claim against employer for fraudulent medical billing); *United States ex rel. Nehls v. Omnicare, Inc.*, No. 07 C 05777, 2013 WL 3819671 (N.D. Ill. July 23, 2013) (individual relator claim against healthcare company for illegal kickbacks); *United States ex rel. Baltazar v. Warden*, No. 07 C 4107, 2011 WL 6400351 (N.D. Ill. Dec. 15, 2011) (individual chiropractor sued supervisor and employer for false healthcare insurance claims); *United States ex rel. Shank v. Lewis Enterprises, Inc.*, Civil No. 04-CV-4105-JPG, 2006 WL 1207005 (S.D. Ill. May 3, 2006) (individual employee sued his employer, an audiology clinic). There is simply no evidence in the legislative history or practice to suggest that only insurance companies can bring ICFPA *qui tam* actions, or that individuals cannot.

2. *The ICFPA was Imported from California, Which Likewise Provides a* **Qui Tam** *Mechanism for Individual Relators.*

The phrase "interested person, including an insurer," and in fact the entire ICFPA, comes from the California Insurance Code Section 1871.7, which too has never been limited to the defrauded insurance company. The ICFPA "adopts nearly word-for-word a statute from California," including the civil penalties and *qui tam* provision. Op. ¶ 18, A.012. Compare 740 ILCS 92/15(a) (West 2002) ("An 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.") with Cal. Ins. Code § 1871.7(e)(1) (West 2002) ("Any 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."). See also 92d Ill. Gen. Assem., Senate Proceedings, Mar. 27, 2001, at 43-44 (noting that the ICFPA was "modeled after a similar law that is *** in existence in the State of California").

Defendants too agreed below that the ICFPA "is modeled directly on a California private insurance fraud law" Section 1871.7. Response Brief of Defendants-Appellees to the Appellate Court (Sept. 19, 2018) at 21. The history of the ICFPA explains how the term "interested person" came to appear in the Act; nothing in that history suggests that the General Assembly intended to limit who could be a relator under the statute or restrict the ICFPA's *qui tam* provision.

First, like the ICFPA, the text of Section 1871.7 confirms that "interested persons" in California includes individual whistleblowers and cannot be limited to the insurance company that was personally defrauded. Section 1871.1(e)(1), like the ICFPA, enables "[a]ny interested persons, *including an insurer*" to serve as a relator. Cal. Ins. Code § 1871.7(e) (emphasis added). Section 1871.7, like the ICFPA, protects "[a]ny employee" for the "initiation of" a *qui tam* action, *id.* at (k), provides double damages to insurance company relators who paid the defendant, *id.* at (g)(2)(B), and excludes as relator "a person who planned and initiated" the fraud, *id.* at (g)(4). Similarly, Section 1871.7(g)(1)(A)(iii)(I) contemplates that the "interested person" may or may not be an insurer, and guarantees the recovery of attorneys' fees regardless: "[t]he person bringing the action, regardless of whether that person paid money to the defendants," shall receive a fee award. None of these provisions make any sense if only an insurance company can be a relator.

Second, nothing in the legislative history suggests that California intended to limit *qui tam* actions to insurance companies. To the contrary, Section 1871.7 has been amended since 1993 to emphasize that the pool of potential relators is broad, not limited. See, *e.g.*, 1995 Cal. Stat. ch. 574, § 2, p. 4427 (S.B. 465) (empowering the California Department of Insurance to bring enforcement actions); 1999 Cal. Stat. ch. 885, § 2, p. 6346 (A.B. 1050) (clarifying that a relator could be an insurer by adding "including an insurer" to the description of interested persons).

Third, California courts uniformly hold that the *qui tam* relator under Section 1871.7 need not be the defrauded insurance company or have any personal injury. "As a true qui tam provision, Insurance Code section 1871.7 does not mandate that the relator has suffered his or her own injury." *People ex rel. Alzayat v. Hebb*, 18 Cal. App. 5th 801, 831 (2017). In *Alzayat*, the relator had standing to bring the *qui tam* claim even though he "did not allege that he was personally harmed" by the fraud. *Id.* The relator's own personal injury was irrelevant because a *qui tam* claim brought under Section 1871.7 addresses an "injury allegedly suffered by the People of the State of California, and [is] not filed for the purpose of remedying an injury suffered by" the individual relator. *Id.* at 830. Defendants dismiss *Alzayat* in a footnote as a mere appellate court opinion. Br. at 18, n.7. Yet the sound reasoning of *Alzayat* is persuasive, unchallenged by Defendants on its merits, and undisturbed by subsequent cases or the California Supreme Court. *Alzayat*, Case No. S246749 (Cal. Order April 11, 2018) (petition for review denied).

If there were any doubt, the California Supreme Court held just last week that a *qui tam* statute "is designed primarily to benefit the general public, not the party bringing the action," and thus "[t]he state can deputize anyone it likes to pursue its claim, including a plaintiff who has suffered no actual injury." *Kim v. Reins International California, Inc*., Case No. S246911, 2020 WL 1174294 at 4, 11 (Cal. Mar. 12, 2020) (rejecting standing challenge in a PAGA *qui tam* action).

Nothing from this history of the ICFPA or Section 1871.7 suggests that ICFPA *qui tam* claims are restricted to insurance companies. The relator's own lack of injury is irrelevant, because "[b]y definition, a qui tam lawsuit vindicates an injury to the government, not an injury to the relator." *Alzayat*, 18 Cal. App. 5th at 830.

C. The Purpose of the ICFPA is to Uncover Fraud to Protect the Public, Not to Protect Insurers.

Individual whistleblowers also must have been authorized to bring *qui tam* actions to carry out the purpose of the ICFPA. That purpose is to protect the public from insurance fraud, not as Defendants' urge, to protect the insurance companies. Statutes must be interpreted in light of "the reason for the law, the problems sought to be remedied, the purposes to be achieved, and the consequences of construing the statute one way or another." *People v. Perez*, 2014 IL 115927, ¶ 9. The "goals" of the ICFPA include "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). See *Michigan Ave. National Bank v. County of Cook*, 191 Ill. 2d 493, 504 (2000) (language of statute offers "the most reliable indicator of the legislature's objectives in enacting a particular law"). The ICFPA thus authorizes civil penalties to fund "enhanced insurance fraud investigation, prosecution, and prevention efforts" and measures to "protect the public." 740 ILCS 92/5(b) and 92/25(f), (g). The purpose of the ICFPA is not to provide a redundant remedy for insurance companies. The purpose is to protect the public from insurance fraud, and to use the *qui tam* mechanism to extend the State's resources to do so. "Permitting parties who have information about possible insurance fraud to bring the claim on the State's behalf satisfies these goals." Op. ¶ 39, A.020.

1. *The ICFPA is to Protect the Public, Not Insurance Companies.*

The General Assembly has concluded that fraud—including insurance fraud—harms the public at large, not just the defrauded party. Laws against fraud generally are "clearly within the class of remedial statutes which are designed to grant remedies for the protection of rights, introduce regulation conducive to the public good, or cure public evils." *Scott v. Ass'n for Childbirth at Home, International*, 88 Ill. 2d 279, 288 (1981) (upholding the penalties of the Illinois Consumer Fraud and Deceptive Practices Act). As Relator pleaded, "the State has a strong interest in protecting the insurance market in Illinois" from fraud that undermines "the insurance industry and setting of rates that impact the public." A.043, ¶ 4. The cost of insurance fraud is paid for by "the law-abiding consumers of this country" through higher premiums, due both to the loss and cost of combatting fraud. 92d Ill. Gen. Assem., Senate Proceedings, Mar. 27, 2001, at 43. See also 740 ILCS 92/5(c) (recognizing "the social costs of increased insurance rates due to fraud"). Recent scholarship reports insurance fraud costs the public over $100 billion per year and the average family $1,400 per year in excess insurance premiums. Johnny Parker, *Detecting and Preventing Insurance Fraud: State of the Nation in Review*, 52 Creighton L. Rev. 293, 294 (2019).

Insurance fraud also costs time, money, and resources to detect, investigate, and prosecute. 740 ILCS 92/5(c) (discussing "compensating the State for the costs of investigation and prosecution"). The fraud here, for example, involves the intentional lie to an insurance company to obtain millions of dollars to which Defendants were not entitled. A.048, ¶¶ 29, 31. Insurers set coverage rules, like rules regarding medical provider licensing, to protect not only themselves, but also patients. One fundamental tenet of VSP, the insurer defrauded here, is that sound and objective medical care requires physicians to control their own medical practice, untainted by corporate profiteering. A.045, ¶ 17. Yet, Defendants blatantly and consciously lied about their compliance with this rule—by claiming that Family Vision Care was owned by a physician rather than a multi-billion-dollar healthcare company controlled by a private equity fund. A.044-45, 047-48, ¶¶ 11-12, 23, 26-29. Fraud like this not only puts patients at risk, in VSP's opinion, but imposes costs to monitor, investigate, and remedy. Whether addressed by the insurer, the State, or both, these investigation and enforcement costs are ultimately borne by consumers and taxpayers.

Accordingly, the General Assembly enacted the ICPFA with civil penalties and has separately criminalized insurance fraud; all Illinois professional licensing agencies and the Illinois State Police are obligated to coordinate enforcement of anti-fraud laws; and the Department of Insurance monitors fraud and refers for prosecution suspected insurance fraud. 720 ILCS 5/17-10.5; Pub. Act 87-1134 (adopting various criminal sanctions for insurance fraud); 215 ILCS 5/155.23.

Defendants make much of the point that the funds recovered in an ICFPA action may not go to the insurer that was defrauded. See, *e.g.*, Br. at 1, 5, 8, 16, 18, 24, 25. They blatantly mis-represent (or try to re-write) the purpose of the ICFPA, claiming that the goal is "remediating harm to a defrauded insurer or self-insured entity." Br. at 16. In fact, "the statute's purpose directly involves combating insurance fraud, not recouping damages." Op. ¶ 29, A.016. The Act requires per-claim penalties in part *because* some of the conduct it is intended to reach does *not* result in easily calculated damages or overpayment, yet still harms the public. The Act even extends beyond financial losses, by its own terms, to combat other harms to the public generally from insurance fraud as well. The ICFPA specifically provides penalties for kickbacks, for example, which interfere with the consumer's selection of medical providers and the integrity of the insurance system, even if the kickback does not result in any financial loss to anyone (even the insurer). 740 ILCS 92/5(a) ("it is unlawful to knowingly offer or pay *** to induce any person to procure clients or patients to obtain services or benefits under a contract of insurance"). The ICFPA labels the penalties "remedial rather than punitive," 740 ILCS 92/5(c), not because they are for insurers, but because they attempt to account for and remedy the harm to the public (and to avoid any argument about double jeopardy if there are criminal and civil prosecutions for the same fraud). See *In re P.S.*, 175 Ill. 2d 79, 86 (1997)). Nothing in Section 5 changes the purpose of the law, which is to fight fraud on behalf of the public. 740 ILCS 92/5(c) (listing "compensating the State" and "alleviating *** social costs" as "goals" of the ICFPA).

The civil penalties recovered under the ICFPA go to the government, with a share to the relator, to fund government efforts to fight insurance fraud. 740 ILCS 92/25(f), (g). This furthers the public's interest in avoiding the costs of insurance fraud by expanding government capacity to find and police fraud. Insurance companies also benefit from the deterrent effects of robust enforcement of the ICFPA and from *qui tam* whistleblowers' uncovering of fraud schemes. To recover funds lost to fraud, insurance companies already have numerous mechanisms (including bringing their own ICFPA action, contractual and common law fraud remedies, and even a special action under 720 ILCS 5/17-10.5(e)). See also Br. at 24 (acknowledging that the insurer can sue to recover funds). On top of those remedies, insurers do not also need the proceeds of every ICFPA action to protect their bottom lines. Defendants' argument fundamentally misses the public interest in insurance fraud, which motivated the General Assembly to pass the ICFPA in the first place.

2. *The* Qui Tam *Provision is to Uncover Fraud and aid the Government, Not Help Insurance Companies.*

Within the ICFPA, the *qui tam* provision acts to bring information of fraud to the government and expand the government's capacity to enforce the ICFPA. "By definition, *qui tam* suits involve claims brought by private parties to assist the executive branch in enforcing the law." Op. ¶ 22, A.013. Like other remedial statutes, the ICFPA is "to be liberally construed to effectuate [its] purpose." *Price v. Philip Morris, Inc.*, 219 Ill. 2d 182, 233-34 (2005) (interpreting the Consumer Fraud Act "for the purpose of protecting consumers and others against fraud"). The General Assembly included a *qui tam* enforcement provision to maximize the impact of the ICFPA while conserving government resources. See *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 542 n.5 (1943) (reporting "experience as old as modern civilization, that one of the least expensive and most effective means of preventing frauds" is a *qui tam* provision with a whistleblower award). The *qui tam* provision is about helping the government, not the insurers.

If the General Assembly did not want individual whistleblowers to bring suit, it would not have written a *qui tam* provision. To limit ICFPA *qui tam* actions to the insurance company that was personally defrauded writes the *qui tam* provision out of the statute. It becomes a duplicative private right of action. This would gut the incentive and enforcement system selected by the General Assembly to protect the public. "[F]or the Act—a statute designed for the purpose of deterring insurance fraud—to have an effect, witnesses of potentially fraudulent insurance claims, like Cahill, must be able to bring a complaint." Op. ¶ 31, A.018.

D. Neither Surplusage nor the Term "Interested" in Other Contexts Limits ICFPA Claims to Insurance Companies.

Against the express statutory language, clear legislative history, and the overwhelming purpose of the statute, Defendants raise meager objections based on the thin allegation of surplusage, an observation about a heading, and other uses of the word "interested" that have no plausible relevance to this case or the ICFPA. Defendants' arguments myopically focus on the word "interested" in an effort to sew doubt about the meaning of the statute. But "[i]t 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. County of Lake*, 2017 IL 121536, ¶ 27 (citations omitted). None of Defendants' arguments creates any meaningful doubt about the General Assembly's intent to enable individual whistleblowers to bring *qui tam* claims.

1. *The Canon Against Surplusage Does not Change the Unambiguous Language of the ICFPA, nor Limit the Qui Tam Provision to Insurance Companies.*

Despite the plain language of the ICFPA as a whole, Defendants attempt to rely on a canon of statutory construction to promote an arbitrary and irrational limitation on who can be a relator in an ICFPA *qui tam* suit. Defendants accuse Relator of reading the "crucial word" interested "out of the statute," creating an alleged surplusage. Br. at 9. Yet even when considering potential surplusage, "legislative intent cannot be determined simply by reading particular words or phrases in isolation." *Bauer v. H.H. Hall Construction Co.*, 140 Ill. App. 3d 1025, 1028 (1986). The language of the ICFPA leaves no doubt that the *qui tam* provision is intended to authorize individual whistleblower actions. The phrase "interested person, including an insurer" simply describes the person with the information to bring a *qui tam* action.

First, the court should not rely on canons of construction at all because the Act unambiguously provides that individuals can be relators. Canons of statutory construction are merely one tool in discerning legislative intent, and only come into play if the language is ambiguous. *People v. Burke*, 362 Ill. App. 3d 99, 105 (2005). The ICFPA is unambiguous; the Act's language only makes sense if individual whistleblowers can use the *qui tam* provision. *Supra* section I.A.

Second, the canon against surplusage actually supports the Relator's position. It is Defendants' reading of the ICFPA that creates surplusage: if "interested person" refers only to an insurance company, then it would be wholly redundant and unnecessary to include both "interested person" and "including an insurer." *Cf. McCarthy v. Taylor*, 2019 IL 123622, ¶ 40 ("Clearly, the listing of 'reasonable expenses' and 'attorney fees' in the rule was not meant to be exhaustive. Indeed, if the drafters of the rule had intended *only* 'reasonable expenses' and 'attorney fees' incurred, the phrase 'appropriate sanctions' would be superfluous.").

Third, the overriding inquiry in statutory interpretation is to discern the intent of the legislature, even to the point of changing or modifying the language of a statute if necessary. As the court "has made clear, a fundamental principle of statutory construction is that all provisions of an enactment should be viewed as a whole and words and phrases should be read in light of other relevant provisions of the statute." *Rushton v. Department of Corrections*, 2019 IL 124552, ¶ 19. "If this intention [of the legislature] can be collected from the statute, words may be modified, altered, or supplied so as to obviate any repugnancy or inconsistency with such legislative intention." *Burns v. Industrial Comm'n*, 356 Ill. 602, 606 (1934). Here, the General Assembly's intent is clear from the language of the statute, its history, and the fundamental purpose of including a *qui tam* provision at all. Even if the word "interested" were read as not technically necessary, the "'preference for avoiding surplusage constructions is not absolute.'" *King v. Burwell*, 135 S. Ct. 2480, 2492 (2015) (quoting *Lamie v. United States Trustee*, 540 U.S. 526, 536

(2004), and holding that "exchange established by the State" just meant "exchange"). See also *Department of Transportation v. Singh*, 393 Ill. App. 3d 458, 466 (2009) (interpreting the phrase "'if any'" to have no independent meaning, but rather as "an emphasis rather than a superfluity," "more as a reinforcement than a crucial modifier").

Defendants further claim that the phrase "including an insurer" is an incomplete list of examples that define the scope of a general term "interested person." Br. at 10, 15 (citing *People ex rel. Birkett v. City of Chicago*, 202 Ill. 2d 36, 48 (2002) ("when a statute provides a list that is not exclusive" the list can be used to discern unnamed items)). But the ICFPA does not include a list; it simply says "including an insurer." Nor does the ICFPA even include the word "other," which is the usual language that triggers this canon of statutory construction. See *People v. Ligon*, 2016 IL 118023, ¶ 23, n.5 ("Under the doctrine of *ejusdem generis,* when a statutory clause specifically describes several classes of persons or things and then includes 'other persons or things,' the word 'other' is interpreted as meaning 'other such like.'"). To the extent Defendants slyly argue for *expressio unius est exclusion,* that the phrase "including an insurer" excludes individual relators as not specifically named, this argument too fails because it attempts to create an utterly false meaning of the term "including." When the General Assembly uses the term "including," it cannot be interpreted to mean "including only." *Paxson v. Board of Education of School District No. 87, Cook County., Ill.*, 276 Ill. App. 3d 912, 921 (1995) (holding that "'*any person, including the State's Attorney*'" cannot be read as limiting actions to the State's Attorney).

The language of the ICFPA is plain and straightforward; it needs no gloss of a statutory canon. The plain language of "including an insurer" indicates that "interested person" is *broader* than just an insurer. *McCarthy*, 2019 IL 123622, ¶ 39 ("the words 'include' or 'including' are ordinarily terms of enlargement, rather than restriction, and indicate that items enumerated are not meant to be exclusive"). The phrase "including an insurer" was in fact added to expand Section 1871.7 in California. Section 1871.7 originally included just the phrase "interested person"; "including an insurer" was only added by amendment in 1999 to confirm that insurance companies could use the law too—in addition to individual whistleblowers whose standing was never in doubt. 1999 Cal. Stat. ch. 885, § 2, p. 6346 (A.B. 1050). If the point of "including an insurer" was to limit *qui tam* claims to insurance companies, the legislature of Illinois (or California) would have said so. The legislature knows how to create a cause of action for insurance companies. See 720 ILSC 5/17-10.5(e). Neither legislature did so in the ICFPA or Section 1871.7.

2. *The Heading of Section 15 Does Not Change the Language of the ICFPA.*

The fact that the General Assembly titled Section 15 of the ICFPA "Action by interested person" does not support Defendants' restrictive reading of the Act. Titles generally lack any interpretive value and provide no more than "a 'short-hand reference to the general subject matter involved.'" *Michigan Ave. National Bank*, 191 Ill. 2d at 506. As Defendants admit, "a statute's title cannot be used to limit the plain meaning of statutory text." Br. at 12 (quoting *Brunton v. Kruger*, 2015 IL 117633, ¶ 43). The text of the ICFPA here is unambiguous that individual whistleblowers can bring ICFPA *qui tam* actions. *Supra* section I.A. Regardless, the title of section 15 merely repeats the text; it provides no additional information about the meaning of the phrase "interested person" or support for Defendants' argument.

3. *The Meaning of "Interested Person" is not Established nor Imported from Other Irrelevant Illinois Statutes.*

With no textual or logical support, Defendants try to constrain ICFPA *qui tam* actions to insurance companies by plucking the word "interested" from an assortment of other laws. Br. at 12-15. Defendants below attempted to tie the ICFPA phrase "interested person" to the Illinois Probate Code, with no luck. Op. ¶ 42, A.021 (recognizing that there is "nothing to support a finding that the General Assembly was referring to the Probate Act of 1975"). They have now discovered the word "interested" in a range of Illinois statutes, no more useful than the Probate Code, from which they attempt to create an "established meaning" for the word. But like other canons of construction, the concept of a word's "established meaning" only comes into play when the statutory language as a whole is ambiguous. *People v. Simpson*, 2015 IL 116512, ¶ 30 ("*If a statute is ambiguous,* we may consider sources other than its language, including legislative history, to determine the intent.") (emphasis added); *People v. Bailey*, 232 Ill. 2d 285, 290 (2009) (no resort to other areas of the law where "the context requires the contrary"). The ICFPA here is not ambiguous. See *supra* section I.A.

Nor is there any question about the origin of the phrase "interested person" in the ICFPA. The legislative history is unequivocal that the General Assembly adopted the ICFPA proposed by the Illinois Insurance Fraud Task Force, which in turn copied Section 1871.7 from California. See *supra* section I.B.2. There is zero evidence that the General Assembly was referring to the use of "interested" from a variety of other statutes that have nothing to do with insurance fraud or *qui tam* actions. Nor, for that matter, is there any evidence the General Assembly wrote the statute's *qui tam* provision as a contrast to the Illinois False Claims Act *qui tam* provision for a "person." Br. at 9; compare 740 ILCS 92/15(a) with 740 ILCS 175/4(b)(1). From the language and legislative history, there is no doubt that the ICFPA and phrase "interested person" come from Section 1871.7.

Even on its own terms, Defendants' "established meaning" argument flounders because "interested" does not have an established meaning. This canon is for terms of art with firmly settled meanings, like "habeas corpus," "residence," or "search." See, *e.g.*, *People v. Johnson*, 2013 IL 114639, ¶ 11 ("habeas corpus" settled); *People v. Bailey*, 232 Ill. 2d 285, 292 (2009) ("search" has settled meaning while "inspect" does not); *Maksym v. Board of Election Commissioners of City of Chicago*, 242 Ill. 2d 303, 320 (2011) ("residence" settled). No authority even suggests that "interested" is such a settled term, and Defendants' examples actually undermine the argument. Defendants cite the Probate Act, Dead Man's Act, and various provisions of corporate law and public contracting statutes where the *legislature defined* the term "interested" and defined it *differently* each time. Br. at 13-15. Nor is the word "interested" in the Civil Practice Act provisions about declaratory judgments persuasive. Br. at 13-14. "Care must be taken when importing the definition of a term from one statute to another, since 'the context in which a term is used obviously bears upon its intended meaning.'" *Cohen v. Chicago Park District*, 2017 IL 121800, ¶ 22. In the declaratory judgment context, there is an acute concern about making sure a court ruling will lead to an actual consequence and impact on the parties; the jurisdiction of the court is at its limits. In the *qui tam* context, there is no dispute that the court is considering an actual dispute for parties with a personal stake: the State and the defendants. Defendants' examples alone undercut any claim that "interested" is a term of art with a singular established, understood meaning or the source of "interested person" in the ICFPA.

Grasping at straws, Defendants' grab-bag discussion of the word "interested" provides no coherent argument that the General Assembly was referring to some ethereal meaning of the word "interested." The language and history are crystal clear; the legislature adopted the language of a California statute. Nor do Defendants connect this exploration of the word "interested" to the illogical conclusion that the General Assembly must have *intended* to allow only insurance companies—and not individual whistleblowers—to be *qui tam* relators.

4. *Constitutional Avoidance Does Not Require Rewriting the ICFPA, Because There is no Doubt the Act is Constitutional.*

Out of arrows in their quiver, Defendants lastly make a desperate appeal to the canon of constitutional avoidance as a basis to write new limitations into the ICFPA or write the *qui tam* provision out. This canon of statutory interpretation does not apply, first, because there is no "grave" or "serious" doubt about whether the ICFPA is constitutional. See *Reno v. Flores*, 507 U.S. 292, 314 n.9 (1993) ("The 'constitutional doubts' argument has been the last refuge of many an interpretive lost cause. Statutes should be interpreted to avoid *serious* constitutional doubts, not to eliminate all possible contentions that the statute *might* be unconstitutional."); *Villegas v. Board of Fire & Police Commissioners of Village of Downers Grove*, 167 Ill. 2d 108, 124 (1995) ("serious" constitutional questions trigger the canon). There is no grave doubt here because this court already upheld relator standing under a *qui tam* statute against these constitutional challenges in *Scachitti*. See *infra* section II.

Moreover, this canon "does not give a court the prerogative to ignore the legislative will in order to avoid constitutional adjudication" *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 841 (1986); *City of Urbana v. Andrew N.B.*, 211 Ill. 2d 456, 492 (2004) (court should not apply canon to adopt construction "plainly contrary to [legislative] intent"). Defendants cannot appeal to the constitutional avoidance canon to re-write the ICFPA where the General Assembly clearly intended to authorize individual whistleblowers to bring *qui tam* actions. With no constitutional challenge or statutory ambiguity, nor standing infirmity of any kind, there is no need to adopt a strained reading of the ICFPA to avoid addressing the constitutional issue.

E. The ICFPA Language Should Not be Read to Create Absurd Results.

Ultimately, the ICFPA should be read to further the intent and purpose of the General Assembly, not to create absurd results that would stifle and undermine that purpose. "When interpreting a statute, the court's primary objective is to ascertain and give effect to the intent of the legislature." *Rushton*, 2019 IL 124552, ¶ 14. And courts must "presume that the legislature did not intend absurdity, inconvenience, or injustice." *Corbett*, 2017 IL 121536, ¶ 35 (rejecting a reading of "trail" that would lead to government immunity for riding a bicycle on a trail through a public park, but not for riding in the public park next to the trail). Here it would make no sense for the term "interested" to qualify which person can bring a *qui tam* suit, beyond one with information about insurance fraud who complies with the procedural requirements of the ICFPA. Any relator with information can fight fraud, effectively pursue a *qui tam* action with the State, and provide deterrence through penalties. The purpose of the law is not served by allowing some persons with information to bring *qui tam* cases, while barring others, especially when the distinction hinges on the impact to the relator personally. The impact on the relator personally is irrelevant; a *qui tam* action is about helping the State and protecting the public.

The Defendants' unsustainably narrow reading of "interested person" cannot be correct. Individual whistleblowers are the persons most likely to have access to useful non-public information to expose insurance fraud. So long as they comply with the ICFPA procedures, they are "interested" and authorized to sue. Without them, the ICFPA *qui tam* provisions are toothless.

Relator here meets the statutory requirements with information about insurance fraud, obtained from her employment with Defendants, which vindicates the interests of the State and fulfills the purposes of the statute. *E.g.* A.014, 017, ¶¶ 7-8, 27-28. This is precisely the type of claim the General Assembly intended to enable.

II. The General Assembly has the Authority to Enact a *Qui Tam* Statute.

The constitutional challenge to the ICFPA is resolved by the straightforward application of this court's precedent. *Scachitti v. UBS Financial Services*, 215 Ill. 2d 484 (2005). The *only* dispute here is whether some provision of the Illinois Constitution prohibits the General Assembly from authorizing a relator to sue through a *qui tam* mechanism under the supervision of the Attorney

General.[2] The answer is no. The court will "uphold the constitutionality and validity of a statute when reasonably possible," *id.* at 515, and *qui tam* statutes have never been considered unconstitutional, in Illinois or anywhere else. In *Scachitti,* the court specifically upheld the right of the General Assembly to authorize a private relator—through a *qui tam* statute and under the control of the Attorney General—to fight fraud and recover civil penalties for the State. Defendants try mightily to escape *Scachitti* but fail at every turn.

Defendants first allege that the State has not suffered any "injury in fact" to support standing, when the General Assembly's interest in the enforcement of the laws and its authority to address insurance fraud through civil penalties are beyond question.

Defendants then try to re-write *Scachitti* and the entire history of *qui tam* statutes as limited to claims for the State's *compensatory* damages. In fact, neither *Scachitti*, *Vermont Agency of Natural Resources v. United States ex rel. Stevens (Vermont Agency),* 529 U.S. 765 (2000) (on which *Scachitti* relies), nor *qui tam* statutes more broadly have ever required a financial loss to the government treasury. The False Claims Act—upheld in *Scachitti*—itself is an action for civil penalties and does not require a financial loss to the government.

With no support from *qui tam* precedents, Defendants next posit that the general common law on assignments between private parties constrains the General Assembly's legislative authority to enact a *qui tam* statute. But Defendants cite no reason or authority that the General Assembly is so constrained. The General Assembly can change the common law, unless prohibited by the Illinois Constitution. *Michigan Ave. National Bank*, 191 Ill. 2d at 519. Regardless, general assignment law would not preclude the State's assignment here because causes of action, including

[2] Relator's discussion of Attorney General control applies as well to State's Attorneys, who are given similar involvement with ICFPA *qui tam* actions. Defendants appear to agree that the considerations are materially the same in both contexts. *E.g.* Br. at 28.

for fraud and for penalties, are generally assignable. *Kleinwort Benson North America, Inc. v. Quantum Financial Services, Inc.*, 181 Ill. 2d 214, 216 (1998) (upholding assignment of punitive damages for fraud).

In a desperate attempt to get around *Scachitti*, Defendants then build up an elaborate straw man scenario: a relator as rogue profiteering prosecutor bringing criminal actions with no checks or oversight. Defendants miss the fact that an ICFPA lawsuit is a civil action, under a civil statute, in a civil proceeding, for civil penalties. ICFPA actions are not remotely criminal, nor are relators criminal prosecutors running amuck. Moreover, *Scachitti* has already answered this objection too. Defendants there attacked the Illinois False Claims Act *qui tam* provision on the ground that "it takes away any prosecutorial discretion" and the right of the Attorney General to control litigation for the State. *Scachitti*, 215 Ill. 2d at 509. The court rejected those arguments and upheld the False Claims Act because "*qui tam* plaintiffs, acting as statutorily designated agents for the state, may proceed only with the consent of the Attorney General, and remain completely subordinate to the Attorney General at all times." *Id.* at 515. The ICFPA and False Claims Act include nearly identical *qui tam* procedures that give the Attorney General full control of the litigation.

Defendants lastly claim that the whistleblower award—labeled contingency compensation—impermissibly taints the role of a private *qui tam* relator. In fact, Defendants' authority from other states merely requires that, like in Illinois, private counsel hired by the State on a contingency must be subject to oversight. Though relators litigate *for the benefit of the State*, they have not been hired by the State and are not litigating *as the State*, with the additional potential considerations of neutrality and abuse of government authority. Whatever oversight the Illinois Constitution requires for relators is satisfied by the Attorney General control requirements of *qui tam* actions. *Scachitti*, 215 Ill. 2d at 515. Moreover, Defendants' hyperbole about relator bias and excess has no basis in reality. For twenty years, the ICFPA has authorized *qui tam* suits, yet Defendants' brief glaringly omits any real-world examples of such hypothetical abuse. Nor did Defendants bother to challenge the ICFPA based on insufficient government control until their opening brief in this court, likely because they know the argument is frivolous after *Scachitti*.

This court does not write on a blank slate. *Scachitti* answers each of the Defendants' objections and applied directly to the ICFPA requires upholding its *qui tam* provision.

A. The General Assembly has the Right to Fight Insurance Fraud.

Defendants' first illogical leap is to claim that the State has not "suffered a discrete 'injury in fact,'" Br. at 27, and thus had no standing that it can confer on Relator. This conclusion ignores the State's obvious "injury to its sovereignty based on the violation of its laws," *Scachitti*, 215 Ill. 2d at 507, and the State's interest in and authority to combat insurance fraud on behalf of the public. The United States Supreme Court likewise recognizes that it is "beyond doubt" the government suffers an "injury to its sovereignty arising from violation of its laws." *Vermont Agency*, 529 U.S. at 771. There is nothing unusual nor controversial about the idea that the State has standing to enforce the law even without a loss to the State treasury.

Nor is there any doubt that the General Assembly has the power to protect the public from insurance fraud, including through a statute with civil penalties. "[T]he legislature may enact any legislation not expressly prohibited by the constitution." *People ex rel. Chicago Bar Ass'n v. State Board of Elections*, 136 Ill. 2d 513, 525 (1990). The State "legislature has broad discretion to determine not only what the public interest and welfare require, but to determine the measures needed to secure such interest." *County of Knox ex rel. Masterson v. The Highlands, L.L.C.*, 188 Ill. 2d 546, 559 (1999). "Once the legislature determines that a problem exists and acts to protect and promote the general welfare of its citizens, the legislation is presumed to be a valid exercise of the State's police power." *Illinois Gamefowl Breeders Ass'n v. Block,* 75 Ill. 2d 443, 453 (1979).

The State's police power includes the power "'to impose fines and penalties for a violation of its statutory requirements.'" *In re Marriage of Miller*, 227 Ill. 2d 185, 196 (2007) (quoting *Missouri Pacific Ry. Co. v. Humes,* 115 U.S. 512, 523 (1885)). It also includes utilizing private parties to assist with government enforcement, which happens not just in *qui tam* statutes, but all manner of private attorney general statutes. See, *e.g., Bennett v. Spear*, 520 U.S. 154, 165 (1997) (upholding standing of private entities under the Endangered Species Act, 16 U.S.C. § 1531 *et. seq.*, and finding "that the obvious purpose of the particular provision in question is to encourage enforcement by so-called 'private attorneys general'" evidenced in part by the statute's "reservation to the Government of a right of first refusal to pursue the action initially and a right to intervene later"). There is nothing novel about civil penalties or public-private enforcement.

B. In *Scachitti,* the Court Already Held That the General Assembly has the Constitutional Authority to use a *Qui Tam* Provision to Collect Civil Penalties.

The direct application of *Scachitti* resolves the constitutional challenge to relator standing. In *Scachitti,* the court upheld the standing of a relator and the right of the General Assembly to enact a *qui tam* statute. There is no meaningful difference between the *qui tam* provision of the ICFPA and the provision of the False Claims Act that was upheld in *Scachitti*. Defendants point out that the False Claims Act deals with fraud on the government, potentially harming the public fisc, while the ICFPA deals with fraud on an insurance company, certainly harming the public interest. That is a distinction without a difference or constitutional significance. Both statutes seek to address fraud through civil penalties, and no provision of the Constitution precludes the General Assembly from doing so with a *qui tam* provision.

1. Qui Tam *Statutes are Constitutional and Confer Standing on Relators.*

Defendants repeat often that relator is "an uninjured person" bringing a claim. *E.g.* Br. at

24. This point is unremarkable—and irrelevant. As discussed above, *qui tam* relators do not sue for or have standing from their own injury. Rather their standing derives from the State. See *Powell v. Dean Foods Co.*, 2012 IL 111714, ¶ 36 (standing simply asks "whether the litigant, either in an individual capacity or in a representative capacity, is entitled to have the court decide the merits of a dispute"). In *Scachitti*, the court upheld the *qui tam* provision of the Illinois False Claims Act and explained how a plaintiff-relator under a *qui tam* statute has standing. 215 Ill. 2d at 494, 508 (2005). In a *qui tam* action, a private plaintiff sues on behalf of the person and the State, pursuant to a statute, to collect a civil penalty. *Id.* at 494-95. "[A] part of the penalty [is to] be paid to the" relator for bringing or prosecuting the action, and the rest of the penalty to the State. *Id.* (tracing the origins of *qui tam* actions back to the time of Blackstone). In a *qui tam* action, there is, by definition, "no cognizable injury in fact suffered by the relator." *Id.* at 508. Instead, the relator has an interest in a share of the penalty and standing "as a partial assignment of the state's right to bring suit." *Id.* at 508 (following *Vermont Agency*, 529 U.S. at 793 n.4 ("[A] *qui tam* relator is, in effect, suing as a *partial* assignee of the United States.")). "Accordingly, *** a *qui tam* plaintiff is a 'real party in interest,' together with the state." *Id.* at 508-09.

In Illinois, "the Constitution is not a grant of power to the General Assembly but only checks the latter's power." *Kluk v. Lang*, 125 Ill. 2d 306, 324 (1988). Thus, the court in *Scachitti* identified just two prerequisites for a *qui tam* statute in Illinois, both of which are met by the ICFPA. *First*, because "[t]he real party in interest is the person or entity entitled to recovery if the lawsuit is successful," the statute authorizing a *qui tam* action must expressly give the relator an interest in the action. 215 Ill. 2d at 503, 506, 509. The Illinois False Claims Act is a *qui tam* statute because it provides the relator a share of the civil penalty and the authority to sue "'*for the person* and for the State.'" *Id.* at 505 (quoting 740 ILCS 175/4(b) (West 2002)). The ICFPA too authorizes the relator to bring a civil action "for the person and for the State." 740 ILCS 92/15(a).

Second, a *qui tam* action must be effectively controlled by the Attorney General. 215 Ill. 2d at 509-10. The False Claims Act met this requirement because the Attorney General has the authority to conduct the litigation and dismiss or settle the suit. *Id.* As discussed in detail *infra* section II.D.2, the ICFPA likewise meets this requirement because the Attorney General controls ICFPA *qui tam* actions in precisely the same way as False Claims Act *qui tam* actions.

In addition, courts in Illinois look to the law of the states after which Illinois statutes have been modeled. See *County of Du Page v. Illinois Labor Relations Board*, 231 Ill. 2d 593, 608 (2008) (interpreting an amendment to the Illinois Public Labor Relations Act in light of similar New York legislation after which it was "modeled"). The ICFPA was patterned after Section 1871.7 from California. *Supra* section I.B.2 (tracing the history). And California law too unequivocally holds that a relator has standing regardless of a personal injury. The California appellate court in *Alzayat*, for example, recently explained that "[a]s a true qui tam provision, Insurance Code section 1871.7 does not mandate that the relator has suffered his or her own injury." *Alzayat*, 18 Cal. App. 5th at 831. Instead, Section 1871.7 addresses an "injury allegedly suffered by the People of the State of California, and [that claim] was not filed for the purpose of remedying an injury suffered by" the individual relator. *Id.* at 830. See also *People ex rel. Strathmann v. Acacia Research Corp.*, 210 Cal. App. 4th 487, 500-01 (2012) (explaining that under Section 1871.7 "an 'interested person' bringing this action as a qui tam relator *** 'has no personal stake in the damages sought—all of which, by definition, were suffered by the government'").

Because the *qui tam* provision of the ICFPA satisfies *Scachitti*, and thus the Illinois Constitution, the Act is constitutional, and the General Assembly conferred standing on Relator.

2. *The Constitutionality of a* Qui Tam *Statute Does Not Turn on a Financial Loss to the State.*

In the face of *Scachitti*, Defendants try to distinguish this dispositive precedent with the idea that the State treasury does not wrongly pay a claim in the insurance fraud at issue in the ICFPA. Br. at 21 (claiming *Scachitti* is limited to "a claim for pecuniary damages"). This point is no more consequential than the observation that the relator is not *personally* injured. The State's standing is unquestionable and not tied to any financial loss. *Supra* section II.A. Likewise, the constitutionality of a *qui tam* statute does not turn on such a loss.

First, the holding of *Scachitti* is premised on the bare fact of injury to the State, whether to its sovereignty or treasury, and is not dependent on damages claims. The court defined a *qui tam* action as a suit "to recover a *penalty*" for a violation of the law, not as an action to recover damages for the government. *Scachitti*, 215 Ill. 2d at 494 (emphasis added). The court then held that a *qui tam* statute "gives a *qui tam* plaintiff a personal stake in the outcome" and that "the interest of a *qui tam* plaintiff in a claim under the Act is justified as a partial assignment of the state's right to bring suit." *Id.* at 508.

Defendants, however, erroneously latch on to a selective quote from *Vermont Agency* that a relator's standing "could 'reasonably be regarded as effecting a partial assignment of the Government's damages claim.'" *Id.* at 508 (quoting *Vermont Agency*, 529 U.S. at 773). But, properly read in full, neither *Scachitti* nor *Vermont Agency* limits *qui tam* actions to cases where the government sustained monetary damages. To the contrary, both recognize standing can be founded on the "injury to [the State's] sovereignty based on the violation of its laws," as well as a "proprietary" injury. *Scachitti*, 215 Ill. 2d at 507; *Vermont Agency*, 529 U.S. at 771. This court did not hold that a relator had standing as an assignee of the "the state's right to bring suit" *for damages*, but as an assignee of "the state's right to bring suit," period. *Scachitti*, 215 Ill. 2d at 508.

Subsequent case law confirms this conclusion. The D.C. Circuit in *Stauffer v. Brooks Brothers, Inc.*, 619 F.3d 1321 (Fed. Cir. 2010), studied the *Vermont Agency* decision in detail and rejected the precise argument Defendants advance here. In *Brooks Brothers*, the court upheld a *qui tam* statute about false patent markings, which involved no fiscal loss to the government. The court reasoned that "a violation of that statute inherently constitutes an injury to the United States [and] *** [b]ecause the government would have standing to enforce its own law, [relator] Stauffer, as the government's assignee, also has standing to enforce" that same law. *Id.* at 1325. The trial court there had errored when it "incorrectly read *Vermont Agency* as applying only to the United States' proprietary injury," because a relator's "standing as the United States' assignee does not depend upon the alleged injury to the United States being proprietary, as opposed to sovereign." *Id.* at 1326. The Supreme Court "in *Vermont Agency* recognized and found conclusive the historical precedent of informer statutes enacted by the First Congress, which assigned certain sovereign interests of the United States to private parties." *Id.* (noting that *qui tam* relators have always been allowed to collect fines even when "not based on harms to the United States' proprietary interest, as the federal treasury was not directly diminished because of the violations"). Defendants attempt to sweep *Brooks Brothers* under the rug because the statute was later amended, Br. at 27, n.9, but that history does not change the persuasive analysis of *Vermont Agency*. Both the language and logic of *Vermont Agency* confirm that injury to the State's sovereign interest supports relators' standing. *Brooks Brothers*, 619 F.3d at 1327 n.3 ("We consider the question decided, that the United States may assign even a purely sovereign interest."). See also *United States ex rel. Bunk v. Gosselin World Wide Moving, N.V.*, 741 F.3d 390, 403 (4th Cir. 2013) (holding relator had standing and rejecting the arguments that *Vermont Agency* turned on a "proprietary injury" and that the "government's sovereignty injury" is "non-assignable").

Second, under false claims acts—where even Defendants concede that a relator has standing—relator standing does not turn on a damages claim, because those laws do not require harm to the government fisc either. A relator can bring a *qui tam* action to seek *only civil penalties* where damages are hard to quantify or the government was harmed but did not lose money (such as a kickback claim or nonconforming goods). See *United States ex rel. Main v. Oakland City University*, 426 F.3d 914, 917 (7th Cir. 2005) (the FCA "provides for penalties even if (indeed, *especially* if) actual loss is hard to quantify"); *Bunk,* 741 F.3d at 409 (upholding $24 million in penalties and no damages and recognizing that "the concept of harm need not be confined strictly to the economic reality."). A false claim is one the "Government *** *will* reimburse," not that has been reimbursed or paid. 740 ILCS 175/3(c); 31 U.S.C. § 3729(b). Thus, the Illinois False Claims Act and Federal False Claims Act provide penalties for merely *presenting* a false claim, even if the claim was never paid. 740 ILCS 175/3; 31 U.S.C. § 3729(a) ("civil penalty of not less than $5,000 and not more than $10,000" for anyone who "presents, or causes to be presented *** a false or fraudulent claim"). They also provide penalties for *conspiracy* to commit a false claim, which again may not involve government financial loss. 740 ILCS 175/3(a)(1)(C); 31 U.S.C. § 3730(b)(1). While false claims acts also provide for triple damages, a relator can sue, and thus has standing, to collect penalties even where the government has suffered no damages. *Bunk,* 741 F.3d 390 (holding relator had standing to seek penalties without damages, even after a criminal prosecution); *Varljen v. Cleveland Gear Co.*, 250 F.3d 426, 429-30 (6th Cir. 2001) (collecting authorities). Financial loss to the government has never been a required element of a false claims act case, nor necessary for a relator to have standing.

Third, Defendants present the ICFPA as unprecedented when, in fact, it is but one species of *qui tam* statutes generally, often called informer statutes. These statutes have existed in the

United States and England for hundreds of years and have never been considered constitutionally infirm. Indeed, *qui tam* actions have historically been enforcement mechanisms to redress violations of various laws, even criminal laws, and not a vehicle for damages claims. "Statutes providing for actions by a common informer, who himself had no interest whatever in the controversy other than that given by statute, have been in existence for hundreds of years in England, and in this country ever since the foundation of our government." *Marvin v. Trout*, 199 U.S. 212, 225 (1905). See also *Vermont Agency*, 529 U.S. at 774-77 (discussing history of informer statutes); *Scachitti*, 215 Ill. 2d at 495 (tracing the origins of *qui tam* actions back to the time of Blackstone); *Pike v. Madbury*, 12 N.H. 262, 266-67 (1841) (interpreting a *qui tam* claim based on *qui tam* precedents back to an English law allowing *qui tam* actions against clergy absent from their church post for too long).

Early *qui tam* statutes included penalties for failure to cooperate with the census, harboring runaway seamen, and for criminal larceny or receipt of stolen goods. *Vermont Agency,* 529 U.S. at 777 n.6. As Chief Justice Marshall explained in *Adams v. Woods*, *qui tam* informer suits were the norm: "[a]lmost every fine or forfeiture under a penal statute, may be recovered by an action of debt, as well as by information." 6 U.S. 336, 341 (1805) (penalty for slave trade). None of these laws involved a government loss.

Throughout the State's history too, the Illinois General Assembly has used *qui tam* mechanisms to enforce civil penalties, unrelated to financial loss to the State, to deter and penalize illegal activity. *E.g.* 1827 Ill. Laws 320, § 2 (anti-gambling penalty of triple gambling losses); 1835 Ill. Laws (1st Session) 63-64, § 2 (Jan. 31, 1835) (selling clocks without a license); Ill. Rev. Laws of 1874, ch. 104, Oil Inspection, p. 732, § 8 (inspection and labeling of flammable liquids). Private relators brought these *qui tam* claims and the Illinois Supreme Court upheld them as constitutional. See *Larned v. Tiernan*, 110 Ill. 173 (1884) (anti-gambling law upheld); *Illinois Central R.R. Co. v. Herr*, 54 Ill. 356 (1870) (seeking railroad crossing penalty); *Higby v. People ex rel. Fishbourne*, 5 Ill. 165 (1843) (seeking clock sales licensing penalty). Again, none of these laws involved a government loss.

When it passed the ICFPA, the General Assembly continued this legacy of *qui tam* actions. ICFPA legislation was introduced in February 2001, 92d Ill. Gen. Assem., Senate Proceedings, Feb. 21, 2001, at 28 (noting first reading of Senate Bill 879), less than a year after *qui tam* statutes had been upheld as constitutional by the United States Supreme Court in *Vermont Agency*, 529 U.S. 765 (decided May 2000). And, the ICFPA was patterned after Section 1871.7, which since 1993 has been used by relators to bring *qui tam* actions for insurance fraud in California.

Fourth, to the extent financial harm to the State is somehow relevant to the standing analysis, the State treasury is impacted by insurance fraud. Defendants focus only on whether the government paid the insurance claim. Yet the State suffers financial harm and incures expenses from insurance fraud generally. The State uses resources for agencies to track insurance fraud, invests law enforcement and other resources to investigate fraud schemes, and expends funds to enforce laws against insurance fraud (whether civil, criminal, administrative or otherwise). See 720 ILCS 5/17-10.5; Pub. Act 87-1134; 215 ILCS 5/155.23. One purpose of the ICFPA penalties is explicitly for "compensating the State for the costs of investigation and prosecution" insurance fraud. 740 ILCS 92/5(c).

In Illinois, "[a]ll statutes are presumed to be constitutional." *Flynn v. Ryan*, 199 Ill. 2d 430, 436 (2002). And when it comes to standing, Illinois doctrine is even broader and more permissive than in federal courts, where relator standing under *qui tam* statutes has long been upheld. *Greer v. Illinois Housing Development Authority*, 122 Ill. 2d 462, 491 (1988) ("to the extent that the State law of standing varies from Federal law, it tends to vary in the direction of greater liberality"). The purpose of a *qui tam* statute is to permit "a common informer, who himself had no interest whatever in the controversy other than that given by statute" to sue for a penalty. *Marvin*, 199 U.S. at 225. Nothing in law or logic limits *qui tam* actions to situations where the government has a financial loss. Fraud violates the laws of Illinois, which is interest enough for constitutional standing under *Scachitti*.

C. Illinois Common Law About Assignments Does Not Preclude *Qui Tam* Statutes.

Defendants next attempt to escape the holding of *Scachitti* by appealing to purported limits from the general common law on assignments. Br. at 25-27. Nothing in *Scachitti, Vermont Agency*, or the extensive history of *qui tam* law suggests such statutes are limited by common law principles about assignments between private parties. This case is not about whether something was formally assigned, but rather the authority of the General Assembly to confer standing, analogized to the logic of a partial assignment. None of Defendants' cases address the authority of the General Assembly nor identify any c*onstitutional* limit on assignments. And the General Assembly can always modify the common law, should it even apply. *Michigan Ave. National Bank*, 191 Ill. 2d at 519 ("the legislature has the inherent authority to repeal or change the common law and may do away with all or part of it").

Regardless, the common law of assignment in Illinois too supports Relator's standing as a partial assignee of the State. In Illinois, "assignability is the rule and nonassignability is the exception." *Kleinwort*, 181 Ill. 2d at 225 (holding that punitive damages claims related to fraud are assignable). Any "cause of action" can be assigned, unless such assignment "would be contrary to the public interest." *Id.* at 226. "Basically, in Illinois, the only causes of action that are not assignable are torts for personal injuries and actions for other wrongs of a personal nature, such as those that involve the reputation or feelings of the injured party." *Id.* at 225. "These limitations are based primarily on public policy concerns." *Id*. An ICFPA claim combats fraud. It is not a personal tort, nor related to anyone's "reputation or feelings." The conferral of standing on relator here is consistent with Illinois public policy, found in its statutes, that insurance fraud is an evil that can be combatted through *qui tam* cases. 740 ILCS 92/5 and 92/15.

Defendants contend the common law limits assignment to a "property right," specifically a "'chose in action.'" Br. at 27. Because ICFPA claims seek civil penalties, not compensatory damages claim, Defendants claim they are "not an assignable chose in action." Br. at 25. Yet none of Defendants' authority undercuts the holdings of *Kleinwort* and *Scachitti*. *Themas v. Green's Tap, Inc.,* 2014 IL App (2d) 140023, holds that an assignee may invoke the jury demand previously made by the assignor; it has nothing to do with what can be assigned. And *Cincinnati Insurance Co. v. American Hardware Manufacturers Ass'n,* 387 Ill. App. 3d 85 (2008) is about anti-assignment clauses of insurance contracts. Neither case narrows *Kleinwort* or holds that assignment is limited to property. If anything, the principle of *Cincinnati Insurance* is that claims for monetary payments for past conduct, like the civil penalties of the ICFPA, are easily assignable.

Moreover, the deterrent effects of the ICFPA's financial remedies are just as effective when enforced by whistleblowers. See *Kleinwort*, 181 Ill. 2d at 227 (punitive damages to "punish a wrongdoer and to deter the wrongdoer" are just as effective whether the injured party "seeks such damages or whether its assignees seek such damages"). No public policy concern justifies an exception to this general rule. Indeed, to find such an exception would override the General Assembly's recognized public policy about the importance of combating insurance fraud through *qui tam* lawsuits. See *id.* at 226 ("The public policy of Illinois is found in *** its statutes.").

D. ICFPA *Qui Tam* Claims are Not Rogue Criminal Prosecutions; They are Civil Actions Controlled by the Attorney General as Required by *Scachitti.*

In a final strained attempt to escape the holding of *Scachitti* and eviscerate the ICFPA, Defendants attack the ICFPA at length with an argument that ICFPA actions are criminal proceedings and thus allegedly some constitutional rule prohibits relators from acting as independent private criminal prosecutors working on a contingency. Br. 27-35. First, this extended discussion of ICFPA actions as "criminal" is so implausible that Defendants never bothered to raise it before. Indeed, Defendants' premise is fundamentally flawed. ICFPA *qui tam* actions are civil actions like False Claims Act *qui tam* actions, and the same in terms of underlying conduct, procedure, Attorney General control, and stakes for the defendants. The only difference may be the identity of the party defrauded, and the constitutionality of a *qui tam* action cannot turn on whether a defendant defrauded, for example, a private HMO plan run by Aetna or a Medicaid HMO plan run by Aetna. The ICFPA provides for a "civil action," under a civil statute, in a civil proceeding, for civil penalties. It is not criminal by any standard. Defendants trumpet the exaggerated claim of criminal prosecution, and present the relator share as a corrupt bounty, because they know there is no authority prohibiting civil *qui tam* proceedings.

The second, independently fatal, flaw in Defendants' argument is the claim that relators litigate ICFPA *qui tam* claims alone without State oversight. Defendants claim that this violates a rule that only the government can bring criminal charges and allegedly taints the whistleblower award as a contingency payment. But here too Defendants are blind to reality, and, *Scachitti* controls the outcome. The provisions of the ICFPA that provide Attorney General control of *qui tam* actions mirror the provisions of the False Claims Act that provide Attorney General control. Under both statutes, relators are not rogue criminal prosecutors. Under both, the government fully controls the *qui tam* action. Under both, any concern about the neutrality of relators based on their share of civil penalties is addressed by Attorney General control. The ICFPA provides the Attorney General control required by *Scachitti* and thus satisfies the Illinois Constitution.

1. *The ICFPA is Civil; Relator is Not Prosecuting a Criminal Indictment.*

Defendants' argument stems from the erroneous premise that ICFPA actions to collect civil penalties are somehow "criminal" "law enforcement" actions. Br. at 27. Defendants mistake relators for criminal prosecutors who answer only to themselves. In fact, the ICFPA is a civil statute just like the False Claims Act upheld in *Scachitti*, litigated with civil procedures, by a private party, to collect civil penalties. There is no basis to indulge Defendants' fantasy that the ICFPA is criminal.

Although Defendants offer no legal test for identifying a criminal statute or action, ICFPA claims are not criminal by any measure. The distinction between civil and criminal actions arises, for example, when courts seek to ensure that constitutional protections are provided for criminal proceedings. *E.g. Hudson v. United States*, 522 U.S. 93, 95–96 (1997) (identifying criminal proceedings to which constitutional due process and protections against double jeopardy apply); *In re P.S.*, 175 Ill. 2d 79, 85–86 (1997) (same). In that context, courts ask first whether the legislature *intended* to establish a civil or criminal penalty. *Hudson*, 522 U.S. at 93; *In re P.S.*, 175 Ill. 2d at 86 ("[t]his is primarily a question of statutory construction"). If a penalty is intended to be civil, then the question is whether on the face of the statute the penalty is "so punitive" so as to transform the civil penalty into a criminal one, based on the seven factors from *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963).[3] Defendants do not raise a Due Process challenge to the ICFPA, yet apparently seek to import these standards *sub silentio* into the analysis of whether the General Assembly has the authority to use a *qui tam* mechanism and thus provide relator standing.

[3] The seven factors applied to the ICFPA strongly confirm it is civil. They are "(1) '[w]hether the sanction involves an affirmative disability or restraint'; (2) 'whether it has historically been regarded as a punishment'; (3) 'whether it comes into play only on a finding of *scienter*'; (4) 'whether its operation will promote the traditional aims of punishment-retribution and deterrence'; (5) 'whether the behavior to which it applies is already a crime'; (6) 'whether an alternative purpose to which it may rationally be connected is assignable for it'; and (7) 'whether it appears excessive in relation to the alternative purpose assigned.'" *Hudson*, 522 U.S. at 99-100.

To the extent the criminal/civil distinction has any relevance to the standing analysis under a *qui tam* statute, there is no doubt that the ICFPA is civil like the False Claims Act. The ICFPA, like the False Claims Act, is part of Chapter 740 of the compiled statutes, "Civil Liabilities," not Chapter 720, "Criminal Offenses." The ICFPA, like the False Claims Act, authorizes the government or relators to bring a "civil action." 740 ILCS 92/10 and 92/15(a). Upon proof of fraud, the ICFPA, like the False Claims Act, provides for "a civil penalty" of $5,000 to $10,000, plus an assessment of penalties for three times the amount of the insurance claim. 740 ILCS 92/5(b). ICFPA claims, like False Claims Act claims, are brought by civil complaint and litigated under the Illinois Rules of Civil Procedure and Chapter 735 "Civil Procedure," in civil courtrooms and proceedings. If there were any doubt, the General Assembly explicitly states that the ICFPA penalties "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).

Defendants point out that the ICFPA defines insurance fraud by reference to a criminal fraud statute. Br. at 29. Yet Defendants cite no case where a cross-reference was relevant, let alone dispositive of whether an action is criminal or civil. And the fundamental nature of a statute cannot turn on such a flimsy distinction as whether the General Assembly used a cross-reference or simply cut-and-pasted a definition of insurance fraud. Nor can it turn on whether a defendant defrauds the private insurance plan or the Medicaid insurance plan operated by the same company (or defrauds one plan today and the other plan tomorrow). Facing this very argument, the California Appellate Court rejected as "patently meritless" the claim that Section 1871.7 actions are criminal and so only a government prosecutor can enforce the insurance fraud law. *People ex rel. Allstate Insurance Co. v. Muhyeldin*, 112 Cal. App. 4th 604, 609 (2003).

Nor is there anything unusual about overlapping civil and criminal legal regimes for insurance fraud. "[T]he legislature may impose both civil and criminal sanctions with respect to the same misconduct." *In re P.S.*, 175 Ill. 2d at 88. The ICFPA itself contemplates the potential for criminal proceedings. 740 ILCS 92/5(c) (ICFPA claims do not preclude "criminal prosecution for the same conduct"); 740 ILCS 92/20(d) (staying the ICFPA civil action when "a criminal action [is] pending against a defendant for substantially the same conduct"). The Illinois False Claims Act is little different. See 740 ILCS 175/3(a) and 4(c)(4); 720 ILCS 5/17-8.5 (fraud on a government entity). See also 31 U.S.C. § 3729; 18 U.S.C. § 287 (same). Illinois law likewise provides a cause of action for both the tort of conversion and crime of theft, 720 ILCS 5/16-1, the civil tort of battery and crime of battery, 720 ILCS 5/12-3, and overlapping consequences for a multitude of other conduct. The existence of a separate criminal sanction for insurance fraud does not transform the ICFPA into a criminal statute, nor relators into criminal prosecutors.

Defendants for their part offer no legal standard for identifying a criminal statute or action, nor a coherent explanation for why the ICFPA is materially different than the False Claims Act, let alone criminal. In addition to the flimsy point about the ICFPA cross-reference, Defendants emphasize that sometimes none of the ICFPA penalties will go to the defrauded insurer. *E.g.* Br. at 1, 5, 8, 18, 24, 25. Naturally the insurer does not recover *civil penalties* collected by the State. The point of government regulation, and corresponding civil enforcement, is to protect the public generally, not specific insurers. And the penalties recovered fund government efforts to fight insurance fraud. 740 ILCS 92/25(f) and (g) (funds "shall be allocated to appropriate State agencies for enhanced insurance fraud investigation, prosecution, and prevention efforts"). Defendants conflate the State's exercise of police power through civil enforcement and penalties with "the enforcement of criminal laws." Br. at 27. They offer no principled basis for why the civil *qui tam* action of the ICFPA should be viewed any differently in practice or constitutional significance than the False Claims Act's *qui tam* action that was upheld in *Scachitti*.

2. *Relator Does Not Litigate Alone; The Attorney General Controls all ICFPA Cases.*

On the mistaken premise that the ICFPA is criminal, Defendants object that ICFPA actions must be litigated by the Attorney General or State's Attorney, and thus cannot proceed through a *qui tam* mechanism. Br. at 22 ("Only State's Attorneys and the Attorney General may pursue penalties for violations of the criminal law."). This argument fails because the ICFPA is not criminal, as explained *supra*, but also because under *Scachitti*, the Constitution requires only Attorney General *control* of litigation. Ill. Const. art. V, § 15 ("The Attorney General shall be the legal officer of the State, and shall have the duties and powers that may be prescribed by law"). The Attorney General fully controls ICFPA *qui tam* litigation in precisely the same way that it controls False Claims Act *qui tam* litigation and—once again—Defendants' arguments flounder on the holding of *Scachitti*.

This court has already heard Defendants' specific challenge premised on Article V, Section 15 of the Illinois Constitution and rejected it because the Attorney General retains control of *qui tam* litigation and settlement. *Scachitti*, 215 Ill. 2d at 509-10. On this issue the ICFPA and False Claims Act are completely indistinguishable. The Attorney General control provisions are identical. Under both statutes, the Attorney General receives notice of the litigation filed under seal, with time to investigate the claims. 740 ILCS 92/15(b) and (c); 740 ILCS 175/4(b)(2) and (b)(3). Under both, the Attorney General can intervene to take control of the litigation at any time. 740 ILCS 92/20(c); 740 ILCS 175/4(b). Under both, regardless of intervention, the Attorney General remains fully informed of each step of litigation. 740 ILCS 92/20(c); 740 ILCS 175/4(c)(3). Under both, the Attorney General may restrict the relator's participation in the litigation. 740 ILCS 92/20(b); 740 ILCS 175/4(c)(2)(C).

Under both statutes, the Attorney General has nearly unlimited discretion to dismiss the case at any point. 740 ILCS 92/20(b) (the government "may dismiss the action notwithstanding the objections" of relator); 740 ILCS 175/4(c)(2)(A) and (c)(2)(B) (same); *People ex rel. Schad, Diamond & Shedden, P.C. v. QVC, Inc.*, 2015 IL App (1st) 132999, ¶ 21 (State's right to dismiss constrained only by "glaring evidence" of bad faith or fraud); *State ex rel. Beeler, Schad & Diamond, P.C. v. Burlington Coat Factory Warehouse Corp.*, 369 Ill. App. 3d 507, 517 (2006) (same). With the sole and exclusive power to dismiss cases, there is no practical difference between the Attorney General filing suit itself and permitting a suit filed by a relator to proceed. See *Scachitti*, 215 Ill. 2d at 509 (rejecting defendants' specific argument that a *qui tam* statute "takes away any prosecutorial discretion" from the State).

"Most critically, the Attorney General has authority to dismiss or settle the action at any time, despite the objections of the *qui tam* plaintiff." *Scachitti*, 215 Ill. 2d at 512; 740 ILCS 92/15(a) ("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 stating their reasons for consenting"); 740 ILCS 92/20(b) (the government "may dismiss the action notwithstanding the objections of the" relator); 740 ILCS 175/4(b)(1) and (c)(2)(A) (same). Thus, "[e]ven when the Attorney General declines to intervene, the Attorney General retains complete control of the litigation." *Scachitti*, 215 Ill. 2d at 512. Ultimately, "*qui tam* plaintiffs, acting as statutorily designated agents for the state, may proceed only with the consent of the Attorney General, and remain completely subordinate to the Attorney General at all times." *Id.* at 515.

"Although the *qui tam* plaintiffs may 'conduct' the litigation on the state's behalf, the Attorney General retains authority to 'control' the litigation." *Id.* at 510. As in other familiar contexts, permitted by the Illinois Constitution, private attorneys represent the interest of the State in ICFPA *qui tam* actions, always under the control of the Attorney General. See *Scachitti*, 215 Ill. 2d at 514; *People v. Illinois State Toll Highway Comm'n*, 3 Ill. 2d 218, 237-38 (1954). *Cf. People v. Philip Morris, Inc.*, 198 Ill. 2d 87 (2001) (discussing litigation where the State was represented by private counsel hired on a contingency basis).

Defendants again try to evade *Scachitti* with a claim that ICFPA actions are criminal and seem to argue that some law, aside from the Illinois Constitution, limits criminal prosecutions to State's Attorneys and the Attorney General. Yet none of the cases Defendants cite limit the authority of the General Assembly. Br. at 29-31. *People v. Pankey* holds that a police citation is not a valid charge of a felony. 94 Ill. 2d 12 (1983). *People v. Buffalo Confectionary Company* concerns the sharing of authority between the Attorney General and State's Attorney. 78 Ill. 2d 447 (1980). *People v. Jennings*, holds, as a matter of statutory authority, that the power of the State's Attorney does not include hiring private counsel without court or county board approval. 343 Ill. App. 3d 717, 723 (2003). Though perhaps academically interesting, these cases again discuss government control of criminal prosecutions; none address the constitutional authority of the General Assembly, let alone the authority to create *qui tam* actions for relators to seek civil penalties.

The Illinois Constitution requires Attorney General control, not court appointment. Private counsel can represent the State as "the real party in interest" where provided by "a constitutional statute." *Fergus v. Russel*, 270 Ill. 304, 308, 342 (1915). The Attorney General sufficiently controls ICFPA litigation under *Scachitti*. Neither the Illinois Constitution nor cases cited by Defendants requires anything more to uphold the General Assembly's choice to use a *qui tam* statute. See also *Allstate Insurance Co.*, 112 Cal. App. 4th at 609 (*qui tam* mechanism does not create any due process concern).

Defendants' true objection is not a concern that the ICFPA affronts any provision of the 1970 Illinois Constitution, but a plea that the enforcement of the State's laws must always be strictly constrained by the limits of the government's resources. Their argument is a naked attempt to squash the bulk of ICFPA claims before they even begin, dressed up in the language of standing and constitutional principles. The appellate court was not deceived.

> [Defendants'] contention that allowing a citizen to sue on behalf of the State will open the proverbial floodgates to litigants seeking a fee is without merit. A plaintiff may bring a qui tam claim only if (i) the State authorizes the relator to sue on behalf of the State and the relator and (ii) the State retains control of the litigation. *Scachitti*, 215 Ill. 2d at 494. The Act requires both. Further, for the Act—a statute designed for the purpose of deterring insurance fraud—to have an effect, witnesses of potentially fraudulent insurance claims, like Cahill, must be able to bring a complaint.

Op. ¶ 31, A.018. This court should not be misled either.

3. *Attorney General Control Also Satisfies Any Neutrality Concerns.*

Last, Defendants use alarmist rhetoric and language from foreign cases to suggest the relator share whistleblower award—as a "contingency"—impermissibly taints the role of private parties in ICFPA *qui tam* litigation. Br. at 32-35 (selectively quoting from *People ex rel. Clancy v. Superior Court* (*Clancy*), 39 Cal. 3d 740 (1985), *County of Santa Clara v. Superior Court*, 50 Cal. 4th 35 (2010), and *State v. Lead Industries, Ass'n, Inc.*, 951 A.2d 428 (R.I. 2008)). Defendants' argument against "contingency compensation" is an ironic attack on a *qui tam* statute; the entire structure and benefit of the *qui tam* action has always been to provide an *incentive* for private parties to assist the government. The "experience as old as modern civilization, [is] that one of the least expensive and most effective means of preventing frauds" is a *qui tam* provision with a whistleblower award. *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 542 n.5 (1943). Without a relator share, there is no functional *qui tam* statute.

Further, none of Defendants' cases even suggest that the General Assembly is constitutionally prohibited from passing a *qui tam* statute which, by definition and design, includes a relator share of the penalties. The cases actually develop the unremarkable requirement in other states that government attorneys should retain control of litigation when the government itself hires private counsel, on a contingency, for certain civil litigation. California, for example, permits governments to hire private counsel on a contingency to sue "on behalf of the public," even to seek a "substantial judgment," and even for conduct that might also be subject to criminal sanction, so long as a government attorney retains sufficient control. *County of Santa Clara*, 50 Cal. 4th at 54, 56 (allowing contingency agreements to prosecute lead paint public nuisance claim). The only narrow exception, under *Clancy,* may be for "cases involving a constitutional 'liberty interest' or 'the right of an existing business to continue operation.'" *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348, 389 (2014) (explaining the narrow holding of *Clancy* where private counsel was hired to trample sensitive First Amendment rights and shut down an adult bookstore). Similarly, courts in Rhode Island and Maryland have upheld the ability of governments to hire private counsel on a contingency, under government supervision to bring public nuisance and other claims, for example, against lead paint and tobacco companies. See *State v. Lead Industries, Ass'n, Inc.*, 951 A.2d 428 (R.I. 2008); *Philip Morris Inc. v. Glendening*, 349 Md. 660 (1998).

The key question for setting the level of government oversight of private attorneys is not whether the government pursues a property claim—as Defendants' assert, Br. at 33—but rather the remedy sought. *County of Santa Clara*, 50 Cal. 4th at 54, 56 (government oversight is important in "criminal prosecutions because of the important constitutional liberty interests at stake"). In most civil cases, like the False Claims Act and the ICFPA, "any remedy will be primarily monetary in nature," and government control of settlement provides sufficient oversight. *Id.* at 63.

Illinois likewise permits private counsel to work on a contingency and requires government control. Ill. Const. art. V, § 15; *Scachitti*, 215 Ill. 2d at 515. *Cf. People v. Philip Morris, Inc.*, 198 Ill. 2d 87 (2001) (enforcing attorneys' lien of tobacco litigation attorney hired by the State on a contingency). Any need for government control is satisfied—doctrinally and practically—by Attorney General control of ICFPA litigation. See *supra* section II.D.2.

Further, Defendants conveniently fail to cite the more recent California Supreme Court cases that actually uphold a *qui tam* statute against neutrality, standing, and constitutional challenges. *Iskanian*, 59 Cal. 4th at 389 (upholding the Private Attorney General Act (PAGA)); *Kim v. Reins International California, Inc*., Case No. S246911, 2020 WL 1174294 (Cal. Mar. 12, 2020) (upholding standing of a relator with no personal injury under PAGA). In *Iskanian*, the California Supreme Court held that the government control provisions of "*Clancy* and *County of Santa Clara* do not apply beyond the context of attorneys hired by government entities as independent contractors" and upheld a *qui tam* action, in contrast, as "a legitimate exercise of legislative authority." 59 Cal. 4th at 390, 391. Because the private *qui tam* litigant does not have the "'vast power of the government available to him,'" the potential for abuse is limited and neutrality requirements inapplicable. *Id* at 391.[4] "Relief under PAGA [as a *qui tam* statute] is designed primarily to benefit the general public, not the party brining the action," and thus "[t]he state can deputize anyone it likes to pursue its claim, including a plaintiff who has suffered no actual injury." *Kim,* 2020 WL 1174294 at *1, 4 (refusing to add any relator standing limitation not required by the legislature).

"Qui tam actions enhance the state's ability to use such scarce resources by enlisting willing citizens in the task of civil enforcement. Indeed, the choice often confronting the Legislature is not between prosecution by a financially interested private citizen and prosecution by a neutral prosecutor, but between a private citizen suit and no suit at all." *Iskanian,* 59 Cal. 4th

[4] For the same reasons, Defendants' comments about prosecutorial ethics, Br. at 30, are inapposite to a relator proceeding as a private party, always subject to full Attorney General control.

at 390. See also *Williams v. Superior Court*, 3 Cal. 5th 531, 545 (2017) (noting that PAGA added civil penalties in part because "many Labor Code provisions contained only criminal sanctions, and district attorneys often had higher priorities"). Illinois courts agree. "Rather than usurping the constitutional power of the Attorney General, the *qui tam* provisions *** support the Attorney General's law enforcement duties." *Scachitti*, 215 Ill. 2d at 510-11. Thus, "a rule disallowing *qui tam* actions would significantly interfere with a legitimate exercise of legislative authority aimed at accomplishing the important public purpose of augmenting scarce government resources for civil prosecutions." *Iskanian*, 59 Cal. 4th at 391.

CONCLUSION

The General Assembly enacted the ICFPA to incentivize whistleblowers with non-public knowledge of fraud, like Relator here, to report and prosecute insurance fraud, to amplify the government's resources, and to protect the public. This case is exactly the type of case the General Assembly sought to enable and could do so within the bounds of the Illinois Constitution. The decision of the Illinois Appellate Court should be affirmed.

Dated: March 18, 2020

Respectfully submitted,

HUGHES SOCOL PIERS RESNICK & DYM, LTD.

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rule 314(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h) state of points and authorities, the Rule 341(c) certificate of compliance, and those matters set forth within the appendix, is 50 pages.

/s/ *Charles D. Wysong*_____
Charles D. Wysong

SUPPLEMENTAL APPENDIX

Dept. of Insurance

STATE OF ILLINOIS

REPORT OF THE

ILLINOIS INSURANCE

FRAUD TASK FORCE

DEPARTMENT OF INSURANCE

SPRINGFIELD

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

Secretary of the Senate

Originated in the Senate

PUBLIC ACT 91-522

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

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

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

(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.

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.*

# # # # # # #

NOTICE OF FILING AND CERTIFICATE OF SERVICE

I certify that on March 18, 2020, the above **BRIEF OF PLAINTIFF-APPELLEE** was 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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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.

/s/ Charles D. Wysong
Charles D. Wysong