UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

NATIONAL FIRE ADJUSTMENT COMPANY, INC., Plaintiff	)	
v.	)	No. 1:18-cv-00008-LEW
ERIC A. CIOPPA, SUPERINTENDENT OF THE MAINE BUREAU OF INSURANCE, Defendant	)	

DECISION AND ORDER

The Plaintiff, National Fire Adjustment Company, Inc., seeks a declaratory judgment stating that the Defendant, Eric Cioppa, cannot enforce 24-A M.R.S. § 1476, which requires that public adjusters adhere to a 36-hour waiting period before soliciting business from Maine citizens or offering a contract for public adjustment services. According to Plaintiff, the statute violates Plaintiff's first amendment speech rights. The parties request a judgment on a stipulated record.

BACKGROUND

National Fire Adjustment Company, Inc. ("Plaintiff" or "NFA") provides licensed public insurance adjustment services for clients who have suffered property damage in the State of Maine. *Stip. Facts* ¶ 14. NFA holds an active resident adjuster license from the State of Maine's Department of Professional and Financial Regulation, Bureau of

Insurance. *Id.* ¶ 15.

It is the nature of NFA's business to enter into contracts with property owners after the property owners suffer a loss insured by an insurance company. When a property owner retains NFA's services, NFA's employees provide loss-adjustments services to the property owner, which services, ideally, will provide the property owner with a method for adjusting (placing a value on) the insured loss that is more favorable to the property owner than the method used by adjusters employed or contracted by the property owner's insurance company. By providing this service, NFA's adjusters (sometimes called "public adjusters") help ensure that property owners settle coverage claims with their insurance companies for fair value. *Id.* ¶ 6. In return for their services, public adjusters charge a fee to the policyholder. The fee is usually a percentage of the overall damage recovery paid by the insurance company. *Id.*

Since 1997, through the Maine Insurance Code, the State of Maine has restricted the ability of public adjusters to solicit business within a 36-hour window following a loss. In its current form,[1] the so-called "36-Hour Rule" reads as follows:

> **1. Solicitation.** An adjuster seeking to provide adjusting services to an insured for a fee to be paid by the insured may not solicit or offer an adjustment services contract to any person for at least 36 hours after an accident or occurrence as a result of which the person might have a potential claim.

[1] The Legislature amended the 36-Hour Rule both before and after its initial passage. In its initially proposed form, the Rule stated that public adjusters "may not solicit or otherwise offer adjustment services." Stip. Facts ¶ 35, citing L.D. 335, § 1 (118th Legis. 1997). As first enacted, the Rule stated that public adjusters "may not solicit or offer an adjustment services contract." *Id.* ¶ 37, citing Comm. Amend. A to L.D. 335 (118th Legis. 1997).

24-A M.R.S. § 1476(1).[2]

When it reviewed the merits of the proposed legislation, and in the course of deliberations that resulted in amendments to the 36-Hour Rule, the Legislature did not consider or rely on any factual findings of fraudulent, misleading, intrusive, or otherwise concerning communications by public adjusters. *Stip. R.* ¶ 43.

Defendant Eric Cioppa is the Superintendent of the Maine Bureau of Insurance. *Id.* ¶ 24. The Maine Bureau of Insurance is one of five agencies within the State of Maine's Department of Professional and Financial Regulation. *Id.* ¶ 25. The Maine Bureau of Insurance regulates the State's insurance industry, including by licensing insurance adjusters and imposing discipline for violations of the State's insurance laws. *Id.* ¶ 26. In addition to other duties, Superintendent Cioppa is charged with protecting consumers from misleading or fraudulent business activities. *Id.* ¶ 27.

Adjusters in Maine must be licensed and are governed by a comprehensive state regulatory scheme to protect the public from misleading or fraudulent business activities. *Id.* ¶¶ 28-29. Among other tools in his enforcement arsenal, Superintendent Cioppa is authorized to revoke, suspend, place on probation, or otherwise limit the licensure of adjusters, and to impose civil penalties and restitution orders, for violations of any law

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[2] In addition to imposing the 36-Hour Rule, the statute also provides that a contract for public adjuster services may be rescinded by the property owners within two business days of its execution:

> 2. Contract provision. Any such adjustment services contract must contain a provision, prominently printed on the first page of the contract, stating that the person contracting with the adjuster has the option to rescind the contract within 2 business days after the contract is signed.

Id. § 1476(2). Plaintiff does not challenge the contract rescission provision.

enforced or rule adopted by the Superintendent. *Id.* ¶¶ 29-33.

Superintendent Cioppa has imposed discipline on public adjusters, including suspensions from practice and civil penalties, for violations of the 36-Hour Rule. *Id.* ¶ 46. For example, in October 2012, Superintendent Cioppa suspended a public adjuster's license for 30 days and ordered him to pay a $500 civil penalty because he had violated the 36-Hour Rule. The adjuster left two telephone messages concerning his services for property owners who experienced a fire-related loss. *Id.* ¶ 47.

NFA has two employees who work as adjusters in Maine, both of whom are duly-licensed. *Id.* ¶ 17. Superintendent Cioppa is not aware of any evidence that NRA's Maine-based adjusters have engaged in any false or misleading statements in their communications with clients regarding NFA's public insurance adjustment services. *Id.* ¶ 23. NFA has instructed its adjusters in Maine to adhere to the 36-Hour Rule. *Id.* ¶ 48. NFA's public adjusters in Maine are presently adhering to the 36-Hour Rule to avoid discipline by the Superintendent. *Id.* ¶ 49. NFA's public adjusters in Maine have created time-keeping and alert systems to ensure that they wait the full 36 hours after a fire before contacting a property owner. *Id.* ¶ 50.

In addition to the foregoing stipulated facts, the parties have stipulated to the following facts concerning the impact of the 36-Hour Rule on public insurance adjustment services. Accordingly, the Court accepts it as established that the first 36 hours after a fire are a critical time for public adjusters to communicate with potential clients about their services; that the first 36 hours after a fire can be stressful, hectic, and traumatic for property owners who have suffered damage; that property owners may relocate to

temporary housing immediately after a fire loss, so that there may be a very short period of time for a public adjuster to locate and communicate with the policyholder; that property owners may agree to cleaning or tear-down services immediately after suffering a property loss, impeding the ability of public adjuster to assess the value of the loss; and that, by logical extension, NFA public adjusters' adherence to the 36-Hour Rule is causing NFA's public adjusters to lose business on an ongoing basis. *Id.* ¶¶ 7-12, 51.

Performing public insurance adjusting services for policyholders in accordance with Maine law is a lawful business activity and is not inherently misleading. *Id.* ¶ 13.

DISCUSSION

Plaintiff argues the 36-Hour Rule violates the First Amendment because it is a "content- and speaker-based restriction on speech [that] is presumptively unconstitutional viewpoint discrimination." Pl.'s Mot. for Disposition of Liability Issues by Judgment on a Stip. R. at 2, ECF No. 21 ("Pl.'s Mot."); *see also* Complaint ¶¶ 4-5. In the alternative, Plaintiff argues the Rule imposes burdens that either do not advance the State's interest or sweep more broadly than necessary to achieve the stated interest. Pl.'s Mot. at 2; Complaint ¶ 44. Defendant argues the 36-Hour Rule directly advances a substantial governmental interest and is no more burdensome than is necessary to serve that interest. Defendant's Mem. of Law for Disposition on a Stip. R. at 7 ("Def.'s Mem.").

The First Amendment, made applicable to the States by the Fourteenth Amendment, prohibits the States from, among other things, abridging the freedom of speech. *Janus v. Am. Fed'n of State, Cnty, and Mum. Emp.*, 138 S. Ct. 2448, 2463 (2018). Persons subjected to a deprivation of their speech rights may, pursuant to 42 U.S.C. § 1983, bring an action

in federal court to obtain declaratory or injunctive relief against the official charged with the enforcement of a state law that abridges the freedom of speech.

So called "commercial speech," varyingly defined in Supreme Court precedent but understood to encompass speech uttered to market goods and services, is protected under the First Amendment. *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 762 (1976). More precisely, providers of good and services and consumers are entitled to engage in commercial speech activity without unduly burdensome interference by the government. *Id.* at 756, 762-64.

> Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.

Id. at 765. As set out in *Virginia Board of Pharmacy*, Plaintiff's interest in marketing its services to prospective clients is, beyond debate, deserving of protection under the First Amendment. Moreover, the stipulated facts demonstrate that Plaintiff's speech is in fact burdened by Maine's 36-Hour Rule. Plaintiff thus has standing to press the claim. *See Van Wagner Boston, LLC v. Davey*, 770 F.3d 33, 37 (1st Cir. 2014); *Ramirez v. Sanchez Ramos*, 438 F.3d 92, 98 (1st Cir. 2006).[3]

As an initial step in analyzing whether the 36-Hour Rule complies with the First

[3] I make the observation concerning standing only because Defendant appears to contest the issue, albeit obliquely. Def.'s Mem. at 7 & n.4.

Amendment, I must consider whether the Rule should be labeled "content-based" or "content-neutral." Plaintiff, hoping for application of strict scrutiny, advocates the former label. Pl.'s Mot. at 7-10. Defendant, seeking intermediate scrutiny, nominates the latter. Def.'s Mem. at 10-13.

Content-based regulations burden the messenger because his or her message is disfavored. *E.g.*, *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018) (invalidating state law that compelled licensed pregnancy-related clinicians to convey a message preferred by the state); *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015) (invalidating municipal code that categorized signs based on the type of information conveyed, affording greater of lesser permission on that basis). Content-based regulations are presumptively violative of expressive rights and will stand only where the regulation is narrowly tailored to serve a compelling state interest. *Becerra*, 138 S. Ct. at 2371; *Reed*, 135 S. Ct. at 2231. By comparison, content-neutral regulations burden the messenger to advance an interest other than message bias. *Rideout v. Gardner*, 838 F.3d 65, 71-72 (1st Cir. 2016), *cert. denied*, 137 S. Ct. 1435 (2017) (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). "Content-neutral restrictions are subject to intermediate scrutiny, which demands that the law be 'narrowly tailored to serve a significant governmental interest.'" *Id.* (quoting *Rock Against Racism*, 491 U.S. at 791). The distinction between a regulation narrowly tailored to a compelling interest, and one narrowly tailored to a significant interest, is that the latter is not required to be "the least restrictive or least intrusive means" of serving the ends in question. *Id.* (quoting *Rock Against Racism*, 491 U.S. at 798).

Plaintiff argues the 36-Hour Rule is content-based because it disfavors the expressive activity of public adjusters as compared to the expressive activity of insurance company adjusters, who do not have to wait 36 hours before engaging in loss adjustment activity. Pl.'s Mot. at 7-8. I am not entirely persuaded that the 36-Hour Rule imposes any message bias as between public adjusters and insurance company adjusters. As Defendant observes, Def.'s Mem. at 8, public adjusters and insurance company adjusters stand in different positions because the insurance company adjusters work at the invitation of the property owner. Should an insurance company adjuster arrive and communicate with the property owner within 36 hours of a covered loss, he or she will do so in fulfillment of a contractual obligation to do so, not opportunistically to solicit a contract for adjustment services. On the other hand, it is at least conceivable that the insurance company adjuster could take steps that compromise, or possibly even settle, a claim for coverage within the 36-hour window, while the property owner is presumed to be experiencing a great deal of emotional disturbance. Consequently, it is at least conceivable[4] that the 36-Hour Rule might not be even-handed in some instances because, oddly enough, it sweeps too narrowly by not constraining insurance company adjuster speech.

Although I am not convinced on the basis of the stipulated record that the 36-Hour Rule was designed to favor one speaker over another, as was the case in *Virginia Board of Pharmacy* (invalidating restrictions on pharmacy price advertisement), *Reed* (invalidating

[4] The parties have stipulated that insurance adjusters have been known to take steps within the 36-hour window that compromise the ability of others to fully evaluate the extent of a loss.

message-based sign regulation), and *Sorrell v. IMS Health*, 564 U.S. 552 (2011) (invalidating content- and speaker-based burdens that restricted only commercial behavior involving the exchange of information), it nevertheless strikes me as an inescapable conclusion that the Rule is the product of a paternalistic distaste for commercial speech[5] that transpires when one party to a communication is presumptively in a state of emotional upset. Given this basic underlying reality, asking whether the Rule is designed to regulate content or is a neutral regulation directed at commerce or conduct[6] is, frankly, like asking whether a new penny is stamped with Lincoln's head or the Union shield. There is room for both stamps, it so happens.[7]

As late as the middle part of the last century the Supreme Court likely would not have questioned the authority of the States to shield consumers from the perceived harms of a well-timed marketing pitch, *cf. Breard v. Alexandria*, 341 U.S. 622, 641-42 (1951) (sustaining conviction for violation of anti-solicitation ordinance that prohibited solicitors, peddlers, hawkers, itinerant merchants, and transient vendors from going to private residences uninvited); *Valentine v. Chrestensen*, 316 U.S. 52, 55 (1942) (sustaining prohibition on the distribution of handbills containing "commercial advertising matter"), but over the last 70 years there has been such a decided pendulum shift that one cannot

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[5] One of the greatest curiosities of the jurisprudence concerning commercial speech is that "commercial speech" is itself a pejorative term that conveys a measure of bias.

[6] "It is also true that the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011).

[7] In *Reed*, the Supreme Court observed that "a content-based law that restricted the political speech of all corporations would not become content neutral just because it singled out corporations as a class of speakers." 135 S. Ct. at 2230 (citing *Citizens United v. FEC*, 558 U.S. 310, 340-41 (2010)).

help but surmise that a majority of the justices on the Supreme Court are of the view that the Free Speech Clause was as much inspired by de Gournay as by Milton, Locke, or Mill. Given this pendulum shift, I fail to see how Defendant can expect me to articulate why the 36-Hour Rule is anything other than a vestige of an earlier era's bias against commercial speech in general. However, the other stamp fits too, and the Supreme Court has held that a state's interest in preventing a harm can be exercised in a manner that prevents a particular message from being received in the first place. *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 631 (1995) (applying intermediate scrutiny after observing that "the harm posited by the Bar is as much a function of simple receipt of targeted solicitations within days of accidents as it is a function of the letters' contents"). Consequently, I will apply the intermediate scrutiny test set forth in *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*, 100 S. Ct. 2343 (2005).

The *Central Hudson* test has four parts:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

447 U.S. at 566. The parties agree that the speech of public adjusters is lawful and not misleading. The remaining issues are whether the government interest is substantial, and, if so, whether the regulation advances the interest without overburdening legitimate expression.

I find the interest to be "substantial." Defendant explains that the interests advanced

by the 36-Hour Rule are professional regulation and consumer protection. Def.'s Mem. at 8-9, 16. "Most notably," says Defendant, the Rule protects the privacy of "vulnerable" property owners by sparing them the indignity of "cold-call solicitations." *Id.* at 8-9, 14. While many philosophers would say that intellect is without purpose in the absence of passion, there are those who would also allow that strong passions are the enemy of reason. Most people can imagine, if they have not experienced, how an extreme misfortune can temporarily undermine the ability to make sound decisions. Additionally, the Supreme Court has held, specifically, that "targeted solicitations within days of accidents" are a "harm" that the State of Florida could redress in the context of attorney regulation.[8] *Went For It, Inc.*, 515 U.S. at 631. As resilient as the people of Maine may be, I cannot say they are any less susceptible to "targeted solicitations within days of accidents" than the people of Florida. Moreover, I think that common sense supports the finding that the average person would prefer the solicitation mail at issue in *Went for It*, to the cold-call knock at the door that is at issue in this case.

Defendant also argues the 36-Hour Rule is particularly weighty because it seeks to maintain professional standards. A speech-related regulation of "professional conduct" will be tolerated if it imposes only an "incidental" burden on speech activity. *Becerra*, 138

[8] Plaintiff says Defendant's showing on the interest issue is inadequate. Although the opinion expressed in *Breard* as to the constitutionality of absolute prohibition on cold-call solicitations has been discredited, the *Breard* Court took it as a given that the public, as a general rule, harbors an aversion to cold-call solicitation. 341 U.S. at 626-27 & n.3. *See also Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 627-28 (1995) (observing that the Bar mustered an "anecdotal record . . . noteworthy for its breadth and detail," but also stating, "we do not read our case law to require that empirical data come to us accompanied by a surfeit of background information. . . . [and] are satisfied that the ban on direct-mail solicitation in the immediate aftermath of accidents . . . targets a concrete, nonspeculative harm"). Plaintiff has not persuaded me that it would be improper for me to similarly credit Defendant's assertions about the desire of many property owners that the immediate aftermath of a fire loss not include cold-call solicitations.

S. Ct. at 2373. For example, in *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978), the Supreme Court upheld the imposition of professional sanctions against a lawyer who engaged in personal solicitation of accident victims at the hospital and in their homes. The Court specifically held "that the State – or the Bar acting with state authorization – constitutionally may discipline a lawyer for soliciting clients in person, for pecuniary gain, under circumstances likely to pose dangers that the State has a right to prevent." *Id.* at 449. Although the rationale for the holding rested heavily on "the profession's ideal of the attorney-client relationship," *id.* at 454, the solicitation restriction in *Ohralik* was also absolute, *id.* at 453 n.9, and was not limited as to time or place, as it is here. Moreover, the underlying interest, said to be the prohibition of barratry, champerty, and maintenance, *id.* at 454 n.11, is not entirely absent from the public adjuster's business formula.[9] For these reasons, in my estimation, the State's interest in professional regulation is not insubstantial in this case.

Finally, I must consider whether the 36-Hour Rule advances the interest in question, and whether it is permeable enough to stand against the first amendment gale whipped up by Plaintiff. On the first of these issues, I conclude that the Rule advances a privacy interest, although some of the argument advanced by Defendant is not helpful on that point (see below). In addition, the Rule advances the interest in professional regulation and consumer protection; specifically, the creation of a buffer period in which property owners

[9] "The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically be 'officers of the courts.'" *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975).

cannot compromise their rights through a contingent-fee contract. Therefore, I reach the issue of permeability.

Defendant argues the 36-Hour Rule is exceptionally permeable to speech activity. Specifically, Defendant states:

> The 36-Hour Rule limits only the soliciting or offering of an "adjustment services contract . . . to an insured for a fee" during the 36-hour period. The statute does not prohibit a public adjuster from communicating with victims (e.g., via direct discussion or dissemination of generic best-practices information; responding to consumer-initiated contacts; engaging in promotional advertising or untargeted mailers to the public; etc.)—so long as the adjuster does not solicit or offer a fee-for-service contract during that time. Further, the public adjuster would be unimpeded in asking the victim if it would be okay for the adjuster to take pictures of the scene, or to recommend that the victim preserve certain things (i.e., not to immediately agree with the company adjuster to cleaning or tear-down services).

Def.'s Mem. at 9-10.[10] In reply, Plaintiff argues that the actual language of the 36-Hour Rule is not that permissive. Pl.'s Mot. at 9. Plaintiff has a point. The Rule states that public adjusters "may not solicit or offer an adjustment services contract." 24-A M.R.S. § 1476(1). The Legislature's use of the disjunctive "or" reflects its understanding that solicitation is not the same thing as making an offer. Black's Law Dictionary tells us that the term "solicitation" includes "[a]n attempt or effort to gain business," and provides as an example attorney advertisements. Black's Law Dictionary (10th ed. 2014).

It is an age-old maxim that a statute must be construed according to its ordinary meaning, "for were a different rule to be admitted, no [person], however cautious and

[10] Defendant's argument that the Rule allows for so much communication is incompatible with Defendant's argument that the rule promotes a privacy interest. However, I do not credit Defendant's suggestions as to the amount of speech activity permitted by the Rule.

intelligent, could safely estimate the extent of his [or her] engagements, or rest upon his own understanding of a law, until a judicial construction ... had been obtained." *Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 89–90 (1821). Consistent with this maxim, a Maine court construing the 36-Hour Rule would treat the question as one of law, would give the words "their plain and ordinary meaning," and would seek to avoid treating words and phrases as mere "surplusage." *Passamaquoddy Water Dist. v. City of Eastport*, 1998 ME 94, ¶ 5, 710 A.2d 897, 899. Based on my reading of the 36-Hour Rule, the ban on "solicitation" is exceedingly broad and acts as a powerful deterrent to even educational outreach activity within the 36-hour window. In my view, it is extremely unlikely that the average property owner through an exercise of common sense would regard educational outreach activity as anything other than solicitation. If offense was taken by a property owner, and if Defendant received a complaint, it seems to me that Defendant would be equally hard-pressed to draw clear lines between educational speech and solicitation speech, especially where the speaker is only present on the scene to serve a commercial interest. In any case, Plaintiff's speech rights should not rest precariously on how Defendant chooses to characterize certain speech when the distinction between the two, in the world of three dimensions, appears to be tissue thin. I expect that Defendant likewise would prefer a less slippery footing upon which to ground his enforcement and disciplinary actions. The benefit of giving words in the statute their plain and ordinary meaning, is that the public charged with knowledge of and compliance with its prohibitions do not need to guess correctly as to the meaning that the official charged with its enforcement may give it. The people of Maine are governed by laws, not by the intention of legislators or the state officials charged with enforcement

of the laws. The text of the statute is the law, even if, as Defendant urges, it is not what was intended.[11] Were it otherwise, it would be like emperor Caligula posting edicts high up on the pillars, so that they could not easily be read.

In short, it stands to reason that Plaintiff does not believe it can communicate with property owners to share its knowledge or describe its services during the 36-hour period without getting scorched. Moreover, given Defendant's argument, it is apparent that Defendant perceives the need to make some allowances for the communication of information related to loss adjustment services. Defendant has also agreed to a stipulation that the burden is significant from an economic perspective. Still, it does not necessarily follow that Plaintiff's inability to strike while the iron is hot is offensive to the Free Speech Clause of the First Amendment.

While I accept that the 36-Hour Rule imposes an opportunity cost for Plaintiff – the parties have stipulated to that effect – I nevertheless conclude that, to the extent the 36-Hour Rule prohibits the actual offer of a public adjustment contract, the 36-hour delay is an "incidental" imposition that serves a substantial consumer protection interest. However, I also conclude that the ban on all solicitation activity, temporary as it may be, is an excessively paternalistic prior restraint on speech and, as such, sweeps more broadly than

[11] I do not find any support in the record that there is a difference between the language used in the statute and what the legislature intended. Even if there was such evidence, I would not credit it in the least. To the extent that there is any difference between what the legislature intended, assuming that such a thing is ever knowable, and the plain language of the law it passed, that is a problem for the political branch to address. The Court is not equipped with the metaphysical ability to divine the potpourri of the legislators' individual and collective intent as to what they thought the bill might be during debate, committee markup and final passage. Even if armed with such an ability, it would be distinctly undemocratic to rely on the Court, fingers crossed, as the Oracle of Delphi to reveal what was intended by the law even if it flies in the face of what the law says.

is necessary to serve the stated interests. Public adjusters are not attorneys subject to the heightened professional standard at work in *Ohralik*, and their services are lawful and not inherently misleading. Moreover, the privacy concern has been given little weight in other cases involving bans on direct solicitation activity. In my view, the interests in professional regulation and privacy do not support the temporary ban on solicitation speech. While it is understandable that many individuals would prefer not to receive solicitation of this kind shortly after suffering a loss, there are others who may welcome and benefit from the public adjuster's message. Those who are offended by such activity are, of course, free to express their view and turn away unwelcome callers. Our free speech rights demand a certain degree of personal fortitude.

Finally, in terms of the interest in consumer protection, prohibiting the offer of contract for 36 hours and allowing for rescission for another 48-hours is a fully adequate means of serving that interest.[12] It is not necessary to ban all solicitation as well. Permitting lawful solicitation that is not inherently misleading, while prohibiting conduct that involves closing a contract, in my view achieves the balance commanded by the Free Speech Clause or, more precisely, the intermediate-scrutiny, commercial-speech wax applied to the Free Speech Clause (and discussed in three concurring opinions) in *Central*

[12] Other courts have similarly overturned state laws restricting solicitation activity by public adjusters. *See Atwater v. Kortum*, 95 So.3d 85, 87 (Fla. 2012) (concluding that a 48-hour ban on solicitation and any "contact" was excessive); *Ins. Adjustment Bureau v. Ins. Comm'r for Commonwealth of Pa.*, 542 A.2d 1317, 1323-24 (1988) (concluding that requirements of a bond, a form contract, a four-day rescission period, and a prohibition on misrepresentation were protection enough and invalidating a 24-hour ban on solicitation as an excessive prior restraint on speech).

Hudson. I therefore grant Plaintiff partial relief, solely with respect to the prohibition against solicitation.[13]

CONCLUSION

Plaintiff's request for judgment on the stipulated record is granted in part and denied in part. The Court hereby declares as unconstitutional, in violation of the Free Speech Clause, that portion of 24-A M.R.S. § 1476(1) that prohibits solicitation of public adjuster services.[14]

SO ORDERED.

Dated this 8th day of January, 2018.

/s/ Lance E. Walker
LANCE E. WALKER
UNITED STATES DISTRICT JUDGE

[13] In fashioning a remedy, the Court can wield a carving knife rather than an axe. "Severability is a matter of state law," *R.I. Med. Soc'y v. Whitehouse*, 239 F.3d 104, 106 (1st Cir. 2001), and "Maine law mandates that the 'provisions of the statutes are severable,'" *IMS Health Corp. v. Rowe*, 532 F. Supp. 2d 183, 186 (D. Me. 2008) (quoting 1 M.R.S.A. § 71(8)). "An invalid portion of a statute or an ordinance will result in the entire statute or ordinance being void only when it is such an integral portion of the entire statute or ordinance that the enacting body would have only enacted the legislation as a whole." *Kittery Retail Ventures, LLC v. Town of Kittery*, 2004 ME 65, ¶ 18, 856 A.2d 1183, 1190. Here, the two prohibitions in the 36-Hour Rule are severable for purposes of remedy.

[14] The stipulated facts do not describe circumstances suggesting the need for injunctive relief at this time.

KeyCite Yellow Flag - Negative Treatment
Distinguished by Golden Triangle News, Inc. v. Corbett, Pa.Cmwlth., January 23, 1997

518 Pa. 210
Supreme Court of Pennsylvania.

INSURANCE ADJUSTMENT BUREAU, Appellant,
v.
The INSURANCE COMMISSIONER FOR the COMMONWEALTH of PENNSYLVANIA, Appellee.

Argued Dec. 10, 1987. | Decided May 20, 1988.

Partnership engaged in the business of negotiating casualty loss claims on behalf of insured property owners filed complaint in equity seeking preliminary injunction against implementation of amendment to public adjuster and public adjuster solicitor law prohibiting solicitation of business by public adjusters or public adjuster solicitors within 24 hours of disaster or fire. The Commonwealth Court, No. 611 C.D. 1984, 108 Pa.Cmwlth. 418, 530 A.2d 132, granted summary judgment in favor of the Commonwealth, and partnership appealed. The Supreme Court, No. 120 E.D. Appeal Docket, 1987, Flaherty, J., held that statute impermissibly burdened free speech rights.

Reversed.

West Headnotes (4)

[1] **Constitutional Law**
⌲ Commercial Speech in General

Party seeking to uphold restriction on commercial speech which is not false or deceptive carries burden of justifying it. U.S.C.A. Const.Amend. 1.

3 Cases that cite this headnote

[2] **Constitutional Law**
⌲ Unfair Trade Practices

Constitutional Law
⌲ Business or Professional Services

Insurance
⌲ Adjusters

Speech of public adjusters within 24 hours of disaster was not so pervasively false or deceptive as to relieve Commonwealth of burden of justifying statute prohibiting solicitation of business by public adjusters or public adjuster solicitors within 24 hours of disaster or fire. 63 P.S. § 1605(a); U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

[3] **Constitutional Law**
⌲ False, Untruthful, Deceptive, or Misleading Speech

If commercial speech is false or deceptive, regulation thereof is presumed constitutional. U.S.C.A. Const.Amend. 1.

3 Cases that cite this headnote

[4] **Constitutional Law**
⌲ Unfair Trade Practices

Constitutional Law
⌲ Business or Professional Services

Insurance
⌲ Adjusters

Speech activity of public adjusters and public adjuster solicitors in soliciting business within 24 hours of disaster or fire involved commercial speech, and statute prohibiting such solicitation impermissibly burdened free speech rights. 63 P.S. § 1605(a); Const. Art. 1, § 7.

7 Cases that cite this headnote

Attorneys and Law Firms

**1317 *211 Gregory J. Boles, Alan E. Kear, Philadelphia, for appellant.

Jerome T. Foerster, Deputy Atty. Gen., for appellee.

*212 Before NIX, C.J., and LARSEN, FLAHERTY, McDERMOTT, ZAPPALA and PAPADAKOS, JJ.

OPINION OF THE COURT

FLAHERTY, Justice.

On February 28, 1984 the Insurance Adjustment Bureau (the Bureau), a partnership engaged in the business of negotiating casualty loss claims on behalf of insured property owners, filed a complaint in equity addressed to the original jurisdiction of Commonwealth Court seeking, inter alia, a preliminary injunction enjoining the implementation of an amendment to the Public Adjuster and Public Adjuster Solicitor law, Act of December 20, 1983, P.L. 260, No. 72, 63 P.S. § 1601-1608. The amendment, in pertinent part, provides:

> No public adjuster or public adjuster solicitor shall solicit a client for employment within twenty-four hours of a fire or other catastrophe or other occurrence which is the basis of the solicitation. With respect to a fire, the 24-hour period shall begin at such time as the fire department in charge determines that the fire is extinguished.

63 P.S. § 1605(a). The Bureau's claim was that this portion of the amendment infringed upon its rights and its customers' rights to freedom of speech, due process, and equal protection under the Pennsylvania and the United States Constitutions.

**1318 Commonwealth Court conducted a hearing on April 26, 1984 and granted the Bureau's Motion for Preliminary Injunction. On December 20, 1984 Commonwealth Court overruled preliminary objections filed by the Commonwealth and directed the Commonwealth to answer the complaint and petition. The Bureau then filed a motion for summary judgment, and on August 13, 1987, after a hearing, a three judge panel of Commonwealth Court denied the Bureau's motion for summary judgment, dissolved the preliminary injunction, dismissed the complaint and granted summary judgment in favor of the Commonwealth, 530 A.2d 132. The Bureau's petition for reargument and application *213 for injunction pending appeal were denied and on September 10, 1987, the Bureau appealed to this Court from the judgment of Commonwealth Court. [1]

The Bureau now asserts that the statute's twenty-four hour ban on solicitation impermissibly restricts freedom of speech; that it violates the Bureau's right to equal protection of the law, that it is an unlawful exercise of the police power and an unlawful special law under the Pennsylvania Constitution designed to benefit a special interest; and that the statute is excessively vague in violation of the Bureau's due process right to receive notice of prohibited conduct.

I.

The statute defines "public adjuster" as a person or entity who adjusts loss claims on behalf of an insured, and "public adjustor solicitor" as a person who solicits contracts for public adjusting services. 63 P.S. § 1601. The Bureau claims that insured property owners, following a loss, often fail to take necessary steps to protect their property and receive a prompt and fair claim settlement. An insured may be emotionally distraught, he may be too busy or otherwise committed, or he may not have the ability or understanding necessary to process his own claim. In any event, public adjusters typically arrange emergency protection of damaged property, secure temporary lodging for displaced persons, advise insureds regarding their rights and duties under their insurance contracts, consult with insurance companies, and commence inventory and appraisal of the loss.

The twenty-four hour restriction is significant to public adjusters and public adjuster solicitors because, prior to the amendment, they routinely approached property owners *214 within hours of a disaster, explaining their services, and, if a contract was signed, beginning work. They assert that contacting the victims of a disaster within twenty-four hours of the disaster is often necessary in order to locate the property owner before he moves to an unlisted, temporary location because of the disaster.

The Commonwealth, on the other hand, claims that the statute prohibiting solicitation of business by public adjusters or public adjuster solicitors within twenty-four hours of a disaster or fire is permissible, in part, because it is only a time, place and manner regulation. Additionally, the Commonwealth argues that if public adjusters and public adjuster solicitors are allowed to solicit business within twenty-four hours of a disaster they may utilize fraudulent practices at a time when victims of disaster are especially vulnerable, and they might, in the course of pursuing their

commercial interests, destroy evidence or otherwise impede a criminal investigation.

The Bureau, however, argues that the public is adequately protected by licensing requirements and by various sanctions which may be imposed against members of the insurance adjustment industry. Public adjusters and public adjuster solicitors are licensed by the Commonwealth, subject to revocation or suspension of their license, and bonded. They may not conduct business without a signed, written contract, **1319 and the form of the contract must be approved by the Insurance Commissioner. The statute requires that any contract secured by a public adjuster or public adjuster solicitor may be rescinded within four days of signing, and there are civil and criminal penalties for violation of any provision of the act, including provisions of the act which prohibit, inter alia, misrepresentation, misappropriation of money, or fraudulent practices. 63 P.S. §§ 1603-1608.

II.

Because we agree with the Bureau that the portion of the statute about which they complain impermissibly burdens their right of free speech, we do not address the other *215 issues raised, but confine our discussion to the aspect of the case concerning the freedom of speech.

The First Amendment to the United States Constitution provides, in pertinent part:

> Congress shall make no law ... abridging the freedom of speech, or of the press....

The Pennsylvania Constitution provides:

> The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty....

Art. I, Sect. 7.

Because the United States Supreme Court has addressed problems relating to commercial speech in a series of opinions, our approach here will be to follow the minimum standards of analysis and substantive protection as required by that Court under the federal Constitution. Having completed our analysis based on federal minimum requirements, we will then consider whether the resolution of this particular case is more appropriately treated under the Pennsylvania Constitution or the United States Constitution.

In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976), the United States Supreme Court, for the first time, brought within the protection of the First Amendment a type of communication which it referred to as commercial speech.[2] In this case, a consumer group challenged *216 a state law prohibiting pharmacists from advertising the price of prescription drugs.[3] The Court observed that speech does not lose its First Amendment protection because it is an advertisement, or because it appears in a format which is sold for profit, or because it solicits a purchase. **1320 *Id.* at 761, 96 S.Ct. at 1825, 48 L.Ed.2d at 358. Speech which does no more than propose a commercial transaction, according to the Court, "is not so removed from any 'exposition of ideas' and from truth, science, morality and arts in general ..." that it lacks all protection from the First Amendment. *Id.* This is so because the free flow of commercial information "is indispensable to the proper allocation of resources in a free enterprise system." *Id.* at 765, 96 S.Ct. at 1827, 48 L.Ed.2d at 360.

The Court also stated, however, that even though commercial speech is protected, it may be subject to some regulation. Time, place and manner restrictions have often been approved, provided that they are imposed without reference to the content of the speech, that they serve significant government interests, and that they leave open "ample alternative channels for communication of the information." *Id.* at 771, 96 S.Ct. at 1830, 48 L.Ed.2d at 364. *217 Additionally, the Court pointed out that false, misleading or untruthful speech does not enjoy First Amendment protection, and that the case at bar did not involve the special considerations pertinent to a case in which the proposed transactions or the advertisements themselves are illegal, nor did it involve the the electronic broadcasting media, which, again, requires a special analysis. *Id.* In fact, the issue involved in *Virginia Pharmacy* was simply:

> whether a State may completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of

> that information's effect upon its disseminators and its recipients.

Id. at 772, 96 S.Ct. at 1831, 48 L.Ed.2d at 365. Because the prohibition was total, but without commenting on the applicability of its ruling to professions other than pharmacists, the Court held that the advertising ban was impermissible.

These fundamental ideas were reaffirmed seven years later in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 103 S.Ct. 2875, 77 L.Ed.2d 469 (1983), a case involving a challenge to a federal statute which prohibited the mailing of unsolicited advertisements of contraceptives. Concerning the difference in levels of protection offered commercial and noncommercial speech, the Court stated:

> [A]s a general matter, "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." With respect to noncommercial speech, this Court has sustained content-based restrictions only in the most extraordinary circumstances. By contrast, regulation of commercial speech based on content is less problematic. In light of the greater potential for deception or confusion in the context of certain advertising messages, content-based restrictions on commercial speech may be permissible. See *Friedman v. Rogers*, 440 U.S. 1, 59 S.Ct. 887, 99 L.Ed.2d 100 (1979) (upholding prohibition on use of trade names by optometrists).

463 U.S. at 65, 103 S.Ct. at 2879, 77 L.Ed.2d at 476 (footnotes ***218** and citations omitted). [4]

The *Bolger* Court also discussed the situation in which noncommercial information was joined together with advertising:

> We have made clear that advertising which "links a product to a current public debate" is not thereby entitled to the constitutional protection afforded noncommercial speech. A company has the full panoply of protections available to its direct comments on public issues, so there is no reason for providing similar constitutional protection when such statements are made in the context of commercial transactions. Advertisers should not be permitted to immunize false or misleading product information from government regulation simply by including references to public issues.

463 U.S. at 68, 103 S.Ct. at 2881, 77 L.Ed.2d at 478 (footnotes and citations omitted).

****1321** [1] [2] [3] Finally, the *Bolger* Court summarized the process of determining what protection is available for a particular instance of commercial speech:

> "The protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation." *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. [557] at 563, 100 S.Ct. 2343 [2350], 65 L.Ed.2d 341 [(1980)]. In *Central Hudson* we adopted a four-part analysis for assessing the validity of restrictions on commercial speech. First, we determine whether the expression is constitutionally protected. For commercial speech to receive such protection, "it at least must concern lawful activity and not be misleading." Id., at 566, 100 S.Ct. 2343 [2351], 65 L.Ed.2d 341. Second, we ask whether the governmental ***219** interest is substantial. If so, we must then determine whether the regulation directly advances the government interest asserted, and whether it is not more extensive than necessary to serve that interest. Ibid.

463 U.S. at 68-69, 103 S.Ct. at 2881, 77 L.Ed.2d at 478-79. [5]

Our first task, thus, is to determine whether the speech activity in this case is commercial or noncommercial; then we must apply the four-part test articulated in *Bolger*.

Perhaps there is no more difficult problem in the area of commercial speech than to define what distinguishes commercial from noncommercial speech. Justice Stevens points out in his concurring opinion in *Bolger* that "we must be ***220** wary of unnecessary insistence on rigid classifications, lest speech entitled to 'constitutional protection be inadvertently suppressed.' " 463 U.S. at 81, 103 S.Ct. at 2888, 77 L.Ed.2d at 487. Justice Stevens goes on:

> I agree, of course, that the commercial aspects of a message may provide a justification for regulation that is not present when the communication has no commercial character. The interest in protecting consumers from commercial harm justifies a requirement that advertising be truthful; no such interest

> applies to fairy tales or soap operas. But advertisements may be complex mixtures of commercial and noncommercial elements: the noncommercial message does not obviate the need for appropriate commercial regulation ...; conversely, the commercial element does not necessarily provide **1322 a valid basis for noncommercial censorship.

Id.

In this case, as in *Virginia Pharmacy* and *Bolger*, the speech has both an informational and a commercial character. The informational aspect is that potential customers are customarily told something of the provisions of a typical insurance policy, of ways in which the insurance company's interest may not coincide with the interests of the policyholder, and of some actions which need to be taken under the typical policy to protect the policyholder's interests. The commercial aspect is that the public adjuster or the public adjuster solicitor is attempting to sell his services. A similar situation arose in *Bolger*, where informational pamphlets accompanied advertisements for contraceptives. One of these pamphlets, entitled "Condoms and Human Sexuality," referred to the seller's brand of condoms by name; the other, "Plain Talk About Venereal Disease," referred to condoms only generically except for a reference on the last page which identified the seller as a distributor of a particular brand of prophylactics. The Court concluded that although no single feature of the informational pamphlets may have compelled the conclusion that they were commercial, the combination of the fact that they were *221 conceded to be advertisements, that they made reference to a specific product, and that they were economically motivated supported the conclusion that the informational pamphlets were commercial speech. 463 U.S. at 66-67, 103 S.Ct. at 2879-80, 77 L.Ed.2d at 477-78.

[4] In the present case, as in *Bolger*, the speech advertises the services of public adjusters as well as informs the potential customer; the speech makes reference to a particular service to be performed by the public adjuster; and it is economically motivated. Keeping in mind Mr. Justice Stevens' concern that commercial speech may not be so easy to distinguish from noncommercial speech in all cases, we conclude, as did the *Bolger* Court, that the speech at issue in this case is commercial. [6]

Next, under the four-part test mentioned earlier, our inquiry is whether the expression is constitutionally protected. As a threshhold matter, commercial speech deserving of constitutional protection must "concern lawful activity and not be misleading." The Commonwealth expresses the concern in this case that the speech at issue is misleading and that it may be used to perpetrate a fraud, particularly if it occurs immediately after a disaster, when the property owner may be vulnerable to overreaching. That some public adjusters and public adjuster solicitors may mislead potential customers does not, of course, establish that all persons in the public adjusting business commit fraud. In fact, in the absence of evidence that the overwhelming volume of public adjusting activity in Pennsylvania is based on misleading speech, we will treat public adjusting as a lawful business activity, just as we would any other business activity, which may be subject to abuse by a few individuals. *See* p. 1321, n. 5 supra. The solicitations involved in this case, therefore, are lawful activity which *222 have not been shown on this record to be pervasively misleading. [7]

**1323 Next, we must ask whether the governmental interest in regulation is substantial. It is self-evident that the protection of consumers from misleading and fraudulent business activity and the preservation of the scene of a disaster for criminal investigation are substantial governmental interests.

Having said this, however, we must determine whether the regulation directly advances the governmental interest and, lastly, whether it is not more extensive than necessary. Arguably, the ban on speech does advance the government's stated interest, for if there is no commercial speech activity, there cannot possibly be any fraud or misleading, but the real question is whether the regulation is more restrictive than it need be.

Because public adjusters and public adjuster solicitors are licensed and must satisfy the Insurance Commissioner that *223 they will "transact business ... in such manner as to safeguard the interest of the public," 63 P.S. § 1602(6), and because conduct which indicates untrustworthiness may result in the revocation of the license, 63 P.S. § 1606(a)(1-13), it is our view that the regulation of misleading and fraudulent behavior may be more directly accomplished through the enforcement of anti-fraud provisions of the act than through the prior restraint of speech. Moreover, the public is protected by the fact that public adjusters and public adjuster solicitors must be bonded, by the fact that their sales contracts must be

in a form approved by the Insurance Commissioner, and by the fact that any person entering into a contract with a public adjuster or public adjuster solicitor may rescind the contract within four days of signing. 63 P.S. § 1605.

Public adjusters and public adjuster solicitors may be fined or have their licenses suspended or revoked for a myriad of reasons, including "material misrepresentation of the terms and effect of any insurance contract; engaging in ... any fraudulent transaction with respect to a claim or loss ...; misrepresentation of the services offered or the fees or commission to be charged; conversion; violation of any rule promulgated under the act; and the commission of fraudulent practices. 63 P.S. § 1606(a)(1-13). Furthermore, a violation of any provision of the act shall be a misdemeanor and subject to a fine of $500 to $1,000 for each violation, 63 P.S. § 1607, and the provisions of the statute are supplementary to all other civil and criminal remedies. 63 P.S. § 1608(c). It is plain that persons who have been victimized by misleading speech of public adjusters or public adjuster solicitors have at their disposal a number of administrative, civil and criminal remedies. In light of this arsenal of remedies, it is our view that the imposition of prior restraints on the speech of public adjusters and public adjuster solicitors is unjustified.

The Commonwealth, of course, asserts that the restrictions involved in this case are only time, place and manner restrictions, since public adjusters and public adjuster solicitors *224 are not banned altogether from soliciting business. Although it is true that the restriction in this case affects only twenty-four hours, the period of time immediately following the disaster may be the only time during which the property owner can be located before moving to an unknown address because of the disaster which has affected his property. Balancing the governmental interest of protecting persons who have just suffered the trauma of losing their property from potentially misleading speech of *some* public adjusters against that of the public adjusters and public adjuster solicitors in informing a likely prospect of the nature and value of their services, we find that the private business **1324 interests are more significant in light of the other remedies available, should there be fraud or misleading speech. In short, the Commonwealth's goals in this case are more appropriately accomplished through regulation of practices than through prior restraint of speech.

As we stated earlier, our approach in this case has been to follow the federal analysis as set out by the United States Supreme Court in order to determine whether the statute meets the minimum federal standards as required by that Court. It is axiomatic, of course, that the states, once they have complied with federal constitutional requirements, are free to impose their own more stringent requirements pursuant to their own constitutions.

The federal analysis requires that a court determine, ultimately, whether the regulation is more extensive than necessary to accomplish a legitimate, important governmental purpose. Fundamentally, this determination requires a balancing of the interests of government against those of the entity or individual whose speech has been regulated, and this balancing will depend upon the perspective of the balancer. Reasonable minds can disagree as to how extensive any given regulation should be with respect to its purpose, and the perspective of the United States Supreme Court on this issue may not be the same as that of a court *225 within a state jurisdiction. The differences of opinion may be based in part on differing jurisprudential theories of the function and responsibilities of government, but they may be based also on a regional, versus a national perspective.

Our perspective is that in the commercial speech area, we should tread carefully where restraints are imposed on speech if there are less intrusive, practicable methods available to effect legitimate, important government interests. Here, the balance of interests should be resolved in favor of the challenger because less intrusive methods were available to effect the governmental objectives.

We hold, therefore, that the Pennsylvania Constitution, Article I, Section 7, will not allow the prior restraint or other restriction of commercial speech by any governmental agency where the legitimate, important interests of government may be accomplished practicably in another, less intrusive manner. Since the legitimate governmental goals in this case could be accomplished by enforcement of civil, criminal and administrative remedies already in place, Commonwealth Court was in error in upholding the validity of the statute's restriction on speech.

The order of Commonwealth Court is reversed.

III.

STOUT, J., did not participate in the consideration or decision of this case.

All Citations

518 Pa. 210, 542 A.2d 1317, 56 USLW 2689

Footnotes

1 In addition to its appeal, The Bureau has petitioned this Court to restore its injunction pending appeal. Although the briefs received in this case indicate that the parties have directed most of their attention to the question of whether the Bureau's injunction should be reinstated pending appeal, because we are now addressing the merits of the case, not the interim question of injunction, there is no need to decide whether the injunction should be reissued.

2 Although purely commercial speech was unprotected prior to 1976, there were indications as early as 1973 that this might change. In *Pittsburgh Press v. Human Relations Commission,* 413 U.S. 376, 93 S.Ct. 2553, 37 L.Ed.2d 669 (1973) the Court upheld an ordinance prohibiting newspapers from advertising employment opportunities which were categorized by sex on the grounds that the discriminatory hirings proposed by the advertisements were illegal. While the Court acknowledged that the advertisements were "commercial speech," which was regulatable under the law at that time, it declined to uphold the ordinance on that ground.

Then in 1975 the Court took another step towards granting some First Amendment protection to commercial speech in a case in which it struck down a Virginia statute which made illegal the circulation of a publication which encouraged abortion. In that case, a New York referral agency placed an ad in Virginia indicating that abortions were legal in New York and that its referral services were available. *Bigelow v. Virginia,* 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975). In *Bigelow,* however, the issue of commercial speech was still not squarely before the court because the advertisement in question contained not only commercial information, but also noncommercial information of clear public interest which was entitled to First Amendment protection in its own right.

It was not until 1976, therefore, that the issue of purely commercial speech came squarely before the Court in *Virginia Pharmacy Board v. Virginia Consumer Council,* 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976), where the issue was simply whether a pharmacist was entitled to advertise the prices of his prescription drugs.

3 The Court held that the consumer group had standing to challenge the statute because the protection afforded by the First Amendment "is to the communication, to its source and to its recipients, both.... If there is a right to advertise, there is a reciprocal right to receive the advertising, and it may be asserted by these appellees." *Id.* at 757, 96 S.Ct. at 1823, 48 L.Ed.2d at 355.

4 This is consistent with the Court's statement in *Virginia Pharmacy,* supra, that although commercial speech may perform the important function of facilitating the flow of information, some regulation is permissible. See text, supra. *See also Zauderer v. Office of Disciplinary Counsel,* 471 U.S. 626, 638, 105 S.Ct. 2265, 2275, 85 L.Ed.2d 652, 664 (1985).

5 We note our agreement with the Bureau that in cases involving the constitutional challenge to a restriction on commercial speech which is not false or deceptive, "The party seeking to uphold a restriction on commercial speech carries the burden of justifying it." *Bolger v. Youngs Drug Products Corp.,* 463 U.S. 60, n. 20, 103 S.Ct. 2875, n. 20, 77 L.Ed.2d 469, 480, n. 20. *See also Zauderer v. Office of Disciplinary Counsel,* 471 U.S. 626, 105 S.Ct. 2265, 85 L.Ed.2d 652, 666, 670 (1985).

The Commonwealth claims, in effect, that some speech at issue in this case has been and might in the future be false or deceptive. There is no evidence, however, that public adjuster speech within twenty-four hours of a disaster is so pervasively false that contacts within this time frame could generally be characterized as false or deceptive. Every business activity is occasionally abused by dishonest individuals, but that does not make business activity generally false or deceptive. For these reasons, it is our view that the record does not support the claim that the speech at issue was false or deceptive, and since the case involves commercial speech, the Commonwealth should have had the burden of justifying the restriction on speech. Commonwealth Court, therefore, was in error in applying the traditional standard of review for constitutional challenges to statutes: viz., that "enactments of the General Assembly enjoy a strong presumption of constitutionality with all doubts resolved in favor of sustaining the constitutionality of the legislation."

If Commonwealth Court's analysis were accepted, it would have the effect of emasculating the four-part test just cited from *Bolger.* Future Pennsylvania courts handling commercial speech cases, therefore, should be careful to require the party seeking to uphold the restriction to justify it, and not, in this area at least, to apply any presumptions in favor of constitutionality. If the case involves a claim that the commercial speech activity in question is false or deceptive, the court must receive evidence on that issue and, depending on its determination as to whether falsehood and deception

are involved, apply the appropriate standard of proof. If the court is satisfied that the speech in question is false or deceptive, then the usual presumption in favor of constitutionality of the regulation would apply.

6 For a discussion of problems associated with the classification of commercial and noncommercial speech, *See* Farber, "Commercial Speech and First Amendment Theory," 74 N.W.U.L.R. 372, 377 (1979).

7 The Commonwealth relies in part on *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978) to argue that the solicitations involved in this case should be regulatable. In *Ohralik* an attorney personally visited accident victims for the purpose of offering his professional services. As part of its rationale in upholding the Ohio restriction against such solicitations, the Court stated:

> Unlike a public advertisement, which simply provides information and leaves the recipient free to act upon it or not, in-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection. The aim and effect of in-person solicitation may be to provide a one-sided presentation and to encourage speedy and perhaps uninformed decisionmaking; there is no opportunity for intervention or counter-education by agencies of the Bar, supervisory authorities, or persons close to the solicited individual. The admonition that "the fitting remedy for evil counsels is good ones" is of little value when the circumstances provide no opportunity for any remedy at all.

Id. at 457, 98 S.Ct. at 1919, 56 L.Ed.2d at 454 (footnotes omitted).

While this statement of the evils of personal solicitation is compelling, it must be remembered that *Ohralik* involved the actions of an attorney. Because attorneys are often highly skilled and persuasive, because they owe a fiduciary duty to their clients, and because attorneys, as officers of the court, have traditionally been held to a standard of conduct that precludes the *appearance* of impropriety as well as actual impropriety, the restrictions of the *Ohralik* decision are not applicable here.

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Supreme Court of Florida

No. SC11-133

JEFFREY H. ATWATER,
Appellant,

vs.

FREDERICK W. KORTUM,
Appellee.

[July 5, 2012]

CANADY, J.

This case concerns a statutory regulation affecting public insurance adjusters, who are authorized to assist insureds and thirty-party claimants in the filing and settlement of insurance claims. We have on appeal Kortum v. Sink, 54 So. 3d 1012 (Fla. 1st DCA 2010), in which the First District Court of Appeal declared invalid section 626.854(6), Florida Statutes (2008), a provision regulating solicitation by public adjusters. We have jurisdiction. See art. V, § 3(b)(1), Fla. Const. We affirm the First District's decision that the statute unconstitutionally restricts the commercial speech of public adjusters because it is not narrowly

tailored to serve the State's interests in ensuring ethical conduct by public adjusters and protecting homeowners.

I. BACKGROUND

During a 2007 special session, the Florida Legislature created the Task Force on Citizens Property Insurance Claims Handling and Resolution (Task Force) to make recommendations regarding the 2004–2005 hurricane claims of Citizens Property Insurance Corporation. Among other recommendations, the Task Force proposed that the Legislature enact the following provision governing public adjusters:

> A public adjuster shall not directly or indirectly through any other person or entity engage in face-to-face or telephonic solicitation or enter into a contract with any insured or claimant under an insurance policy until at least 72 hours after the occurrence of an event that may be the subject of a claim under the insurance policy unless contact is initiated by the insured or claimant.

Kortum, 54 So. 3d at 1014.

During its 2008 regular session, the Legislature enacted a law similar to the Task Force's proposal. The Legislature added to the proposal a provision stating that a public adjuster may not "initiate contact" with a claimant and reduced the period of the restriction from seventy-two to forty-eight hours. Section 626.854(6), Florida Statutes (2008), thus provides:

> A public adjuster may not directly or indirectly through any other person or entity initiate contact or engage in face-to-face or telephonic solicitation or enter into a contract with any insured or

> claimant under an insurance policy until at least 48 hours after the occurrence of an event that may be the subject of a claim under the insurance policy unless contact is initiated by the insured or claimant.

The Legislature passed amendments to other portions of section 626.854 in 2009 and 2011, but there have been no revisions to section 626.854(6) since its enactment.

In October 2009, Frederick W. Kortum, Jr., a public adjuster, filed a complaint for declaratory and injunctive relief "alleging that section 626.854(6) violates his constitutional rights to free speech, equal protection of the laws, and to be rewarded for his industry." Kortum, 54 So. 3d at 1014. Kortum asserted that the statute prohibits all public adjuster-initiated communication during the forty-eight-hour period. In response, the Department of Financial Services (Department) contended that section 626.854(6) does not prohibit a public adjuster from using written methods of communication to contact a potential claimant. Kortum, 54 So. 3d at 1015.

The trial court determined that section 626.854(6) is ambiguous, accepted the Department's interpretation that the statute prohibited only in-person or telephonic communication, and ruled that the statute is constitutional. The trial court concluded that because section 626.854(6) primarily regulates conduct—not speech—the case was governed by United States v. O'Brien, 391 U.S. 367 (1968), in which the United States Supreme Court stated:

> [G]overnment regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Kortum, 54 So. 3d at 1015 (quoting O'Brien, 391 U.S. at 377). In O'Brien, the Court upheld a federal statute prohibiting the knowing destruction or mutilation of selective service certificates.

In the decision now on review, the First District reversed the trial court's decision. After determining that the plain language of section 626.854(6) "prohibits all public adjuster-initiated contact, whether electronic, written or oral," the First District concluded that section 626.854(6) regulates commercial speech—not merely conduct. Kortum, 54 So. 3d at 1018. As a result, the First District applied the test from Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557 (1980), rather than the more deferential O'Brien standard.

In Central Hudson, the Supreme Court set out a four-prong test to be used to evaluate the constitutionality of a statute regulating commercial speech:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must [1] concern lawful activity and not be misleading. Next, we ask [2] whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine [3] whether the regulation directly advances the

> governmental interest asserted, and [4] whether it is not more extensive than is necessary to serve that interest.

447 U.S. at 566. The First District concluded that section 626.854(6) satisfies the first three prongs of this test but held that the statute does not satisfy the fourth prong of Central Hudson. The First District concluded that the Department failed to demonstrate "that prohibiting property owners from receiving any information from public adjusters for a period of 48 hours is justified by the possibility that some public adjuster may unduly pressure traumatized victims or otherwise engage in unethical behavior." Kortum, 54 So. 3d at 1020. Because the First District concluded that section 626.854(6) unconstitutionally burdens the commercial speech of public adjusters, it did not address Kortum's assertions that the statute violates his right to equal protection of the law or his right "to be rewarded for his industry" guaranteed by article I, section two of the Florida Constitution. Id. at 1014.

Jeffery Atwater, in his capacity as Chief Financial Officer and head of the Department, appealed the First District's decision. The Department contends on appeal that section 626.854(6) does not restrict written communication and that because the statute regulates conduct and not the content of speech, the requirements of Central Hudson are not applicable. Based on this narrow reading of the statute, the Department thus argues that the statute is in "the rational

relationship test category for the regulation of conduct" and that the statute should be sustained under this test. Appellant's Initial Brief at 4.

II. ANALYSIS

In the analysis that follows, we first conclude that section 626.854(6) prohibits public adjusters from initiating any form of communication with a potential claimant during the hours immediately following a claim-producing event and that the statute regulates protected commercial speech. We then conclude that the First District was correct in applying the test outlined by the Supreme Court in Central Hudson to evaluate the constitutionality of section 626.854(6). The Department's argument is predicated entirely on its position regarding the proper interpretation of the statute—a position that we reject. No alternative basis is asserted by the Department for sustaining the constitutionality of the statute and reversing the First District's decision.

Section 626.854, Florida Statutes (2008), defines and regulates public adjusters in Florida. It states in part:

> The Legislature finds that it is necessary for the protection of the public to regulate public insurance adjusters and to prevent the unauthorized practice of law.
>
> (1) A "public adjuster" is any person, except a duly licensed attorney at law as hereinafter in s. 626.860 provided, who, for money, commission, or any other thing of value, prepares, completes, or files an insurance claim form for an insured or third-party claimant or who, for money, commission, or any other thing of value, acts or aids in any manner on behalf of an insured or third-party claimant in negotiating for or effecting the settlement of a claim or claims for loss

> or damage covered by an insurance contract or who advertises for employment as an adjuster of such claims, and also includes any person who, for money, commission, or any other thing of value, solicits, investigates, or adjusts such claims on behalf of any such public adjuster.
>
> . . . .
>
> (6) A public adjuster may not directly or indirectly through any other person or entity initiate contact or engage in face-to-face or telephonic solicitation or enter into a contract with any insured or claimant under an insurance policy until at least 48 hours after the occurrence of an event that may be the subject of a claim under the insurance policy unless contact is initiated by the insured or claimant.
>
> . . . .
>
> The provisions of subsections (5)-(12) apply only to residential property insurance policies and condominium association policies as defined in s. 718.111(11).

Kortum asserts that section 626.854(6) acts as a forty-eight-hour ban on all commercial speech from public adjusters to potential clients. The Department in turn asserts that section 626.854(6) does not actually regulate commercial speech. According to the Department, the statute only restricts how a public adjuster may contact the potential client during a forty-eight-hour period, not what a public adjuster may say to a potential client during that time. Specifically, the Department contends that the statute prohibits only in-person or telephonic solicitation and that because written communications are not initiated through "any other person or entity," the statute does not prohibit public adjusters from distributing written documents, such as informational mailings, to potential claimants during the forty-eight-hour period. Neither party contends that the

statute limits a public adjuster's ability to engage in general advertising not targeted at a specific homeowner known to have experienced a recent loss.

The First District concluded that the plain language of section 626.854(6) "prohibits all public adjuster-initiated contact, whether electronic, written or oral" and declared the statute unconstitutional. Kortum, 54 So. 3d at 1018. This Court "review[s] de novo a district court decision declaring a statute unconstitutional." Fla. Dep't of Children & Families v. F.L., 880 So. 2d 602, 607 (Fla. 2004).

"[W]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984) (quoting A.R. Douglass, Inc. v. McRainey, 102 Fla. 1141, 1144, 137 So. 157, 159 (1931)). "[W]ords or phrases in a statute must be construed in accordance with their common and ordinary meaning." Donato v. Am. Tel. & Tel. Co., 767 So. 2d 1146, 1154 (Fla. 2000). "It is only if the statutory language is ambiguous that 'the Court must resort to traditional rules of statutory construction to determine legislative intent.'" Blanton v. City of Pinellas Park, 887 So. 2d 1224, 1230 (Fla. 2004) (quoting Palm Beach Cnty. Canvassing Bd. v. Harris, 772 So. 2d 1273, 1282 (Fla. 2000)). Likewise, the "[a]dministrative construction of a statute, the legislative history of its enactment, and other extraneous matters are properly considered only

in the construction of a statute of doubtful meaning." Donato, 767 So. 2d at 1153 (quoting Fla. State Racing Comm'n v. McLaughlin, 102 So. 2d 574, 576-77 (Fla. 1958)). In the instant case, we agree with the First District that the plain language of section 626.854(6) "prohibits all public adjuster-initiated contact, whether electronic, written or oral" and that the Department's interpretation of the statute is untenable because it requires "the court to eliminate the 'initiate contact' prohibition inserted by the legislature." Kortum, 54 So. 3d at 1018.

Section 626.854(6) states that a public adjuster "may not directly or indirectly through any other person or entity initiate contact" with a potential claimant during the specified time frame. As noted above, the Legislature added the phrase "initiate contact" to the Task Force's proposal when adopting section 626.854(6). This Court is bound to "interpret statutes as they are written and give effect to each word in the statute." Fla. Dep't of Revenue v. Fla. Mun. Power Agency, 789 So. 2d 320, 324 (Fla. 2001). Consequently, the Legislature's insertion of the broad phase "initiate contact" causes us to conclude that section 626.854(6) bans all public adjuster-initiated communication with a potential claimant during the forty-eight-hour period.

Contact means to "get in communication with," to "make connection with," or "to talk or confer with." Webster's Third New International Dictionary 490 (1993) (second definition). The definition of "contact" is not restricted to any

particular type of communication, but rather encompasses both written and oral transmissions. The statute's prohibition against initiating contact thus means that a public adjuster may not make any sort of communication to an identified claimant during the forty-eight-hour period. It is unreasonable to read the restriction on "initiat[ing] contact" "directly or indirectly through any other person or entity" to permit—as the Department urges—a public adjuster to initiate the dissemination of written materials to a claimant during the forty-eight-hour period.

The Department's claim that the public adjuster-initiated contact and solicitation regulated by section 626.854(6) are conduct—not protected commercial speech—is unpersuasive. This argument is predicated on the strained reading of the statute advanced by the Department. With the rejection of that strained statutory reading, the argument collapses.

The Supreme Court has expressly held that solicitation in a business context is protected commercial speech. In Edenfield v. Fane, 507 U.S. 761, 764 (1993), the Supreme Court reviewed a Florida regulation providing that a certified public accountant (CPA) "shall not by any direct, in-person, uninvited solicitation solicit an engagement to perform public accounting services . . . where the engagement would be for a person or entity not already a client of [the CPA], unless such person or entity has invited such a communication." (alteration in original) (quoting Fla. Admin. Code R. 21A-24.002(2)(c) (1992)). The Supreme Court

stated that "it is clear that this type of personal solicitation is commercial expression to which the protections of the First Amendment apply." Id. at 765. The Supreme Court then reiterated that "even a communication that does no more than propose a commercial transaction is entitled to the coverage of the First Amendment." Id. at 767. The Department offers no reason why solicitation by a public adjuster would not be protected speech when solicitation by a CPA is "clear[ly] . . . commercial expression to which the protections of the First Amendment appl[ies]." Id. at 765.

O'Brien likewise supports the conclusion that section 626.854(6) regulates commercial speech. In O'Brien, 391 U.S. at 375-76, the Supreme Court distinguished nonexpressive conduct from protected speech in the context of reviewing a federal law prohibiting the knowing destruction of a selective service certificate. The Supreme Court rejected "the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." Id. at 376. Instead, the Supreme Court limited the protections that accompany pure speech to conduct that is "necessarily expressive" and concluded that the statute regarding selective service certificates only incidentally affected speech. Id. at 385. Unlike the destruction of a draft card, a public adjuster's act of contacting or soliciting a potential customer is necessarily expressive. The purpose and intent of the public adjuster's act of

contacting the claimant is to inform the potential client of the services offered by public adjusters and to obtain the customer's consent to a contract. There is no reason for a public adjuster—in his capacity as a public adjuster—to contact a claimant but to engage in communication about the commercial transaction of public adjusting.

Because section 626.854(6) regulates commercial speech—not merely conduct—the First District was correct in applying the test from Central Hudson to evaluate the constitutionality of the statute. The Department has failed to present any argument showing that the First District erred in concluding that the challenged restriction is more extensive than necessary to serve the State's interests.

III. CONCLUSION

As explained above, the plain language of section 626.854(6), Florida Statutes (2008), prohibits all public adjuster-initiated contact with potential claimants during the forty-eight-hour period following a claim-producing event. Because this statute regulates commercial speech, the First District did not err in applying the four-prong test from Central Hudson. Accordingly, we affirm the First District's decision and lift the stay that was imposed pursuant to Florida Rule of Appellate Procedure 9.310(b)(2).

It is so ordered.

POLSTON, C.J., and PARIENTE, LEWIS, QUINCE, LABARGA, and PERRY, JJ., concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

An Appeal from the District Court of Appeal – Statutory or Constitutional Invalidity

First District - Case No. 1D10-2459

(Leon County)

Michael H. Davidson, Florida Department of Financial Services, Tallahassee, Florida; Cynthia S. Tunnicliff of Pennington, Moore, Wilkinson, Bell & Dunbar, P.A., Tallahassee, Florida; Maria E. Abate and Elana H. Gloetzner of Colodny, Fass, Talenfeld, Karlinsky & Abate, P.A., Fort Lauderdale, Florida,

for Appellant

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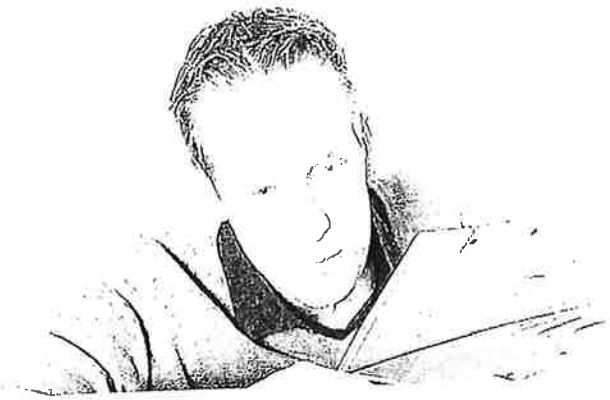
for Appellee

Florida Adjusters Win Free Speech Case Against 48-Hour Solicitation Rule

By Brent Kallestad (https://www.insurancejournal.com/author/brent-kallestad/) | July 9, 2012



A 2008 Florida law establishing a 48-hour moratorium on public adjusters has been ruled unconstitutional by the Florida Supreme Court on grounds that it restricts commercial speech.

The decision was a blow to the insurance industry and Chief Financial Officer Jeff Atwater, who appealed a lower court ruling that was unanimously upheld by the state's highest court. Public adjusters serve as advocates for policyholders while negotiating insurance claims. The overturned law had prevented them from getting involved in insurance cases for at least 48 hours (https://www.insurancejournal.com/news/southeast/2011/09/22/216819.htm) after the occurrence of an event.

The association representing Florida public adjusters applauded the ruling.

"The ban on solicitation is a violation of public adjusters' free speech rights — and more importantly, an unfair rule that put policyholders at a disadvantage," said Harvey Wolfman, president of the Florida Association of Public Insurance Adjusters. "Thanks to this ruling, we can help more policyholders in those critical first hours when they need it most."

Atwater's office, however, did not quibble with the ruling.

"The office respects the Supreme Court's authority and its ruling in this case," said Atwater spokeswoman Alexis Lambert, who added that Atwater's role in the case was one intended to support consumers.

The insurance industry, however, sided with Atwater's challenge largely because many commercial insurers provide their own adjusters to assist in claims.