

IN THE SUPREME COURT OF FLORIDA

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JAN 26 2011

CLERK, SUPREME COURT
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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.

S.Ct. CASE NO.: 11-133

FREDERICK W. KORTUM, JR.,

Appellee.

_____ /

APPELLEE’S MOTION TO VACATE AUTOMATIC STAY

The Appellee, Frederick W. Kortum, Jr., files this Motion to Vacate the Automatic Stay, in order that he may exercise his constitutional right to engage in truthful commercial speech during the pendency of this appeal:

1. **INTRODUCTION**

This Court has mandatory jurisdiction over appeals of decisions by district courts of appeal declaring statutes invalid. Art. V, § 3(b)(1), Fla. Const. Although departments of government, such as the Department of Financial Services (the “Department”), receive an automatic stay pending review upon filing a notice of appeal in such cases, the Court may vacate that stay. Fla. App. P. Rule 9.310(b)(2). A stay should continue only if it is “essential” for the public good, and in deciding whether a stay is essential, the Court should consider “the

likelihood of ultimate success on the merits, the likelihood of harm if no stay is granted and the remediable quality of any such harm.” *State ex rel. Price v. McCord*, 380 So. 2d 1037, 1038 n.3 (Fla. 1980).

2. **FIRST DISTRICT OPINION**

The Department seeks to overturn a ruling by the First District Court of Appeal (“First District”) that public adjusters, who assist policyholders in settling insurance claims, have been unconstitutionally barred by statute from any and all forms of business solicitation during the first 48 hours after a property loss. The First District made clear that the challenged statute is not essential in any fashion, and the Department’s Motion for Stay, while not necessary, does not put forth any grounds that a stay is essential for the public good. Mr. Kortum respectfully submits that a stay would actually perpetuate harm, rather than preventing harm. This appeal and a stay pending the appeal threatens the rights of licensed Florida public insurance adjusters to engage in truthful commercial speech. The unconstitutional statute contravenes commercial speech rights well established by this Court and the United States Supreme Court.

3. **THE APPEAL IS UNLIKELY TO SUCCEED ON THE MERITS**

The Department cannot prevail in defending this unconstitutional measure. The First District, applying the *Central Hudson*¹ test established by the U.S. Supreme Court and followed by this Court, found that the challenged statute deprives public insurance adjusters of their commercial speech rights by banning all solicitation of lawful public adjusting business for the first 48 hours after a claim-producing event. Appendix 1 - *Kortum v. Sink*, 2010 WL 5381934 at *1.

Commercial speech has received First Amendment protection for 35 years, since the U.S. Supreme Court established that “the free flow of commercial information is indispensable . . . to the proper allocation of resources in a free enterprise system.” *Va. St. Bd. of Pharm. v. Va. Citizens Consumer Council*, 425 U.S. 748, 765 (1976). The right to advertise (or solicit business) and the reciprocal right of consumers to receive such commercial information are both protected. *Id.* at 757. Florida extends the same speech rights “as required under the First Amendment.” *Café Erotica v. Fla. Dept. of Transp.*, 830 So. 2d 181, 183 (Fla. 1st DCA 2002).

At issue in the instant case is Section 626.854(6), Florida Statutes, which provides:

¹ *C. Hudson Gas & Elec. Corp. v. Pub. Serv. Commn. of N. Y.*, 447 U.S. 557 (1980).

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.

The plain and unambiguous wording of the challenged statute demonstrates that commercial speech is at issue.

However, the Department, both at trial and on appeal, steadfastly denied that the statute at issue regulates commercial speech. Instead, the Department argued that the statute regulates conduct, and thus that the *Central Hudson* test was inapplicable. Although the trial court was persuaded by the Department's alternative reliance on cases² that specifically regulated conduct not speech, the First District correctly dismissed such cases as "inapposite." Appendix 1 -*Kortum v. Sink*, 2010 WL 5381934 at *3. The Department's refusal to acknowledge that the fundamental issue in this case is one of commercial speech can only be explained by the fact that the case law – in Florida or elsewhere – does not favor commercial speech restrictions of the type contained in Section 626.854(6), Florida Statutes. In fact, Florida courts begin their scrutiny of speech restrictions with the

² *United States v. O'Brien*, 391 U.S. 367 (1968) (upheld prohibition on act of burning draft card); *Café Erotica v. Fla. Dept of Transp.*, 830 So. 2d 181 (Fla. 1st DCA 2002) (upheld prohibition on placement of signs because prohibition was content neutral).

