

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

FREDERICK W. KORTUM, JR.,
Plaintiff,

CASE NO.:

vs.

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

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

The Plaintiff, Frederick W. Kortum, Jr., sues the Defendant, Alex Sink, in her official capacity as Chief Financial Officer and head of the Department of Financial Services for the State of Florida, and alleges:

NATURE OF ACTION

1. This action challenges the constitutionality of Florida Statutes limiting the ability of public insurance adjusters to engage in truthful commercial speech. Specifically, the challenge is to the following provision of Section 626.854, Florida Statutes (2008) (referred to hereafter as the “challenged statute”):

(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.

JURISDICTION AND VENUE

2. The case arises under Article I, Sections 1, 2, and 4, of the Constitution of Florida. The challenged statute also violates prohibitions against tortious interference with business.

3. The Court has jurisdiction under Article V, Section 5, Constitution of Florida, and Chapter 86, Florida Statutes.

4. Venue is proper in Leon County because the defendant maintains her headquarters in the county. §47.011, Florida Statutes.

PARTIES

5. The Plaintiff is a Florida citizen and taxpayer residing in the city of Oviedo in Seminole County. Since 2002, he has been a public insurance adjuster duly licensed under Florida law. Ch. 626, Fla. Stats. (2008). His primary place of business is in Orange County, Florida. Mr. Kortum has suffered damages and will suffer future damages if his truthful commercial speech rights are not restored.

6. The Defendant, Alex Sink, is the Chief Financial Officer of the State of Florida and head of the Department of Financial Services (“DFS”), whose duties include, among others, the administration of laws governing public insurance adjusters. §626.016, Fla. Stats.

PUBLIC INSURANCE ADJUSTING

7. Public insurance adjusters exclusively represent insurance policyholders, advocating for the best settlement possible from insurance companies. Typically, public insurance adjusters contact and contract with an insured owner or renter only after a disaster or mishap, not before. Then they assist with preparing, filing, and adjusting insurance claims. The work of a public insurance adjuster includes assisting in the inventory of lost items, estimating damages, appraising the policyholder's loss, and attempting to negotiate settlements for the insured. A public insurance adjuster also may advise clients on policy conditions regarding temporary repairs and protective measures. The range of responsibilities depends on the contract with the insured.

8. The fees charged by public insurance adjusters are capped by state law at certain percentages of the insurance claim payments received by their clients. Studies show that the work of public insurance adjusters can increase the average settlement by an amount greater than the fee charged by a public adjuster for that work.

9. Public insurance adjusters work under a comprehensive regulatory scheme, one that goes beyond that imposed on others who hold out their services to the public in similar circumstances. These regulations include the following:

- Public insurance adjusters must hold permanent licenses to practice within the state. Unlike some states, Florida does not issue emergency public adjuster licenses.
- A licensed public insurance adjuster must pass a written examination, post a \$50,000 surety bond, and complete 24 hours of biennial continuing education.
- Public insurance adjusters may not act as contractors with their clients or have financial interests in contracting or salvaging firms that do business with those clients.
- Public insurance adjusters are subject to a state code of ethics that bars negotiating with claimants or witnesses who are suffering from shock, serious mental or emotional distress, or trauma associated with their loss.
- Public-adjuster contracts must conform to state requirements, and must include anti-fraud provisions. They are subject to unfair and deceptive trade practices laws.
- Public insurance adjusters are prohibited from giving loans or financial advances to clients or prospective clients, and from giving anything worth more than \$25 as an advertisement or inducement to contract.
- Public insurance adjusters' fees are capped at 10 percent for hurricane-related or other public state-of-emergency claims, and at 20 percent for all other claims. The 10-percent cap applies during the first year after a storm.
- Insured individuals and claimants who contract with a public insurance adjuster may cancel their contracts within five business days after signing during a declared state of emergency, and within three business days for non-emergencies.
- Contracting with a public insurance adjuster does not remove a claimant's right to participate in the adjustment of his or her claim.

10. The State of Florida, in addition to regulating public insurance adjusters, also operates an insurance company, Citizens Property Insurance Corp. (“Citizens”), that provides approximately one-quarter of residential property insurance in Florida. Therefore, Citizens and public insurance adjusters often are in adversarial relationships.

11. The 2007 Citizens Policy Manual contains an “Immediate Contact Rule,” which states, “Citizens expects the [Citizens] adjuster to attempt contact within 24 hours of assignment [and] additional attempts within 48 hours.” Therefore, the explicit policy of the state-run property insurance company is to have early contact with policyholders, while state statutes bar the consumer advocate – the public insurance adjuster – from contact for 48 hours.

PLAINTIFF’S WORK AS A PUBLIC INSURANCE ADJUSTER

12. For the first six years the Plaintiff was licensed as a public insurance adjuster -- until the 48-hour ban took effect on October 1, 2008 -- his practice consisted primarily of work with clients he had solicited within the first 48 hours after the claim-producing events that had damaged or destroyed their property.

13. Since the time restriction on solicitation took effect, the Plaintiff has not attempted to solicit policyholders until after 48 hours have elapsed from the time their property was damaged or destroyed.

14. In attempting to solicit new clients after 48 hours, Mr. Kortum has found that many policyholders have moved away from their property, thus making it hard and sometimes impossible to contact them.

15. As a result, the Plaintiff has experienced a sharp drop in contracts since the 48-hour ban became law.

THE STATUTE'S BACKGROUND

16. Public insurance adjusting has been practiced in Florida for more than half a century. *Larson v. Lesser*, 106 So. 2d 188 (Fla. 1958). It is a lawful activity, regulated by the Department of Financial Services (“DFS”) under statutory authority found in Chapter 626, Florida Statutes (2008).

17. Statutes and regulations provide numerous consumer protections against deception by public insurance adjusters, and also provide strict penalties for deceptive practice. Yet no pattern of generally false or misleading speech has been found to exist in the profession of public insurance adjusting.

18. A legislatively created 2007 Task Force on Citizens Property Insurance Claims Handling & Resolution concluded that the public needs to be protected from unscrupulous public insurance adjusters. However, on information and belief, the Plaintiff alleges that no testimony or other evidence was presented to the task force or to legislators who considered the task force recommendations to

demonstrate that a 48-hour ban on early solicitation would directly advance the state's goal of protecting the public.

19. The Plaintiff further alleges on information and belief that DFS has not received any complaints from the public during the past five fiscal years establishing a pattern of problems with public insurance adjusters soliciting within the first 48 hours after claim-producing events.

20. There are no time restrictions on other licensed or unlicensed businesspeople or professionals -- such as insurance company adjusters, cleaning services, contractors, roofers, smoke-mitigation or water-damage experts, etc. -- who may freely approach and contract with policyholders in the immediate aftermath of claim-producing events.

21. The State of Florida operates Citizens, one of the businesses whose representatives are free to contact policyholders during the first 48 hours.

22. Many claim-recovery strategies and decisions are developed within the first 48 hours, and insurance settlement offers and agreements may be made within that time. This diminishes the possibilities for a public insurance adjuster to provide useful assistance.

23. Furthermore, without full and adequate access to consumer-based commercial speech information, such as that which public insurance adjusters

provide, policyholders may enter agreements that will result in only partial recovery of their actual damages.

24. The challenged statute, as enacted and as applied, directly impairs and restricts the Plaintiff's rights in the following ways:

a. It violates the inalienable right to be rewarded for industry, the right to acquire, possess and protect property, and other rights guaranteed by Article I, Sections 1 and 2, Constitution of Florida.

b. It violates the Plaintiff's right to Free Speech, guaranteed by Article I, Section 4, Constitution of Florida. It bans truthful commercial speech, but is not narrowly tailored to advance a substantial state interest.

c. It violates the Plaintiff's rights to Equal Protection guaranteed by Article I, Section 2, Constitution of Florida.

d. It constitutes a tortious interference by the State with the Plaintiff's business because representatives of the state-operated Citizens are free to contact policyholders during the 48 hours that state-regulated public insurance adjusters are barred from contact.

COUNT ONE: DECLARATORY JUDGMENT

25. The Plaintiff realleges the paragraphs above, and incorporates them herein by reference.

26. The Plaintiff, faced with a state statute restricting rights to speak about his business, is in doubt about his rights and, in order to pursue his livelihood, seeks a declaratory judgment under Sections 86.011 and 86.021, Florida Statutes.

COUNT TWO: FREEDOM OF SPEECH

27. The Plaintiff realleges the paragraphs above and incorporates them into this count by reference.

28. The rights of the Plaintiff to engage in truthful commercial speech about a lawful, licensed activity is impaired by the challenged statute in violation of Article I, Sections 1, 2, and 4, Constitution of Florida.

29. The challenged statute stigmatizes public insurance adjusters, placing them under restrictions not placed on others who have contact with insured citizens. Moreover, the challenged statute denies Florida citizens the services of public insurance adjusters at a time when they may be most needed.

30. The restriction on truthful commercial speech by public insurance adjusters works to disadvantage consumers, who benefit from the services of public adjusters. Conversely, the restriction provides more opportunities for insurance companies, including Citizens, to conclude settlements that may disadvantage insured individuals who do not have access to a knowledgeable consumer advocate in the early aftermath of damage to their property.

31. If the challenged statute is not enjoined, the Plaintiff will suffer immediate and irreparable injury to his business and members of the public will be denied access to truthful information in a timely manner.

COUNT THREE: EQUAL PROTECTION

32. The Plaintiff realleges the paragraphs above and incorporates them into this count by reference.

33. The challenged statute applies only to public insurance adjusters and similar statutory restrictions are not imposed on other individuals and businesses – including construction workers, contractors, and service providers -- that also may contact and contract with policyholders under similar circumstances. Nor are insurance companies and their adjusters restricted from contacting their existing customers during the 48 hours immediately after a claim-producing event.

34. The discrimination against public insurance adjusters is harmful to the Plaintiff and to the public and is contrary to the protections provided by Article I, Section 2, Constitution of Florida.

35. The discrimination violates the Plaintiff's fundamental rights, including a citizen's right to benefit from his industry and the other inalienable rights of Article I, Section 2, Constitution of Florida, and the right to free speech guaranteed by Article I, Section 4, Constitution of Florida. The state statute must be reviewed under a strict scrutiny standard.

COUNT FOUR: TORTIOUS INTERFERENCE WITH BUSINESS

36. The Plaintiff realleges the paragraphs above and incorporates them into this count by reference.

37. The State of Florida operates a large property insurance company (Citizens) that has issued policies to a significant number of Floridians.

38. Although Citizens policy recognizes that effective adjustment of insurance claims should be done promptly after a loss, the State restriction on truthful commercial speech by public insurance adjusters prevents the Plaintiff from effectively pursuing his profession.

39. On information and belief, the Plaintiff alleges that the challenged statute was adopted with an intention of diminishing the public insurance adjusters' role as advocates for policyholders and thereby the State intentionally and knowingly interfered with the prospective business relationships of the Plaintiff and other public insurance adjusters. This interference will be eliminated by a judgment that the statute is unconstitutional.

40. Enactment and enforcement of the statute by the State constitutes a tortious interference with the Plaintiff's business.

NOTICE PROVIDED TO ATTORNEY GENERAL

41. The Plaintiff has provided notice to the Attorney General of intention to bring this action, and a copy of this pleading has been served on the Attorney General.

PRAYER FOR RELIEF

42. The Plaintiff realleges the paragraphs above and incorporates them into this prayer by reference.

43. The Plaintiff has no adequate remedy at law.

44. Therefore, the Plaintiff requests the Court to grant the following relief:

a. Declaration that the challenged statute is unconstitutional under the Constitution of Florida as it is applied to the Plaintiff and to others similarly situated;

b. Issuance of a permanent injunction prohibiting the Defendant from enforcing the challenged statute;

c. Assessment of damages for the Plaintiff's loss of rights during the period the statute has prohibited his rights;

d. Granting Plaintiff all other relief to which he is entitled in law and equity.

Dated this of October 2009.

Respectfully submitted,

Talbot D'Alemberte
Florida Bar No. 0017529

Patsy Palmer
Florida Bar No. 0041811

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VERIFICATION BY PLAINTIFF

County of Leon
State of Florida

Plaintiff Frederick W. Kortum, Jr., being first duly sworn, states that all allegations in this pleading are true, based on his personal knowledge.

Date

Frederick W. Kortum, Jr.,
Plaintiff

Frederick W. Kortum, Jr., known to me, appeared before me this ____ day of _____ 2009 and, after being sworn, made the statement above and affixed his signature.

Notary Public

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been furnished by both U.S.

Mail and electronic transmission on this ____ day of _____ 2009 to:

Ben Diamond, Esq.
Office of the Chief Financial Officer
The Capitol
Tallahassee, Florida 32399

The Honorable Bill McCollum
Attorney General of Florida
The Capitol, PL-01
Tallahassee, Florida 32399-1050

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