COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

WORCESTER COUNTY NO. SJC-07846

COMMONWEALTH

v.

JAMES N. ELLIS, JR., JAMES N. ELLIS, SR.,
RONALD D'AUTEUIL, NICHOLAS J. ELLIS,
MARTHA PORCARO, AND HELEN D. BILOURIS

BRIEF OF *AMICUS CURIAE* COALITION AGAINST INSURANCE FRAUD

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IN THE SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH OF MASSACHUSETTS

COMMONWEALTH	)	
v.	)	No. 07846
JAMES N. ELLIS, JR. & Others	)	
Defendants-Appellants	)	

MOTION OF COALITION AGAINST INSURANCE FRAUD FOR LEAVE TO PARTICIPATE AS *AMICUS CURIAE*

The Coalition Against Insurance Fraud ("Coalition") hereby moves for leave to participate as *amicus curiae* in the above-styled action and respectfully requests that the Court accept the brief conditionally filed with this motion. The Coalition is a broad-based group, including consumers, insurers, and law enforcement agencies, dedicated exclusively to fighting insurance fraud through public advocacy and public education. The Coalition combats all forms of insurance fraud as a means to reduce the effect of fraud on the cost of insurance.

The members of *amicus curiae* are able to offer this Court a unique perspective, because they include providers and consumers of insurance, both of which are frequent victims of insurance fraud. Neither group is ordinarily represented in insurance fraud prosecutions, but they are, of course, the intended beneficiaries of the challenged Massachusetts legislation. In addition, certain Coalition members are law enforcement agencies involved in the prosecution of insurance fraud. Thus, *amicus* has a direct interest in the outcome of this litigation.

This brief brings to the Court's attention relevant legal principles distinct from the prosecution perspective of the Commonwealth of Massachusetts that bear on the Court's resolution of this case. *Amicus curiae* therefore addresses relevant matter that has not already been brought to the attention of the Court by the parties, i.e., whether the annual assessments against the Automobile Insurers Bureau of Massachusetts and the Workers' Compensation Rating and Inspection Bureau of Massachusetts to pay the salaries and benefits of assistant attorneys general in the Fraud Division of the Massachusetts Office of the Attorney General are constitutional.

WHEREFORE, THE COALITION respectfully requests that

this Court grant it leave to participate as *amicus curiae* in this action and that it accept the brief provisionally filed with this motion.

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*

Amicus Coalition Against Insurance Fraud ("Coalition") was launched in 1993 to promote a broad-based effort dedicated exclusively to fighting insurance fraud through public advocacy and public education. The Coalition employs the resources of consumers, law enforcement organizations, and insurers to combat all forms of insurance fraud as a means to reduce the effect of fraud on the cost of insurance.

The members of *amicus curiae* are able to offer this Court a unique perspective, because they include providers and consumers of insurance, both of which are frequent victims of insurance fraud. Neither group is ordinarily represented in insurance fraud prosecutions, but they are, of course, the intended beneficiaries of the challenged Massachusetts legislation. In addition, certain Coalition members are law enforcement agencies involved in the prosecution of insurance fraud. Thus, *amicus* has a direct interest in the outcome of this litigation.

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ISSUE PRESENTED FOR REVIEW

Whether the lower court properly found that the Defendants were not denied their constitutional, statutory, or common law rights to a disinterested prosecutor.

STATEMENT OF THE CASE

Amicus Curiae adopts the Statement of the Case set forth in the Brief for Commonwealth-Appellee.

ARGUMENT

I. INSURANCE FRAUD IS A PROBLEM OF ENORMOUS SCOPE.

To appreciate the significance of the present case, it must be placed in context. Insurance fraud is a national, multi-billion dollar problem. Although the costs of such fraud are difficult to quantify precisely, available estimates give some sense of the vast scope of the problem. For example, a 1996 Report on Health Care Fraud by the General Accounting Office observed that for health care fraud alone (one form of insurance fraud) estimates of annual losses "range from 3 to 10 percent of all health expenditures -- between $30 billion and $100 billion based on estimated 1995 expenditures of over $1 trillion." United States General Accounting Office, Health Care Fraud: Information-Sharing Proposals to Improve Enforcement Efforts 1 (1996) ("GAO Fraud Report"). The Coalition Against Insurance Fraud has found that "insurance fraud claims amounted to $85.3 billion in 1995, resulting in a cost of more than $1,030 to each American family in the form of higher insurance premiums, taxes and the increase

in the cost of goods and services affected by this fraud." Kirk J. Nahra, The Role of Victims in Criminal Investigations and Prosecutions 11 (White Paper, Coalition Against Insurance Fraud, 1998). In light of these enormous sums at stake, the court below was clearly correct to find that Massachusetts has a "legitimate and compelling interest in prosecuting insurance fraud." See Commonwealth v. Ellis, No. 97-192, 1998 WL 470551, at *14 (Mass. Super. July 31, 1998); (App. IV/1409).[1]

Massachusetts is far from alone in recognizing the urgent need to bolster enforcement efforts in the insurance fraud context. On the federal level, for example, "[i]n late 1993, the Attorney General designated health care fraud as the Department of Justice's number two enforcement priority, second only to violent crime initiatives." GAO Fraud Report at 1. Earlier this year, the Attorney General called for still more aggressive action against such fraud, "through greater coordination and communication of information between law enforcement and private" insurers. See Letter from Janet Reno,

[1] References to (App. [Volume #]/[Page #]) are to Defendants' four volume appendix.

Attorney General, to All United States Attorneys, et al. 1 (Oct. 9 1998) (and attached Statement of Principles for the Sharing of Health Care Fraud Information Between the Department of Justice and Private Health Plans) ("Statement of Principles"). As set forth below, such coordinated efforts -- including the Massachusetts' statutory scheme at issue in this case -- are entirely consistent with federal and state constitutional guarantees of a disinterested prosecutor.

II. VICTIM PARTICIPATION IN THE PROSECUTION OF CRIMES IS BOTH ROUTINE AND APPROPRIATE.

A. Victim Participation is Routine.

Cooperation between crime victims and government officials historically has been critical to the effective administration of the criminal justice system. Indeed, throughout the early history of our criminal justice system, the crime victim often played a front-line role in directing the progress of a prosecution.[2] More recent developments

[2] See, e.g., Juan Cardenas, The Crime Victim in the Prosecutorial Process, 9 Harv. J.L .& Pub. Pol'y 357, 359 (1986) ("The practice of allowing crime victims to initiate private prosecutions is a long-held English tradition, based on the common (Continued...)

have, of course, lodged primary discretion to determine what crimes to prosecute in the hands of government prosecutors, see, e.g., Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978), but victim cooperation and participation in the investigation and prosecution of crimes remain key elements of the process.

In all kinds of cases, ranging from the least to the most serious, law enforcement relies heavily on cooperation from the public. For example, in a typical assault case, a victim must first contact the police to report the crime, relay the details of the incident, participate in identification of the perpetrator, testify at trial, and (if the defendant is convicted) present a victim impact statement at sentencing. During this process, the victim generally incurs a variety of costs, the benefit of which accrue directly to the State. Notwithstanding this fact, there

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(...Continued)
belief that the surest method of bringing a criminal to justice is to leave the prosecution in the hands of the victim and his family."); Karen L. Kennard, The Victim's Veto: A Way to Increase Victim Impact on Criminal Case Dispositions, 77 Cal. L. Rev. 417, 419-20 (1989) (noting that during the American colonial period, crime victims often made arrests themselves, paid sheriffs to apprehend criminals, and paid private attorneys to prosecute cases).

can be no doubt that the victim's participation is desirable and, indeed, necessary.

The cooperation that store owners routinely supply law enforcement in shoplifting cases is far more substantial than in the typical assault case, but no less appropriate. Shoplifters are caught almost exclusively by retailers' private security officers, who observe the crime, investigate if necessary, apprehend and detain the suspect, report the crime to local police, and testify at the defendant's trial. All of the costs incurred by such security officers are directly underwritten by the victimized corporation. If this cooperation between government and private interests were not allowed, however, either shoplifters could steal with impunity, or law enforcement would be forced to shift additional resources away from higher-priority areas to combat shoplifting.[3] Once again, it is thus clear that such

[3] Embezzlement cases present another typical example. Because embezzlement victims are familiar with their own finances, it is logical and expedient for them to pay for investigations into possible embezzlement, and then share the information they obtain with law enforcement authorities.

public/private cooperation in the prosecution of criminal cases is beneficial.

Consistent with the desirability of victim cooperation in the criminal process generally, the insurance industry has been particularly focused on assisting law enforcement with criminal investigations. Organizations like the Coalition, the National Insurance Crime Bureau (for property/casualty insurers), and the National Health Care Anti-Fraud Association (comprised of health insurers and law enforcement agencies) exist primarily to assist law enforcement in the detection, investigation, and prosecution of insurance-related crimes, and to encourage cooperation between fraud victims and law enforcement. In addition to these organizations, many insurers themselves have active anti-fraud programs, and work extensively with a wide range of public law enforcement officials to ferret out fraud.

Notably, the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") takes this practice of cooperation a step further, by actually requiring that private insurers and law enforcement officials must "consult with, and arrange for the sharing of data with representatives of health plans" in their efforts to fight fraud.

Moreover, as noted supra at 4, the Statement of Principles accompanying the Attorney General's recent call for increasing victim participation in the insurance fraud context emphasizes that the current trend is to encourage even broader cooperation between fraud victims and law enforcement.

In sum, in criminal prosecutions generally and in insurance fraud cases in particular, victim participation is both commonplace and critical to an effective law enforcement process. As demonstrated below, such cooperation is also fully consistent with well-settled legal doctrine.

B. Victim Participation is Appropriate.

Judicial precedent from across the country clearly and consistently demonstrates that cooperation between victim and prosecution is not sufficient to disqualify a prosecutor on grounds of improper bias. Unlike judicial officers, prosecutors are simply not expected to be entirely "neutral and detached." Rather, "[i]n an adversary system, [prosecutors] are necessarily permitted to be zealous in their enforcement of the law." Marshall v. Jerrico, Inc., 446 U.S. 238, 248 (1980). As a result, disqualification of an allegedly

conflicted criminal prosecutor "is a drastic measure which courts should hesitate to impose except when absolutely necessary." In the Matter of Grand Jury Subpoena, 873 F.2d 170, 176 (7th Cir. 1989) (quoting Freeman v. Chicago Musical Instrument Co., 689 F.2d 715, 721 (7th Cir. 1982)).

The threshold for a successful claim of prosecutorial bias or conflict of interest is therefore high. To disqualify a prosecutor or otherwise find a due process violation because of a prosecutor's alleged lack of neutrality, most courts require that any perceived conflict of interest be "actual." A defendant must "point to specific instances in the record to suggest an actual conflict or impairment of his or her own interests . . . ." State v. Webb, 790 P.2d 65, 75 (Utah Ct. App. 1990). Allegations amounting to a mere appearance or hypothetical existence of a conflict are insufficient. Id.; see also State v. Camacho, 406 S.E.2d 868 (N.C. 1991) (prosecutor may not be disqualified "unless actual conflict of interest" exists). "The Courts, as a general rule, should remove a public prosecutor only to protect a defendant from actual prejudice arising from a demonstrated conflict of interest or a

substantial risk of an abuse of confidence . . . ." People v. Herr, 658 N.E.2d 1032, 1033 (N.Y. 1995) (citations omitted).

Of course, while prosecutorial discretion receives considerable deference, it is not entirely unfettered. Many courts hold that a "direct personal interest" in the outcome of a criminal prosecution on the part of a prosecutor is sufficient to justify disqualification. See, e.g., Nicholas v. Sammons, 363 S.E.2d 516, 517 (W. Va. 1987) (syllabus point 1) (disqualification was proper "where the prosecutor has some direct personal interest arising from animosity, a financial interest, kinship, or close friendship such that his objectivity and impartiality are called into question."); Shaw v. Garrison, 467 F.2d 113, 118 (5th Cir. 1972) (where the prosecutor had a "significant financial interest in the continued prosecution" because of a book contract, prosecution brought for harassment purposes could be enjoined); City of Maple Heights v. Redi Car Wash, 554 N.E.2d 929 (Ohio Ct. App. 1988) (individual prosecutor disqualified where there was deep personal animosity between prosecutor and defendant, and prosecutor had filed a personal libel suit against defendant). In addition, some courts have found disqualification appropriate where the prosecutor has had some

attorney-client relationship with the parties involved whereby he obtained privileged information that may be adverse to the defendant's interest in regard to the pending criminal charges. See, e.g., Sammons, 363 S.E.2d 516 (syllabus point 1).[4]

The present case, however, like the assault and shoplifting examples noted above, involves only victim cooperation and participation in the prosecution of a crime, not through direct, case-specific assistance but through general funding of an overall insurance fraud enforcement scheme. It does not by any stretch implicate either a "direct personal interest" on the part of a prosecutor, or an attorney-client relationship between prosecutor and defendant. Therefore, as

[4] Similar conflict of interest concepts have been extended to the context of "private prosecutors." Many states allow private citizens to act as public prosecutors, with the consent of local law enforcement. Where such prosecutions are allowed, courts have approved of their use so long has they have no distinctly personal interest in a case that renders their participation improper. See, e.g., Woods v. Linahan, 648 F.2d 973 (5th Cir. 1981) (where prosecution staff was "inundated" with cases, sheriff's office could solicit victim's family to hire a private attorney to assist in the investigation, interview witnesses, and even file motions, so long as private attorney remained under ultimate control of the District Attorney).

set forth below, the Defendants here cannot satisfy the high threshold for a successful claim of prosecutorial bias.

III. THE CHALLENGED MASSACHUSETTS STATUTORY SCHEME IS AN APPROPRIATE LEGISLATIVE EFFORT TO ADDRESS THE PROBLEM OF INSURANCE FRAUD.

Fighting insurance fraud is an extremely significant governmental interest. The Massachusetts' General Court clearly enacted the challenged legislation in an effort to further that interest. Under the framework for analysis set forth above, the General Court's choice of means to advance that interest is a matter of legislative prerogative, so long as it does not accord prosecutors a "direct personal interest" in the outcome of a particular prosecution. *Amicus* respectfully submits that the purported financial connection between the insurance companies and the Insurance Fraud Division of the Attorney General's Office ("Fraud Division") in this case could hardly be more attenuated, and that the challenged statutory scheme is thus a proper exercise of legislative power.

Contrary to Defendants' arguments, there is no direct financial link between insurance companies and the Fraud Division. Rather, the

challenged legislation provides for funding of investigations and prosecutions of insurance fraud in such a way that prosecutors in the Attorney General's Office remain accountable to the Commonwealth, and not to insurers. Specifically, the two voluntary associations of insurers -- the Automobile Insurers Bureau of Massachusetts ("AIB") and the Workers' Compensation Rating and Inspection Bureau of Massachusetts ("WCRIB") -- are assessed by the General Court, and pay the assessments into the General Fund. St. 1990, c. 338, § 1, as amended by St. 1991, c. 399, § 3; St. 1995, c. 38, § 210. The Attorney General establishes the salaries of the Fraud Division's attorneys, who receive no additional benefits for prosecuting insurance fraud cases. G.L. c. 12, §§ 2 & 10. Those salaries are then paid from the General Fund by the State Treasurer, according to allocations authorized annually by the General Court. See, e.g., St. 1998, c. 194, § 2 (appropriating $734, 030 for insurance fraud enforcement for fiscal year 1999). There is thus no direct funding of the Fraud Division by the insurance industry or any individual insurer.

Moreover, although the General Fund is reimbursed for the salaries of the Fraud Division's attorneys by the legislatively mandated

assessments against the two industry associations, that does not render those attorneys personally "interested" in the results of the cases they prosecute, and therefore cannot overcome the strong presumption in favor of the constitutionality of the General Court's enactments. See, e.g., Commonwealth v. Lammi, 386 Mass. 299, 301 (1982) (deference of the judiciary to legislative enactments requires the Court to "indulge every rational presumption in favor of [the statute's validity]" (internal quotation omitted); Zayre Corp. v. Attorney General, 372 Mass. 423, 433 (1977) (indicating that "judicial restraint includes recognition of the inability and undesirability of the judiciary substituting its notions of correct policy for that of a popularly elected Legislature").[5]

[5] Defendants rely substantially on People v. Eubanks, 927 P.2d 310 (Cal. 1996), modified in part (Feb. 26, 1997), in support of their position that the challenged statutory scheme permits insurers to exert undue influence on prosecutors of the Fraud Bureau. Eubanks is inapplicable here for two reasons. First, the Eubanks court explicitly distinguished a broad industry group assessment, as in this case, from the payment by a specific crime victim for a specific prosecution that was at issue there. Id. at 321. Second, the California court held that disqualification would be appropriate only if financial assistance from the victim were "of such character and magnitude" as to "render it unlikely that the defendant will receive fair treatment." Id. at 312. Clearly, that was not the case here.

Notably, the Fraud Division does not restrict its investigations to cases involving members of the AIB or the WCRIB, even though they are the only two organizations required to pay the Commonwealth for that purpose.[6] Other types of fraud, including that involving life insurance, Social Security disability, dental insurance, disability insurance, and self-insured employers, are also prosecuted by the Fraud Division. Each case accepted by the Fraud Division receives the same internal review and approval as all other prosecutions by the Attorney General's Office, by supervisory attorneys whose salaries are not funded by the assessments against the AIB and WCRIB. (App. III/817-21, 899-90, 977.) Thus, individuals and organizations who are not subject to the General Court's assessments have the same access to the Fraud Division as members of the AIB and WCRIB.

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[6] In fact, this case demonstrates how persons other than insurers can participate in the investigation or detection of fraud cases. It is undisputed that the first reports concerning the criminal activities at issue in this case came from a member of the public, a company whose claims experience was apparently tainted by fraudulent claims. See Commonwealth v. Ellis, No. 97-192, 1998 WL 470551, at *6 (Mass. Super. July 31, 1998) (App. IV/1409). That initial complaint was followed by several other reports by members of the public. Id.

In sum, the structure of the challenged legislation reflects the General Court's recognition of the enormous costs to the insurance industry and to the people of the Commonwealth of the rampant insurance fraud in Massachusetts, and the need to designate both legal and financial resources to address the problem. As the same time, however, the funding mechanism established by the legislative scheme maintains ample distance between insurance companies and the attorneys of the Fraud Division. The funding mechanism is simply too indirect to present a risk that prosecutors will be unconstitutionally influenced by the insurance industry or by individual insurers, and Defendants' various challenges should therefore be rejected.

CONCLUSION

For the reasons set forth above, the decision below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Timothy J. Simeone, on Thursday, December 10, 1998, served the Motion of Coalition Against Insurance Fraud for Leave to Participate as Amicus Curiae and two copies of the Brief of Amicus Curiae Coalition Against Insurance Fraud upon counsel listed and in the manner specified below:

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