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
L.T. No. 1D10-2459

FREDERICK W. KORTUM, Jr.,

Appellee.
_____/

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

APPELLANT'S REPLY BRIEF

_____
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SUMMARY OF ARGUMENTS

The Appellee's own trial testimony conclusively established that the harm he attributes to the statute was in reality caused by his own construction of the statute, and his poor business decisions. That is insufficient to render the statute unconstitutional.

The Appellee's construction of the statute, indulged in by the district court, is erroneous because it fails to give force and effect to each word in the statute, and thereby renders the statute unconstitutional. The Appellant's construction of the statute gives force and effect to every word in the statute, and renders it constitutional. Courts are required to construe statutes in a manner that renders them constitutional unless such a construction is clearly erroneous or contrary to legislative intent. The Appellant's construction of the statute is neither clearly erroneous nor contrary to legislative intent.

Because of the high degree of similarity between the services rendered by both attorneys and public adjusters to claimants under a homeowner's insurance policy, and because the skills and knowledge need to perform those services are so similar, and the knowledge juxtaposition between the advocates and claimants is so similar, the holdings in The Florida Bar v. Went For It and Ohio Bar Ass'n. v. Ohralik, allowing restrictions on attorney's commercial speech should be extended to include public adjusters.

IT IS THE APPELLEE'S OWN BUISNESS PRACTICES, NOT THE STATUTE, THAT HAVE CAUSED THE HARM OF WHICH HE COMPLAINS. THEREFORE, THE STATUTE CANNOT BE HELD UNCONSTITUTIONAL

The Appellee constantly asserts that the first 48 hours are critical to a public adjuster's proper entry into the claims adjustment process, yet he has admitted that a completed insurance claims form, the first step in that process, is rarely even submitted within the first 48 hours, and that settlement of an insurance claim rarely occurs within 48 hours of submission. (Stipulated Facts 33 and 34.) Moreover, it is common knowledge that the statute of limitations on an insurance claim, during which it can be re-opened to address previous oversights, is 5 years. Section 95.11 (2) (b), Fla. Stat. Thus, under the statute in question, a public adjuster not initially contacted by an owner has *four years and 364 days* to become involved in the adjustment process!

At trial, the Appellant's expert witness, Mr. Montgomery, testified that the entry of a public adjuster into the claims adjustment process within the first 48 hours after a claims producing event was not at all critical to a proper resolution of the claims adjustment process, and that he routinely and successfully represented owners who contracted with him long after the expiration of a 48 hour period following the loss. (Tr. Vol 2, pgs 257-271). The Appellee presented no expert testimony counter to that opinion.

At trial, the Appellee attempted to build the case that the statute had the effect of hindering his contacts with potential claimants, and thereby decreased the number of contracts successfully obtained. However, on cross examination, the Appellee was forced to admit that the ratio of contacts to contracts remained essentially unchanged despite the statute (about one contract for every six contacts Tr. Vol. 2, pgs. 155-156), that he had declined to even attempt written solicitations since the statute took effect (Tr. Vol. 2, pgs. 150-151), and that the single largest factor determining successful contract entry was whether a repair contractor was already on the premises, whereupon the Appellee would inexplicably walk away and not even attempt to contact the homeowner. (Tr. Vol. 2, pgs 156-159). It is suggested that the Appellee's haste to discredit the statute is driven by a desire to shift onto the statute the blame for his inexplicably poor business decisions and their consequences.

The trial testimony in this cause, apparently overlooked by the district court, established without contradiction or even an attempt at refutation, the following facts, which facts are binding on every appellate reviewer of this cause:

1. It was the Appellee's sole and exclusive construction of the statute that led him to abandon written communication as a method of soliciting business, even during the pleading phase of this litigation where the department

took the position that the statute did not forbid that method of solicitation. (Tr. Vol.2, pgs. 150-151).

2. The purported decline in Appellee's business coincided with a more than double increase in the number of public adjusters doing business in the same locale as the Appellee. (Stipulated Fact Nos. 15, 16, 17)

3. The percentage of successful solicitations versus attempts thereat experienced after the effective date of the statute remained essentially unchanged from the time period before the effective date of the statute (about 16%). (Tr. Vol. 2, pgs 155-156)

4. The Appellee could not show any monetary damages he suffered as the result of the statute. (Tr. Vol. 2, pgs. 159-161).

5. The single greatest cause of a decline in Appellee's solicitations was the Appellee's inexplicable business decision not to even attempt a solicitation if a contractor was already present on the claim site. (Tr. Vol.2, pgs 156-159)

6. The Appellee did not change the speech content of his solicitations due to the statute. (Tr. Vol.2, pgs. 175-176)

Despite those established facts showing that the statute was not the cause of the damages the Appellee claimed it unconstitutionally caused him, the

district court concluded to the contrary. That was error, for a statute that causes no harm cannot be found to be unconstitutional; harm is the very essence of standing. See, 10 Fla. Jur. 2d. "Constitutional Law" Section 97, and cases cited therein.

THE DISTRICT COURT AND APPELLEE'S CONSTRUCTION OF THE STATUTE IS ERRONEOUS

In his haste to have the statute declared unconstitutional, the Appellee steadfastly refuses to give the words "through any other person or entity" any force or effect. If he did so, he would have to concede that those words delimit the statute's restrictions to only those communications offered by a public adjuster through the conduct of his or her physical presence before the claimant, or through telephonic means where the public adjuster has the claimant's ear. The statute places no restrictions on the words that a public adjuster may use in his or her solicitations; it merely says, in effect "you are not allowed to get in the face of the claimant or on his or her telephone during the period of repose, and through incessant supplication and entreaty win entry into a contract". The use of written communication where the public adjuster can in written form provide a claimant with any and all information the public adjuster feels a claimant may need to receive to protect his or her rights under an insurance policy is not in any way restricted or regulated by the statute. In that regard, the statute's limitations are considerably less restrictive of solicitation conduct that those seen in *The Florida*

Bar v. Went For It, Inc., *infra*, and *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978) where the attorneys were prohibited from *any form of written solicitation, as well as personal solicitation, respectively, for 30 days following a tragedy!* Yet, those restrictions were found constitutional.

As demonstrated in the Appellant's Initial Brief, its construction of the statute gives force and effect to every word, including "directly or indirectly contact", allows written or electronic communication to be initiated by the public adjuster during the period of repose, and renders the statute constitutional. The Appellee's construction gives no force or effect to the words "through any other person or entity", prohibits the initiation of written or electronic communications by a public adjuster during the period of repose, and renders the statute unconstitutional. That is not a favored construction of statutes, and should not be indulged in by this court.

THE STATUTE SHOULD BE FOUND CONSTITUTIONAL EVEN UNDER A COMMERCIAL FREE SPEECH ANALYSIS

The Appellee consistently refers to public adjusters as specially trained experts and advocates who act on behalf of property owners claiming to have suffered a loss covered by a contract of insurance, and whose fiduciary duty it is to act as an advocate on behalf of that owner so as to persuade the insurance company to grant a more favorable settlement to the owner. (Stipulated Facts 18, 24-28; 35-

37; Appellee's Initial Brief, pgs. 2-4; R. Vol. 4, 750-759). Moreover, the Appellant advertises his work to the public as a professional service performed by experts, and not mere tradespeople. (R. Vol. 4, 750-759; Stipulated Facts 18, 26, 27; Defendant's Exhibits 1, 4). Further, as pointed out in his Answer Brief at page 3, public adjusters receive education in fields relevant to their profession, must pass a written licensing examination, and must receive 24 hours of continuing education every 2 years.

Simultaneously, the Appellee categorizes policyholders as usually ignorant of the details of their insurance contracts, coverage issues, and claims filing requirements, who may not even possess a copy of their policy, and who are under significant stress and trauma immediately after a claims producing event. (Stipulated Facts 21, 22; Defendant's Exhibits 1, 4; Answer Brief, pgs. 2-3).

That stark juxtaposition of the relative knowledge, experience, training, and role of the two parties to a public adjuster's contract calls into serious question the applicability of the attorney-as-persuader limitation on solicitations announced by the court in *Fla. Bar v. Went For It, Inc*., 515 U.S. 618 (1995), and *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978), where a majority of the court allowed restrictions of lawyers' commercial speech (lawyers' solicitation of accident victims) on the basis the that lawyers [unlike accountants involved in *Edenfield v. Fane*, 507 U.S. 761 (1993)] are trained and engaged in the art of persuasion, and

could use that persuasion to dupe the unwary into professional services' contracts they might later regret.

How is that relationship materially different than in the instant situation where one party is woefully ignorant of everything important to a rational decision and is suffering stress and trauma, and the other is an experienced and trained professional whose very job it is to know every nook and cranny of an insurance policy and to use that knowledge to persuade an insurance company to part with its money? Cannot that same persuasion be used to induce entry into a professional services contract the ignorant policyholder will later regret? The depositions entered into evidence at the trial, below, answer that question strikingly in the affirmative. And, consider the specialized niche of the knowledge and training possessed by public adjusters; how many lawyers (or even judges) can read their homeowners' insurance contract and understand what it does or doesn't cover, or how much coverage, dollar-wise, is allocated to the different categories of policy coverage, and how those allocations affect a claim?

Moreover, the contractual relationships under examination are essentially identical; both injury lawyers and public adjusters utilize contingency contracts that entitle the advocate to a percentage of the client's recovery, both require advocacy on behalf of the client, both require a specialized knowledge and training unique to the advocate, both require the client to cooperate with the advocate, and

both economically join the client to the hip of the advocate. It is respectfully suggested that the knowledge gap between the two parties is so great, that the inherently persuasive nature of public adjusting is so pervasive, and that the similarity of the respective contractual relationships so compelling, as to justify applying the rationale of *Fla. Bar v. Went For It, Inc., supra*, and *Ohralik v. Ohio State Bar Ass'n,, supra* to the instant situation, and allowing the restriction in question, even under a free speech rather than a conduct analysis. This seems particularly rational and appropriate where, as here, the district court acknowledged that the statute passed all but the fourth prong (narrow tailoring), of the *Central Hudson* test, and the Department's construction of the statute would enable it to pass that fourth prong.

CONCLUSION

Section 626.854(6), Fla. Stat., is a narrowly drawn exercise of the legislature's police power to regulate trades and professions for the protection and well-being of the public, and this court should so declare and reverse the district court opinion under review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply 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 May 2011.

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Michael H. Davidson

CERTIFICATE OF COMPLIANCE

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

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Michael H. Davidson