IN THE SUPREME COURT OF FLORIDA

JEFFREY H. ATWATER, in his
Capacity as Chief Financial Officer
of the State of Florida, and head of
the Department of Financial Services,

Appellant,

v. Case No. 11-133

FREDERICK W. KORTUM, Jr.,

Appellee.
_____/

ON APPEAL FROM THE DISTRICT COURT OF APPEAL, FIRST DISTRICT OF FLORIDA

APPELLANT'S INITIAL BRIEF

_____
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PRELIMINARY STATEMENT

References to the trial transcript are designed by (Tr. Vol. page number) of the transcript.

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The District Court opinion appealed from is designated as (R. 1, page number.)

STATEMENT OF THE CASE AND FACTS

In the aftermath of the 2004-2005 hurricane seasons the Florida Legislature commissioned a task force to study and make recommendations to the legislature for statutory remedies to the many claims-handling problems experienced by those persons insured by the Citizens' Property Insurance Corporation created by Section 627.351(6), Fla. Stat. That task force met over a period of more than a year, studied the attendant problems, and in its Third and Final report dated June 11, 2008, made recommendations for a variety of remedial statutory amendments. Among the topics studied was the participation of public adjusters in the claims-adjusting process. Among the statutory amendments recommended by the task force was the enactment of Section 626.854(6), Fla. Stat., which regulates contact between public adjusters and insureds during a 48 hour period of repose following a claims-producing event. During the course of the task force's promulgation of that statute, it was brought to the task force's attention that a statute imposing a complete ban on all communications between public adjusters and insureds, even if for only a brief time, posed certain constitutional problems relative to commercial free speech. In reaction, it was announced during a task force hearing on November 16, 2007, that the phrase "through any other person or entity" was being inserted into the statute so as to allow written communications between a public adjuster and an insured or claimant during the period of repose immediately

following a claims-producing event. (See, November 16, 2007 task force hearing, on-line at http://www./taskforceoncitizensclaimshandling.org/Video.htm, "Videos", Part I, at 36 minutes and 40 seconds.) That phrase was enacted into law by the legislature along with the rest of the draft recommended by the task force, the legislature amending that draft only by changing the period of repose from 72 to 48 hours and adding the phrase “directly or indirectly” to precede the phrase “through any other person or entity”, so that the statute as enacted reads:

> 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.

In circuit court proceedings initiated by the instant Appellee, he took the position that the statute unconstitutionally banned all forms of communication between public adjusters and insureds or claimants for 48 hours after a claims-producing event, while the instant Appellant took the position that the statute did not ban written communications between public adjusters and insureds or claimants and was therefore constitutional. The circuit court agreed with the latter position, and entered judgment for the department. (R. Vol. 5, pgs. 864-870)

On appeal, the district court held that the use of the words words “directly or indirectly” constituted a total ban on all communications, and thus rendered the statute unconstitutional for being too broadly drawn. (R. 1) This appeal followed.

SUMMARY OF ARGUMENTS

The circuit court was right, and the district court was wrong. The district court's reading of the statute has the effect of reading the phrase "through any other person or entity" completely out of the statute, and gives those words no meaning, force or effect. Those words were inserted into the draft statute by the legislature's own task force for the express purpose of allowing written communications between pubic adjusters and insureds or claimants. (See, November 16, 2007 task force hearing, on-line at http://www.taskforceoncitizensclaimshandling.org/Video.htm, "Videos", Part I, at 36 minutes and 40 seconds, and Tr. Vol. 2, pgs. 240-248, the trial testimony of Terry Butler, task force attorney.) The district court also erred by, essentially, implying a legislative intent to ban all modes of communication during the period of repose where there is no contextual evidence of that intent or the necessity of implying the same so as to give force and effect to the statute as written.

The district court further erred by applying the *Central Hudson* test [*Central Hudson Gas & Electric Corp. v. Pub. Serv. Commn. of N.Y.*, 447 U.S. 557 (1980)] to the statute in the face of uncontroverted trial testimony from the Appellee, himself, and another witness called by the Appellee, that the statute had no effect on the content of their solicitation speeches. As there are only two regulatory components to the statute--speech and conduct--if speech is not being regulated, as

the trial testimony showed, the only component left to be regulated is conduct, which takes the statute out of the *Central Hudson* analysis for commercial speech and places it into the rational relationship test category for the regulation of conduct. The district court erred by ignoring that uncontroverted trial testimony, and holding that the statute unconstitutionally regulated commercial speech.

The district court also erred by failing to give deference to and rejecting the department's construction of the statute without any finding that said construction was beyond the range of possible or reasonable constructions or clearly erroneous or contrary to legislative intent. Established case law holds that only when the reviewing court finds an agency's construction of a statute beyond the range of possible or reasonable constructions, or is clearly erroneous and contrary to legislative intent can a reviewing court fail to give deference to the agency's construction of the statute it is charged with administering. Here, the district court made no such finding but nevertheless rejected the department's construction of Section 626.854(6), Fla. Stat.

THE DISTRICT COURT ERRED IN ITS READING OF THE STATUTE

The standard of review applicable to the construction of Section 626.854(6), Fla. Stat., is *de novo*.

The district court erred by failing to give meaning and effect to the phrase "through any other person or entity". By specifically addressing communications

made by any other person or entity the legislature evidenced its intent, consistent with the intent expressed by the task force it commissioned, to regulate *only* communications made through another person or entity. Written communications such as letters, door hangers, fliers, e-mails, mailed advertisements, etc., are made through their own format and content, and are not other persons or entities. Their delivery of commercial speech is devoid of conduct, and the content of their speech is not regulated by the statute. In contrast, persons and entities are living, sentient, animate beings, or their legal equivalent, who cannot communicate without some aspect of conduct being involved. Written communications do not possess those qualities. By reading the statute as a complete ban on all communication, the district court gave no meaning, force, or effect to the exception for communications not made through any other person or entity, and thereby disallowed the exception for written communications clearly intended by the task force the legislature commissioned to promulgate statutory language on that very subject.(See, November 16, 2007 task force hearing, on-line at http://www.taskforceoncitizensclaimshandling. org/Video.htm, "Videos", Part I, at 36 minutes and 40 seconds.)

If the legislature had intended to simply ban all communication initiated by public adjusters during the 48 hour period of repose, it would have rejected the task force's recommendation to insert the words "through any other person or entity"

into the statute, and deleted that phrase. That deletion, if made, would have been in accord with the district court's reading of the statute. However, that deletion was not made, and there is no evidence that the legislature intended to depart from the task force's recommendation in that regard. By failing to give meaning, force, and effect to those words, the district court violated the fundamental requirement that statutes must be read to give meaning, force, and effect to every word in a statute. *State v. Goode*, 830 So.2d 817 (Fla. 2002); *Jones v. ETS of New Orleans, Inc*., 793 So.2d 912 (Fla. 2001); *Gulfstream Park Racing Asss'n, Inc. v. Tampa Bay Downs*, Inc., 948 So.2d 599 (Fla. 2006).

The district court then compounded that error by reading the statute in a manner that rendered it unconstitutional when it was its duty to read the statute in a manner rendering it constitutional unless it was clearly erroneous to do so. *State v. Giorgetti*, 868 So.2d 512 (Fla. 2004). *It is only the district court's reading of the statute that results in a total ban on all forms of communication during the period of repose that renders the statute unconstitutional.*

Essentially, that reading consisted of the court's search for an *exemption* to what it presumed to be an unconstitutional ban on all speech during the period of repose (R.1, pg. 10) without any prior search for an actual and unconstitutional *ban* on all speech during the period of repose. In other words, the district court erroneously reviewed the statute by looking for an exemption to a total ban on all

speech during the period of repose before it had established that the statute actually imposed such a ban. Statutes that do not regulate something cannot be unconstitutional; only statutes that overreach the legislature's regulatory authority can be unconstitutional. If the statute does not work to ban written communications during the period of repose, it need not make an exemption for that mode of communication; statues do not need to exempt that which they do not forbid. Thus, the focus of the district court's initial search of the statute should have been for a legislative intent to prohibit *all* communication, including written communication initiated by a public adjuster, during the period of repose, because, under applicable case law, that intent would clearly render the statute unconstitutional and in need of a judicial declaration to that effect. Instead, and erroneously, the district court searched for an exemption to that intent, which intent it unilaterally ascribed to the legislature with no evidence to support the presence of such an intent. Again, it is only the district court's bare and unsupported misreading of the statute that supplies the unconstitutional intent to ban all communication during the period of repose.

The statute's only express prohibitions on any particular mode or modes of communication are limited to face-to-face and telephonic modes of communication; the statute contains no express prohibitions on written modes of communication. That prohibition was read into the statute by the district court,

apparently as an implied intent by the legislature to ban all modes of communication during the period of repose. However, implied intent is to be ascribed to the legislature only when necessary to give force and effect to the statute in question so as to prevent it from being rendered meaningless, and inferences drawn from legislative silence cannot be credited when they are contrary to all other textual and contextual evidence of legislative intent. *In re: Hewett's Estate,* 35 So.2d 904 (Fla. 1943); *White v. Mercury Marine, Div. of Brunswick,* 129 F.3d 1428. (11th Cir. 1997) Here, the statute is expressly silent as to any legislative intent to ban written communications during the period of repose, and there is no need to imply any legislative intent to give force and effect to the statute as written, for it expressly and unambiguously bans face-to-face and telephonic communications initiated by a public adjuster during the period of repose. It was and is enforceable as written, without the need to imply an additional ban on written communications. Nonetheless, the district court equated the legislature's express silence on the regulation of written communications during the period of repose as an implied ban on such communications when the only evidence of the legislature's intent on that question is the legislature's adoption of its task force's language intended to *allow* such communications during the period of repose. That was error.

The district court invoked unspecified grammatical rules to arrive at the conclusion that the phrase "directly or indirectly through any other person or entity" modified the three express prohibitions in the statute (initiate contact, engage in face-to-face, solicitations, and telephonic solicitations) so as to disregard the "any other person or entity" qualification of the statute, but did not explicate just what those rules were or how their invocation obtained the result announced by the court. Likewise, the district court did not explain how giving force and effect to the words "through any other person or entity" would eliminate the phrase "initiate contact". The crux of the question missed by the district court is not the *initiation* of contact *but the nature of the contact*; the statue expressly prohibits only communications emanating from another human being or entity, not from a written instrument. (Because the law considers individuals and corporations as equivalent entities, it is obvious that by the use of the word "entity" the legislature intended to close the loophole that would otherwise be left open to an individual to argue that he or she was soliciting in his or her corporate capacity during the period of repose, and not as an individual.) It is only through apparently inexplicable linguistic alchemy that the district court's statutory construction can be accepted, and the Department's construction rejected.

The only extrinsic evidence of legislative intent regarding the regulation of written communications during the period of repose is the legislatively adopted

intent of its commissioned task force to create, not eliminate, an exemption for written modes of communication; the legislature adopted the language crafted by its commissioned task force to allow such communications. The district court's review should have concluded that because written speech was neither expressly nor impliedly banned by the statute, and because the legislature's task force clearly intended to create an exemption for written modes of communication by inserting language for that purpose into the proposed statute, which language the legislature adopted and did not reject, written modes of communication remained open and unaffected by the statute, thus rendering the statute narrowly drawn and therefore constitutional.

However, the district court approached its review of the statute in a backwards manner. Finding no express intent to ban written modes of communication, it, essentially, decided to give the words "through any other person or entity" no meaning, force or effect. The district court thereby and then concluded that unless an exemption for written communications could be found, the statute banned all forms of communication. It then searched the statute for a legislatively intended exemption for written communications. However, because it had already decided to give the words "through any other person or entity" no meaning, force or effect, it concluded that its search for that exemption was in vain, and declared that because no such exemption could be found the statute must

be read as imposing a total ban on all communication, thus rendering it overly broad and unconstitutional. That reading is erroneous because: 1) the statute imposes no express ban on written communications during the period of repose, only face-to-face and telephonic communications are expressly regulated by the statute; 2) there is no need to imply the intent of a total ban to give the statute force and effect as written; 3) a statute that does not either expressly or impliedly address a particular subject should not be re-written by the courts to do so; and, 4) that reading ignores the exemption for written communications expressly intended by the legislature's own task force and adopted by the legislature.

Moreover, even accepting the district court's finding that the statute regulates not conduct but speech---speech certainly being a fundamental freedom secured by both state and federal constitutions---its reading of the statute runs afoul of the rule that statutes which impinge on fundamental freedoms are strictly construed, and that no law should be construed to deprive a person of his or her fundamental freedoms unless that result is clearly compelled by the language used by the legislature. *Dombrowsi v. Pfister*, 380 U.S. 479; 85 S. Ct. 1116; 14 L. Ed. 2d 22 (1965); *Lieberman v. Marshall*, 236 So.2d 120 (Fla. 1970); *Bartley v. Holden*, 338 A.2d 137 (Del. Super. Ct. 1975); *In re: Detention of A.S.*, 982 P. 2d 1156 (1999). There is no language in the instant statute that compels the outlawing of written communications between public adjusters and insureds or claimants

during the period of repose; only face-to-face and telephonic communications are expressly regulated by the statute, and it is not necessary to imply a legislative intent to ban written communications to give force and effect to the statute. By broadly reading the statute to ban all forms of communication, including written communication, during the period of repose the district court erroneously read it to deprive public adjusters of their fundamental freedom of speech, thereby justifying its declaration that the statute is unconstitutional, all without any express or even implied showing of legislative intent compelling the outlawing of such written communications. Had the district court fulfilled its obligation to read the statute strictly so as to limit its application to the only the forms of communication expressly addressed and banned therein, face-to-face and telephonic, and thus allow written communications between public adjusters and insureds or claimants during the period of repose, as clearly intended by the legislature's own task force, it could have found the statute constitutional, which was also its obligation. *State v. Giorgetti*, *supra*. By not fulfilling those intertwined obligations, the district court erred.

THE COURT ERRED BY APPLYING THE *CENTRAL HUDSON* TEST TO THE STATUTE. THE APPELLEE'S OWN WITNESSES TESTIFIED THAT THE STATUTE DID NOT AFFECT THE CONTENT OF THEIR SPEECH WHEN SOLICITING CONTRACTS WITH INSUREDS OR CLAIMANTS

Unlike so many cases involving a constitutional challenge to a statute that are resolved at trial level by a summary judgment procedure, this cause came to the

district court from a bench trial where testimony was taken, exhibits admitted, and facts established. One of the facts established through the testimony of Appellee's own witnesses is that *neither of them had changed their speech regarding their solicitation of contracts because of the statute.* (Tr. Vol. 1, 98-100, Vol. 2, 175-176.) Those facts are the controlling record facts of this case. They were not disputed by the Appellee or found erroneous by the district court. As there are only two components of the statutes--speech and conduct--and, as the Appellee's own witnesses testified that the statute did not affect their speech, all that is left to be regulated by the statute is conduct. The district court erred by ignoring that un-contradicted testimony, and compounded that error by finding that the statute regulates speech and not conduct, thereby erroneously subjecting the statute to analysis under the *Central Hudson* tests rather than the rational relationship test, which it passes, as implicitly acknowledged by the district court when it acknowledged that the statute passes *Central Hudson's* third prong.

THE DISTRICT COURT ERRED BY REJECTING THE DEPARTMENT'S CONSTRUCTION OF THE STATUTE WITHOUT FINDING IT OUTSIDE THE RANGE OF POSSIBLE OR REASONABLE CONSTRUCTIONS, OR FINDING IT CLEARLY ERRONEOUS AND CONTRARY TO LEGISLATIVE INTENT

The district court further erred by rejecting the department's construction of the statute without finding it outside the range of possible or reasonable constructions, or clearly erroneous and contrary to legislative intent. That is contrary to established case law standards requiring the courts to defer to an

agency's construction of a statute unless the reviewing court expressly finds that construction outside the range of possible or reasonable constructions, or clearly erroneous and contrary to legislative intent. *Fla. Dept. of Revenue v. Florida Mun. Power Agency*, 789 So. 2d 320 (Fla. 2001); *Donato v. American Tel. & Tel. Co*., 767 So.2d 1146 (Fla. 2000); *Perkins v. Department of Health and Rehabilitative Services, Dist. IV*, 452 So.2d 1007 (Fla. 1st DCA 1984). The courts will defer to an agency's construction of a statute if that construction is not clearly erroneous. *Florida Interchange Carriers Ass'n. v. Clark*, 678 So.2d 1267 (Fla. 1996).

Here, the statute makes no explicit statement regarding forms of communication other than face-to-face or telephonic. It certainly makes no express statement regarding the impropriety of written or electronic communications initiated by a public adjuster during the period of repose. There is certainly no express legislative intent to ban all forms of communication during the period of repose, and there is no need to imply such an intent to give force and effect to the statute as written. Based on statements made during the Citizens' Task Force hearing held on November 16, 2007 (which can be found on-line at http://www.taskforceoncitizensclaimshandling.org/Video.htm, "Videos", Part I, at 36 minutes and 40 seconds) that the phrase "through any other person or entity" was being purposefully inserted into the statute so as to allow written communications to be initiated by a public adjuster during the period of repose

(and thus avoid constitutional challenges), the department constructed the statute to allow that which it did not expressly forbid, and thus allowed public adjusters to initiate written communications within the 48 hour period of repose. Contrary to the district court's reading of the statute (R.1, pg. 12), the legislature's amendment placing the words "directly or indirectly" into the statute, preceding the words "through any other person or entity" clearly does not change the requirement that the direct or indirect contact be initiated *through any other person or entity* to be banned. Written communications facilitated by fliers, door hangers, mail box insertions, e-mails, billboards, etc, are certainly not *other persons or entities*; they are inanimate objects having no living existence. Given the history of the task force's contribution to the statute, that construction is not outside the range of possible or reasonable constructions, and it is certainly not unreasonable to assume that in enacting the statute with that wording the legislature was adopting its task force's intent to allow written communications during the period of repose. Again, had the legislature intended to ban all such communications, it would not have utilized the phrase "through any other person or entity" that was inserted into the statute by its own task force for the express purpose of allowing written communications. The district court erred by not granting the customary deference to the department's construction of the statute without finding it outside the range

of possible or reasonable constructions, or finding it clearly erroneous or contrary to express or implied legislative intent.

CONCLUSION

This court should reverse the district court, and find that Section 626.854(6), Fla. Stat., is a constitutional exercise of the police power of the state.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Initial Brief was forwarded by U.S. mail to Wilbur E. Brewton and Kelly B. Plante 225 South Adams Street, Suite 250 Tallahassee, Fl. 32301 and to Talbot D' Alemberte and Patsy Palmer P.O. Box 10029 Tallahassee, Fl. 32302 this _____ day of March 2011.

_____

Michael H. Davidson

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Initial Brief of Appellee was typed in 14 point Times New Roman.

_____

Michael H. Davidson