

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

FREDERICK W. KORTUM, JR.,

Appellant,

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

v.

CASE NO. 1D10-2459

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

Appellee.

Opinion filed December 29, 2010.

An appeal from the Circuit Court for Leon County.
James O. Shelfer, Judge.

Wilbur E. Brewton, Kelly B. Plante, and Tana D. Storey, Brewton Plante, P.A.,
and Talbot D'Alemberte and Patsy Palmer, D'Alemberte & Palmer, PLLC,
Tallahassee., Tallahassee, for Appellant.

Michael H. Davidson, Tallahassee, for Appellee.

Cynthia S. Tunnicliff and Ashley P. Mayer of Pennington, Moore, Wilkinson, Bell
& Dunbar, P.A., Tallahassee for Amici Curiae Property Casualty Insurers
Association of America National Association of Mutual Insurance Companies.

Maria Elena Abate and Elana H. Gloetzner of Colodny, Fass, Talenfeld, Karlinsky
& Abate, P.A., Ft. Lauderdale for Amicus Curiae Florida Property and Casualty
Association.

VAN NORTWICK, J.

Frederick W. Kortum, Jr., a public adjuster, appeals a final judgment determining that section 626.854(6), Florida Statutes (2008), which bans solicitation by public adjusters for a period of 48 hours, is not unconstitutional. We reject the argument of the Department of Financial Services, appellee, accepted by the trial court, that the statute is ambiguous and, as a result, the agency's interpretation that the statute constitutionally regulates only the time, place, and manner of commercial solicitation should be accepted. We hold that the statute unambiguously bans all solicitation for 48 hours and that this restriction on commercial speech violates Article I, § 4 of the Florida Constitution under the standards of Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557 (1980). Accordingly, we reverse and remand for further proceedings.

Factual and Procedural History

A public adjuster, for compensation, assists insureds in negotiating for or effecting the settlement of a claim for loss or damages covered by an insurance policy. § 626.854(1), Fla. Stat. (2008). Florida has regulated public adjusters at least since 1955. See § 636.23(5), Fla. Stat. (1955); Larson v. Lesser, 106 So. 2d 188 (Fla. 1958). During its 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.¹ During its work, the Task Force became aware of the impact that public adjusters have on the insurance claims process following a hurricane. The Task Force identified abuses on the part of certain public adjusters and proposed legislation to revise the statutes governing public adjusters. Pertinent to this appeal, with respect to solicitation by public adjusters, the Task Force recommended that the legislature enact the following statutory provision:

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.

The language of the statute enacted by the legislature, see § 626.854(6), Florida Statutes (2008), differed from the recommendation and provides 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

¹ Citizens Property Insurance Corporation is a governmental entity created under section 627.351(6), Florida Statutes (2004), to provide insurance for residential and commercial property for property owners who are unable to procure insurance through the private insurance marketplace. Citizens Property Ins. Corp. v. Ashe, 35 Fla. L. Weekly D2534 (Fla. 1st DCA November 17, 2010).

insurance policy unless contact is initiated by the insured or claimant.

(emphasis added). The legislature changed the language recommended by the Task Force by adding the phrase “initiate contact or” and reducing the temporal length of the solicitation restriction from 72 to 48 hours.

Kortum, 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. Because we agree with Kortum that section 626.854(6) unconstitutionally burdens the commercial free speech rights of public adjusters, we do not address his further contention that the statute violates his right to equal protection of the law or his right “to be rewarded for industry” guaranteed by Article I, § 2 of the Florida Constitution.

At trial, Kortum introduced testimony that the first 48 hours after a claim inducing event are critical because an uninformed policyholder can make decisions that would substantially diminish recovery under the insurance policy by failing to preserve evidence, by failing to find damaged property, and by overspending on mitigation or restoration efforts. The Department’s expert witness disagreed. Further, the Department asserted that section 626.854(6) did not prohibit a public adjuster from contacting a potential claimant through email or in writing. Both Kortum and his expert witness contended that the statute prohibited contact or

communication of any kind with claimants during the 48-hour period. Neither party has introduced relevant legislative history to support their respective positions. The Department candidly conceded at oral argument, however, that, if the statute is read as a total ban on all solicitation during the first 48 hours, it cannot pass constitutional muster.

In its final judgment, the trial court found that the language of section 626.854(6) is ambiguous and, therefore, the agency's interpretation should be upheld unless that construction is clearly unauthorized or erroneous. GTC, Inc. v. Edgar, 967 So. 2d 781, 785 (Fla. 2007). The court accepted the Department's interpretation that the statute only prohibited face-to-face or telephonic communication within the first 48 hours. Next, relying upon United States v. O'Brien, 391 U.S. 367 (1968), the court found that the statute regulates conduct and only narrowly affects speech by prohibiting face-to-face solicitations and telephonic solicitations. O'Brien holds that when "speech" and "nonspeech" elements are combined in the government regulation of a course of conduct:

[T]hat . . . 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.

Id. at 376-77. The trial court found that a legitimate governmental purpose exists to provide a citizen who has been traumatized by a casualty loss with some “breathing room before making weighty decisions.” To accomplish such purpose, the trial court found that section 626.854(6) was narrowly drawn and did not prohibit anything other than face-to-face solicitation and telephonic solicitations. The court found that the primary purpose of the statute is to control conduct, but recognized that the statute does affect the public adjuster’s ability to speak. This appeal followed.

Commercial Speech

The trial court’s construction of a statute is subject to *de novo* review. Daniels v. Fla. Dep’t of Health, 898 So. 2d 61, 64 (Fla. 2005). Appellee has relied upon two cases to support its argument that section 626.854(6) is a conduct statute, O’Brien and State v. Conforti, 688 So. 2d 350 (Fla. 4th DCA 1970). Those cases are inapposite since they clearly regulated conduct. O’Brien involved an antiwar protester’s conviction for burning his draft card. Conforti involved lewd dancing in a nightclub.

We agree with Kortum that Central Hudson governs the case before us. “[C]ommercial speech . . . is, expression related solely to the economic interests of the speaker and its audience.” Central Hudson, 447 U.S. at 561. “Commercial expression not only serves the economic interest of the speaker, but also assists

consumers and furthers the societal interest in the fullest possible dissemination of information.” Id. Commercial speech has been afforded protection under the First Amendment since Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (Fla. 1976) (invalidating a state law prohibiting pharmacists from advertising the price of prescription drugs). However, commercial speech is not accorded the same protection as other constitutionally protected expression. Central Hudson, 447 U.S. at 563. As the court explained in Virginia Board of Pharmacy, commercial speech can be subject to time, place, and manner restrictions provided that they are imposed without reference to the content of the speech, they serve significant governmental interests, and “they leave open ample alternative channels for communication of the information.” 425 U.S. at 771.

In Central Hudson, the court set forth the four-part test to determine the constitutionality of a restriction on 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 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.

