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## **The Conflicted, Private Prosecutors Comprising The Office Of Insurance Fraud Prosecutor**

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Healthcare providers in the State of New Jersey have been suffering through a dramatic increase in the number of prosecutions by the Office of Insurance Fraud Prosecutor (“OIFP”), an entity within the Office of the Attorney General (“OAG”), Department of Law & Public Safety (“DLPS”), State of New Jersey. In recent years, OIFP prosecutions have been instituted against healthcare providers based on what some might call thin and unconvincing evidence, without considering certain exculpatory evidence. OIFP investigations and operations have been characterized by extremely aggressive tactics, such as the abrupt shuttering of healthcare facilities seemingly without considering the continuity of patient care or the preservation of and transfer of medical records. The OIFP has dispatched special investigation units within private insurance companies to obtain records from healthcare providers without notifying such providers through the customary subpoena process, which allows for a challenge to wrongful seizures. The OIFP has brought charges against healthcare providers using aggressive theories to support their novel use of certain statutes (e.g., using the Health Care Claims Fraud Statute to criminalize what might typically be considered a civil matter, and the Runner Statute to criminalize referrals that are expressly outside the scope of the statutes). These aggressive prosecutions have exacted a devastating toll on many healthcare providers, and threaten to interfere with the care of patients who depend on those providers. When a pattern of prosecutions have such a potentially damaging effect on the public, questions must be asked about what is motivating the prosecutions, and do the benefits outweigh the burdens. In this case, the evidence points strongly to the conclusion that these prosecutions are the direct result of the OIFP being unduly influenced by the private interests of insurance companies, who fund the OIFP’s operations and the salaries of their prosecutors and investigators, and have an unprecedented seat at the prosecutorial table unlike any other private citizens.

Without a doubt, healthcare fraud is a problem in the State of new Jersey. However, combating healthcare fraud, like any other crime, requires strict adherence to principles of fundamental fairness and due process deeply-rooted in the U.S. and New Jersey Constitutions and case law. While one may naively attribute the increase in OIFP prosecutions and inexplicable behavior to benign prosecutorial zeal, evidence within the OIFP’s own establishing statute illuminates the

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flagrant conflict of interest affecting the OIFP and driving wrongful OIFP prosecutions. Simply stated, the manner in which the OIFP is funded (as described below) has converted OIFP prosecutors into “Private Prosecutors” as that concept has been defined by courts throughout the United States, in violation of the law.

***Insurance Companies Pay The Salaries And Other Expenses, And Fund The Retirement Plans, Of The Prosecutors And Investigators Seeking To Imprison Healthcare Providers***

The OIFP was created by *N.J.S.A. 17:33A-16*. Every year, the DLPS, through the OAG, calculates what it costs to run the OIFP. *N.J.S.A. 17:33A-30*. That calculation includes the salaries paid to OIFP prosecutors and investigators. *N.J.S.A. 17:33A-8A(f)*. It also includes payments made to the retirement funds of OIFP prosecutors and investigators. *Id.* Further, the calculation includes rent for the OIFP’s offices and “all other direct and indirect costs” associated with running the OIFP. *Id.*<sup>[1]</sup> After calculating the amount, the OAG informs the Commissioner of Banking and Insurance. *N.J.S.A. 17:33A-30*. The Commissioner then reimburses the DLPS for running the OIFP. *Id.* The amount paid to DLPS to run the OIFP is then, quite simply, billed to and paid by insurance companies. *N.J.S.A. 17:33A-8(g)*. Thus, OIFP prosecutors and investigators – including those seeking a prison sentence for healthcare providers – are paid by the alleged victims in this case.

The OIFP is an excellent investment for insurance companies because it vests them with broad powers beyond those enjoyed by any other private industry and/or class of alleged victims.<sup>[2]</sup> Unlike any other prosecutors who exercise the power to seek imprisonment, prosecutors at the OIFP are required to consider the recovery of money for insurers “as a major priority[.]” *N.J.S.A. 17:33A-26*. Indeed, the OIFP must track how much money it recovers for insurers and others and report it to the Governor. *N.J.S.A. 17:33A-24(d)*. The OIFP has a Liaison Section that is responsible for ensuring “continuing communication” between many State Departments and Divisions as well as “every county prosecutor’s office [and] local government units ....” *N.J.S.A. 17:33A-18(a)*. There is one, and only one, non-governmental group that is part of the liaison group: insurance companies. *Id.* Thus, insurers are the only entities included in the inner circle of otherwise public service entities whose representatives have special access to OIFP prosecutors and investigators. Other than insurers

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<sup>[1]</sup> The insurers’ funding is not limited to the OIFP. Indeed, county prosecutors can request reimbursement for insurance fraud prosecutions from the money funded by the insurers. *N.J.S.A. 17:33A-28*.

<sup>[2]</sup> Having the powerful OIFP do its bidding makes it all the more economical because no one insurance company can be required to pay more than 5% of the cost of running the OIFP. *N.J.S.A. 17:33A-8(g)*.

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no other actual or potential victims of insurance fraud such as doctors or patients have such special access. Nor, of course, do any public advocacy or citizen groups.

Membership in the exclusive liaison group has substantial benefits, one of which is the Liaison Section's mandate "for providing information to and coordinating information among any referring entities on pending cases of insurance fraud which are under investigation or being litigated or prosecuted." *N.J.S.A.* 17:33A-18(b). Thus, private insurers are entitled to receive information about pending investigations and to "coordinate" with the prosecution. The "coordination" between the prosecutors and the insurers (always the alleged victim) is not an empty promise. *See N.J.A.C.* 11:1-6.11(c). **Indeed, the OIFP cannot refuse to investigate a matter that an insurer wants investigated.** "The Insurance Fraud Prosecutor shall investigate and, if warranted, prosecute, cases referred to it by insurers..." *N.J.S.A.* 17:33A-19 (emphasis added).

The OIFP (with all its prosecutorial power) operates at the behest of the alleged victims. Ultimately, the prosecutors are simply an arm of the insurance companies, thereby giving those private companies far more power than they would otherwise have, such as the power to imprison people, issue secret grand jury subpoenas, compel compliance with those subpoenas and engage in all other activities that are invested exclusively in a prosecutor.

Indeed, insurers are not shy about flexing the prosecutorial muscle for which they pay. Unlike any other industry or alleged victim, insurers can fund a million dollar plus campaign that threatens prison.<sup>[3]</sup> As mentioned above, to be sure, insurance fraud is a problem in New Jersey. The due process violation is that the insurers have co-opted the OIFP, paying salaries, funding retirements, conducting investigations, and running advertising campaigns threatening prison.

Once an insurer dispatches the OIFP to investigate a matter, the insurer has, in the form of its agent (the OIFP), access to "information in the possession of the State or local public entities, including agency inspection reports, motor vehicle records and license information, individual case files, and intelligence information compiled and maintained by the Division of State Police in the Department of Law and Public Safety." *N.J.S.A.* 17:33A-23 By dispatching the OIFP in an effort to retrieve money, the insurers have an advantage to all others because the OIFP

shall have access to all information concerning insurance fraud enforcement activities in the possession of all State departments and agencies. The office shall meet on a regular basis with representatives of State departments and agencies

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<sup>[3]</sup> <http://www.nj.gov/oag/insurancefraud/awareness.html>

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and county prosecutors to set specific goals and strategies for the most effective resolution of insurance fraud cases, whether by criminal, civil, or administrative enforcement action, or a combination thereof.

*N.J.S.A. 17:33A-27.*

Additionally, of course, insurers are exempt from subpoenas (i.e., they need not go through the legal rigors of obtaining a subpoena to obtain records), and are entitled to “all information” on a referred case if the OIFP simply asks for it. *Id.* Dispensing with subpoenas is an added benefit to the insurers because it removes any chance that an interested party might move to quash, relieves the OIFP of the need to be specific, and, perhaps most importantly, completely removes any judicial oversight from the exchange of information between the prosecutors and the only non-public member of the liaison group, the insurers.

Through the “coordination” that occurs within the liaison group, and based upon the requirement that the OIFP investigate as directed by the insurers, the insurers have access to many other OIFP mandated powers, such as to

Confer from time to time with departments or other units of State government which have units which investigate fraud, in order to coordinate activities, share information, and provide any assistance necessary to any State agency in overseeing administrative enforcement activities; Formulate and evaluate proposals for legislative, administrative and judicial initiatives to strengthen insurance fraud enforcement; In connection with insurance fraud enforcement activities, act as the liaison for the Executive Branch of government with agencies involved in insurance fraud enforcement outside the Executive Branch, including federal agencies and the Judiciary....

*N.J.S.A. 17:33A-24.*

Although some of those powers could be exercised by lobbyists, here, the insurers get that service with an insider appointed directly by the Governor and confirmed by the Senate. *N.J.S.A. 17:33A-16.* Once again, unlike any other private group of businesses, insurance companies have a special advocate in Trenton, one who bears the Governor’s and the Senate’s stamp of approval.

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***The OIFP's Constitutional Problem***

The Fifth Amendment of the United States Constitution provides that no person shall be “deprived of life, liberty, or property, without due process of law.” Article 1, paragraph 1 of the New Jersey Constitution also protects “values like those encompassed by the principles of due process and equal protection.” *Greenberg v. Kimmelman*, 99 N.J. 552, 568 (1985). The Due Process Clause safeguards “the fundamental elements of fairness in a criminal trial.” *Rivera v. Illinois*, 556 U.S. 148, 158 (2009) (citing *Spencer v. Texas*, 385 U.S. 554, 563-564 (1967)). While fundamental fairness encompasses the rights enumerated in the Bill of Rights, *Dowling v. United States*, 493 U.S. 342, 352 (1990), the Supreme Court has repeatedly held that fundamental fairness requires protections that are not mentioned in the Bill of Rights but are essential to a fair trial. *In re Winship*, 397 U.S. 358 (1970) (holding that, despite the absence of a specific constitutional provision requiring proof beyond a reasonable doubt in criminal cases, such proof is a due process requirement).

A long line of federal and state cases, including the U.S. Supreme Court, have identified private prosecutions as a serious threat to fundamental fairness and due process, and even overturned convictions wherein the prosecutor’s personal interest in the case cast doubt on their impartiality. The insurers’ payment of OIFP salaries, retirement plans, rent and seemingly everything else effectively converts the OIFP into a private prosecutor. Under these circumstances, New Jersey and federal law is clear that this relationship is impermissible. OIFP prosecutors and investigators, people vested with the power to take away a citizen’s liberty and fine him into poverty, are paid by insurers. When OIFP prosecutors and investigators look toward retirement, they know that money comes from insurers. When the “continuing communication” between the insurers takes place as required, *N.J.S.A.* 17:33A-18(a), it is known to all at the OIFP that the people talking pay the OIFP’s rent. Whether real or perceived (the law makes no distinction), the payment arrangement between insurers and the OIFP demonstrates “conflicting loyalties [that] calls into question the objectivity of those charged with bringing a defendant to justice.” *Young v. United States*, 481 U.S. 787, 810 (1987).

It cannot be credibly argued that the OIFP’s total financial dependence on the insurers does not, in some way shape or form, present an untenable danger of coloring the prosecutors’ and investigators’ assessment of probable cause to proceed; the disclosure of exculpatory evidence; and the willingness to plea bargain, all of the foregoing being the elements of a judicially-prescribed test to ascertain the existence of an unwaivable conflict. For example, the OIFP cannot decline an investigation referred by an insurer. It is required to investigate whatever the insurers want. *N.J.S.A.* 17:33A-19. Neither the investigators nor the prosecutors are permitted to exercise their professional judgment on what to investigate. Just imagine the scrutiny a physician would face if it became clear that an interest non-physician has usurped their authority and independent medical

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judgment. Additionally, OIFP prosecutors and investigators must discharge their obligations with the mandate that getting money for the insurers is a “major priority[.]” *N.J.S.A. 17:33A-26*. In other words, the OIFP prosecutors are directed to get money for the people who pay the bills. The insurers, of course, have many avenues to collect money to which they deem themselves entitled, *e.g.*, arbitrations, lawsuits and decisions to remove health care providers from network. Unlike funding the OIFP, none of those traditional avenues provides the threat of State prison.

The other powers granted to and freely exercised by the insurers over the OIFP create additional “conflicting loyalties.” For example, the OIFP is required to investigate whatever insurers demand, *N.J.S.A. 17:33A-19*, to collect money for the insurers, *N.J.S.A. 17:33A-26*, and to engage in frequent and full communication with insurers, *N.J.S.A. 17:33A-18(a)*. The need to collect money for the insurers is explicitly demonstrated by the forfeiture allegations in recent OIFP indictments. Not only does the OIFP seek return of funds traceable to the alleged offense, the OIFP seeks to void all claims pending with insurers. All of this might make for good policy and even good government ***if the insurers were not permitted to pay for and use the OIFP as a private prosecutor.***

In any event, the conflict between seeking justice and answering to the insurers is clear. Further, the manner in which insurers conduct and direct the OIFP’s investigations and prosecutions calls into question the objectivity of those charged with bringing a defendant to judgment. There is no other prosecutorial agency in New Jersey in which the alleged victim is dispatched to investigate and obtain evidence for the prosecutors at the prosecutors’ request. Indeed, alleged victims and even witnesses are routinely warned to do no such thing. It could even be considered witness tampering or obstruction of justice. Additionally, there is no other set of circumstances in which the alleged victim is asked by the prosecutors to go out and obtain a statement. The State would never ask the family of a murder victim to obtain a formal statement. The State would never ask Goldman Sachs, for example, to send one of its investigators to obtain a statement from someone suspected of defrauding that company.

To be sure, the OIFP’s objectivity is at risk of compromise given that it investigates crimes hand-in-hand with insurers. There is no other instance in which prosecutors work so closely with an alleged victim, asking the alleged victim to interview potential defendants. Nor is there any instance in which a prosecutor partners with an alleged victim who pays the prosecutor’s salary, retirement and rent.

There are many time-honored methods by which insurance fraud can be rooted out and prosecuted. To a certain extent, the OIFP employs traditional methods. However, insurer payments to the OIFP adds a dimension to the investigation and prosecution of crime that presents an

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unacceptable risk to a defendant's right to a fair trial and the need to avoid an appearance of impropriety. No other prosecutors are paid by the alleged victims. Although the Legislature is charged with revising or repealing the statutory scheme, it is the court's obligation to remedy the harm visited upon healthcare providers in the State of New Jersey by those statutes. Indeed, no other branch of government has the power to do so.

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