

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

FREDERICK W. KORTUM, JR.,

CASE NO.: 2009 CA 3926

Plaintiff(s),

vs.

ALEX SINK, in her capacity as
Chief Financial Officer and head of
the Department of Financial Services
for the State of Florida,

Defendant(s).

FINAL JUDGMENT

THIS CASE was tried before the Court without a jury on April 19, 2010. The Plaintiff, Frederick W. Kortum, Jr. is a duly licenced and practicing public insurance adjuster. As such, Mr. Kortum is subject to the regulations contained in Chapter 626 of the Florida Statutes. The Defendant, Alex Sink is the Chief Financial Officer of the State of Florida and the agency head for the Division of Financial Services. The Division of Financial Services is tasked by the legislature with enforcing the laws and regulations governing public insurance adjusters.

At issue in this case is the constitutionality of Section 626.854(6), Florida Statutes which reads as follows:

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.

Not surprisingly the parties interpret the above quoted statute differently. The Plaintiff views the statute as a total ban for 48 hours following a loss by an insured of any type of communication by a public adjuster with an insured that has suffered a casualty loss. The Plaintiff seeks a declaratory judgment that the statute unconstitutionally suppresses his right to commercial free speech and his right to equal protection under the law. The Plaintiff contends that the statute impermissibly singles him out when company adjusters (those employed by the insurance company) and tradespeople are not subject to the same restraint.

The Defendant, on the other hand, reads the statute as no more than a ban for 48 hours of face to face or telephonic solicitation. Defendant couches her arguments as a curb on conduct and not a suppression of commercial speech. Defendant contends that printed or electronic correspondence such as e-mails or letters, flyers or door hangers are not prohibited by the statute during the 48 hour period. The Defendant contends that public adjusters are different from company adjusters and from trades people who may contract with the insured and hence the statute does not violate the Plaintiff's equal protection rights under the Florida and the United States Constitutions.

The Court's first task is to determine, based on the rules governing statutory construction and the evidence and arguments presented by the parties at trial, what a public adjuster may do during the 48 hour period following a loss by an insured. Case law clearly leads the Court through the steps that it must take. First, the plain meaning of statute is always the starting point of statutory interpretation. *GTC, Inc. v. Edgar*, 967 So.2d 781 (Fla. 2007); and *Holly v. Auld*, 450 So.2d 217 (Fla. 1984).

Florida case law contains a plethora of rules and extrinsic aids to guide courts in their efforts to discern legislative intent from ambiguously worded statutes. However,

[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.

The Court finds that the language of Florida Statute 626.854(6) is not clear and unambiguous. Either interpretation advanced by the parties is reasonable and logical. The statute could be read to ban only face to face or telephonic contact as Defendant contends or alternatively it could be read to ban all contact "directly or indirectly" which would include all oral and written or electronic contact. This is how Plaintiff reads the statute.

Having found that the language is susceptible to varying interpretations, the Court must determine from the evidence which is to prevail. Again, the Florida Supreme Court provides the guidance. Quoting from *GTC v. Edgar*:

Thus, if the meaning of the statute is clear then this Court's task goes no further than applying the plain language of the statute. However, when a statutory term is subject to varying interpretations and that statute has been interpreted by the executive agency charged with enforcing the statute, this Court follows a deferential principle of statutory construction:

An agency's interpretation of the statute that it is charged with enforcing is entitled to great deference. See *BellSouth Telecommunications, Inc. v. Johnson*, 708 So.2d 594, 596 (Fla.1998). This Court will not depart from the contemporaneous construction of a statute by a state agency charged with its enforcement unless the construction is "clearly unauthorized or erroneous."

Finding, as the Court does, that Defendant's interpretation is not "clearly unauthorized or erroneous" the Court must accept the Defendant's interpretations of what the statute allows and what it prohibits. The Court's finding is that for the first 48 hours after a casualty, a public adjuster may not solicit face to face or by telephone with an insured who has sustained a loss. No other form of contact is prohibited by the statute during the first 48 hours and no prohibition of contact exists after 48 hours.

Having made the above findings, the Court must now turn to Defendant's argument that the statute regulates conduct and not speech, for if it does, then a lower threshold of constitutionality is applied. If speech is suppressed by the statute, even if it is commercial speech, the statute is subject to more intense scrutiny.

The Court is convinced from the evidence that the statute exists to serve a legitimate governmental purpose. The primary legitimate government purpose of the statute is to provide a citizen that has been traumatized by a casualty loss with some breathing room before making the decisions that will be necessary to begin to put his or her life back together. The statute provides the respite that the legislature feels that the victim of a casualty needs. To the Court, that is a substantial and legitimate and important governmental purpose.

To accomplish its purpose, the statute is narrowly drawn, lasting only 48 hours, it does not attempt to curb any particular message; it does not prohibit anything other than face to face solicitations and telephonic solicitations. The Court finds that the statute prohibits the "conduct" of confronting the insured face to face and the "conduct" of telephoning the insured during the 48 hour period.

Even though the control of conduct, not speech, is the primary aim of the statute, the Court is not unmindful of the fact that curbing the public adjuster's ability to solicit face to face or by telephone necessarily limits the public adjuster's ability to speak. As the Plaintiff logically points out, the only reason for the face to face meeting or the telephonic contact would be to communicate with the insured in the hopes of obtaining a contract of employment.

The Court can state its findings no better than the United States Supreme Court does in the case of *United States v. O'Brien*, 391US 367, 88 S.Ct. 1673, (S. Ct. 1968):

This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong.

Whatever imprecision inheres in these terms, we think it clear that a government 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.

The United States Constitution Amendment 14 Section 1, as well as the Florida Constitution provide equal protection under the law for all citizens. The most obvious question raised in this litigation, is that if the state has a legitimate interest in shielding the insured for the first 48 hours following a casualty loss, why would the ban not also apply to the company adjuster? The answer lies in the nature of the contractual relationship of

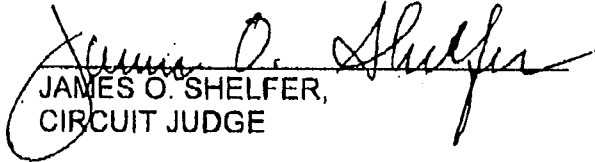
the two adjusters to the insured. The intent of the legislation is to prohibit conduct designed to solicit a contract to represent the insured in the adjustment and ultimate settlement of the insurance claim. The adjuster for the company is already in a contractual relationship with the insured and hence would not be contacting the insured seeking to enter into a contract of employment. There is a fundamental difference between the public adjuster and the company adjuster and hence there is no equal protection violation in their differing treatment.

The Plaintiff argues that the public adjuster is no different from the trades people who must be employed to do the actual work to repair the damage done by the casualty. Why, the Plaintiff asks, are the roofers and the cleaning people not subject to the no contact ban? These tradesmen are contract employees that are hired to perform a defined task. A public adjuster is a licensed professional that is a fiduciary to the insured. The public adjuster, while hired by contract, is in an agency relationship with the insured to resolve the entire claim. The evidence establishes that in most cases the public adjuster shares in the settlement proceeds and in most cases the settlement check is payable jointly to the adjuster and the insured. In most cases the settlement cannot take place without the consent of the public adjuster. The public adjuster occupies a unique position with the insured. Because of this unique relationship with the insured, the prohibitions placed on the public adjuster by the statute while the trades people are not so prohibited does not violate the public adjuster's rights under the United States and the Florida Constitutions to equal protection.

Now, therefore, after considering the evidence presented at trial; the stipulations entered into by the parties; the matters the parties submit to the Court for judicial notice;

the arguments of the parties and the memorandums of law submitted by the parties, the Court finds for the Defendant and against Plaintiff. Plaintiff's request for a Declaratory Decree finding Section 626.854(6) Florida Statutes, as interpreted unconstitutional and as applied is denied.

DONE and ORDERED in Chambers at Tallahassee, Florida this 7th day of May, 2010.


JAMES O. SHELFER,
CIRCUIT JUDGE

Copies furnished to:

Talbot D'Alemberte, Esquire
Patsy Palmer, Esquire
D'Alemberte & Palmer PLLC
Post Office Box 10029
Tallahassee, FL 32302

Michael H. Davidson, Esquire
Department of Financial Services
200 East Gaines Street, 612 Larson Bldg.
Tallahassee, FL 32399