Commercial Speech in the Sunshine State: Florida's Forty-Eight-Hour Ban on Solicitation by Public Insurance Adjusters Is Unconstitutional and Bad Public Policy

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I. INTRODUCTION

By many accounts, the frequency and severity of natural disasters—including hurricanes, wind storms, floods, and fires—have been increasing in recent years.[1] What is more, these disasters are affecting a greater number of people.[2] Public insurance adjusting is a small but important part of the solution to these problems. In the typical case, a public adjuster offers to assist the owner of damaged property in the timely settlement of the owner's insurance claim. The need for this service is greatest in the immediate aftermath of a natural disaster, when the insured should be focusing his efforts on piecing his life back together—not on negotiating with his insurance company. Moreover, in the unfortunate case where an event has rendered the insured's home uninhabitable, the insured will naturally have to relocate. Thus, unless the public adjuster is permitted to contact the insured in the immediate aftermath of the insured event,[3] the public adjuster might lose the insured's business, and the insured might lose the public adjuster's services.

Despite these public-policy arguments to the contrary, the Florida Legislature passed a law that prohibits a public adjuster (or her agent) from engaging in any face-to-face or telephonic solicitation of an insured within forty-eight hours of the event that gave rise to the insured's claim, unless the contact had been initiated by the insured.[4] This Paper explains that the Florida law, Section 626.854(6) of the Florida Statutes, should be struck down as violative of the right to free commercial speech as protected by both the U.S. Constitution and the Florida Constitution

[1] *See, e.g.*, DANIEL A. FARBER & JIM CHEN, DISASTERS AND THE LAW: KATRINA AND BEYOND 110 (2006).

[2] *See id.*

[3] Although the event is not in fact insured until the claim is paid or settled, for convenience, this Paper often uses the term "insured event" to refer to the event that gives rise to the insured's claim.

[4] FLA. STAT. § 626.854(6) (2008).

or repealed as bad public policy. In particular, Part II sets forth the doctrine of commercial speech as articulated by the U.S. Supreme Court and the Florida Supreme Court. Part III applies the doctrine to the forty-eight-hour ban to show that, while Florida has three substantial interests in the regulation of solicitation by public adjusters, Section 626.854(6) nevertheless unconstitutionally restricts the right of public adjusters to freely transmit (and the right of insureds to freely receive) commercial speech. And Part IV demonstrates that public policy dictates the same conclusion as the law: Section 626.854(6) should be taken off the books.

II. THE DOCTRINE OF COMMERCIAL SPEECH

A constitutional analysis of the restriction imposed by Section 626.854(6) fits neatly within the broader commercial-speech jurisprudence of the U.S. Supreme Court and the Florida Supreme Court. Thus, Part II sets down the applicable constitutional texts, identifies the criteria that classify speech as commercial, and adumbrates the elements of the famous *Central Hudson* test that a court would use to determine the constitutionality of the forty-eight-hour ban on solicitation by public adjusters.

The First Amendment to the U.S. Constitution states that "Congress shall make no law . . . abridging the freedom of speech . . . ."[5] Similarly, Article I, Section 4 of the Florida Constitution provides that "[n]o law shall be passed to restrain or abridge the liberty of speech . . . ."[6] As a general matter, Florida courts define the scope of free speech—including commercial speech—under the Florida Constitution consistently with the freedom-of-speech jurisprudence of

[5] U.S. CONST. amend. I. The First Amendment to the U.S. Constitution is "of course" applicable against the states through the Due Process Clause of the Fourteenth Amendment. *See, e.g.*, Bigelow v. Virginia, 421 U.S. 809, 811 (1975).

[6] FLA. CONST. art. I, § 4.

the U.S. Supreme Court.[7] Thus, aspects of the federal commercial-speech doctrine that have not yet been litigated in the Florida courts would nevertheless be applicable in a Florida court proceeding.

The definition of commercial speech extends beyond the "core notion" of speech that merely proposes a commercial transaction.[8] Indeed, speech is not classified as commercial solely because it is an advertisement,[9] it refers to a specific product,[10] or the declarant has an economic motivation for the speech.[11] Instead, there is "strong support" for the classification of speech as commercial only when all of these criteria are met.[12]

As the Florida Supreme Court explained in *State v. Bradford*, the constitutionality of a restriction on commercial speech is determined based on the framework established by the U.S. Supreme Court in the famous *Central Hudson* case.[13] *Central Hudson* divides the constitutional inquiry into two levels of analysis. First, the court examines the nature of the commercial speech itself. If the commercial speech pertains to illegal activity or is false or deceptive, the speech is entitled to no constitutional protection and thus may be prohibited or otherwise regulated.[14] Second, the court examines the nature of the restriction. If the restriction is supported by a

[7] Café Erotica v. Fla. Dept. of Transp., 830 So. 2d 181, 183 (Fla. Dist. Ct. App. 2002).

[8] Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 66 (1983).

[9] *Id.* (citing New York Times v. Sullivan, 376 U.S. 254, 265–66 (1964)).

[10] *Youngs*, 463 U.S. at 66 (citing Associated Students v. Attorney General, 368 F.Supp. 11, 24 (C.D. Cal. 1973)).

[11] *Youngs*, 463 U.S. at 67 (citing Bigelow v. Virginia, 421 U.S. 809, 818 (1975)).

[12] *Youngs*, 463 U.S. at 67.

[13] 787 So. 2d 811, 820 (Fla. 2001) (finding unconstitutional a statute criminalizing insurance solicitation by chiropractors when benefits were available).

[14] *Id.* (citing Central Hudson Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 563–64 (1980)).

substantial government interest and is narrowly tailored to directly and materially advance that interest, the restriction is permissible even though the commercial speech is entitled to constitutional protection.[15]

III. THE DOCTRINE OF COMMERCIAL SPEECH APPLIED TO THE FORTY-EIGHT-HOUR BAN ON SOLICITATION BY PUBLIC ADJUSTERS

Part III.A explains that a public adjuster's solicitation of business from an insured within forty-eight hours of the insured event constitutes commercial speech. Part III.B shows that this restricted commercial speech is entitled to constitutional protection. Parts III.C and III.D demonstrate that, while Florida has three substantial interests in the regulation of solicitation by public adjusters, Section 626.854(6) is not narrowly tailored to directly and materially advance those interests.

A. *A Public Adjuster's Solicitation of Business Constitutes Commercial Speech*

In order to be classified as commercial, speech generally must be some kind of advertisement and refer to a specific product, and the speaker must have an economic motivation for the speech.[16] Solicitation by a public adjuster within forty-eight hours of the insured event meets all three of these criteria. First, the public adjuster is advertising her services. Such is the nature of any professional solicitation. Second, the public adjuster's services may rightly be considered a specific product. The public adjuster offers to "adjust" the insured's claim against his insurance company in exchange for a flat fee or a percentage of the claim. And third, the public adjuster clearly has an economic motivation to solicit business from the insured because the public adjuster is compensated for her work. Thus, solicitation by public adjusters—

[15] *Bradford*, 787 So. 2d at 820 (citing *Central Hudson*, 447 U.S. at 563–64).

[16] *See supra* notes 9–12 and accompanying text.

regardless of when it occurs—constitutes commercial speech as understood by the U.S. Supreme Court and the Florida Supreme Court.

B. *The Restricted Commercial Speech Is Entitled to Constitutional Protection*

Solicitation by public adjusters is entitled to constitutional protection if it neither pertains to illegal activity nor is false or deceptive.[17]

1. The Restricted Commercial Speech Does Not Pertain to Illegal Activity

First, the commercial speech restricted by Section 626.854(6) does not pertain to illegal activity. As a general matter, public insurance adjusting is a legal activity under Florida law. Indeed, with nearly 3,000 licensed public adjusters, the proportion of public adjusters to state citizens is more than twice as high in Florida (about 16:100,000) as in any other state.[18] More specifically, the Florida Supreme Court stated over fifty years ago in the course of overturning a ban on all solicitation by public adjusters that there is no "reasonable basis whatsoever in the public health, welfare, or safety that justifies . . . [a] prohibiti[on] [on a public adjuster's] . . . actually engaging in the business which the Legislature itself recognizes as being perfectly legitimate."[19] Hence, neither the practice of public insurance adjusting in general nor public adjusters' solicitation of business in particular constitutes illegal activity.

[17] *See supra* note 14 and accompanying text.

[18] OFFICE OF PROGRAM POLICY ANALYSIS & GOVERNMENT ACCOUNTABILITY, PUBLIC ADJUSTER REPRESENTATION IN CITIZENS PROPERTY INSURANCE CORPORATION CLAIMS EXTENDS THE TIME TO REACH A SETTLEMENT AND ALSO INCREASES PAYMENTS TO CITIZENS' POLICYHOLDERS, No. 10-06, at 3–4 (2010) [hereinafter PUBLIC-ADJUSTER POLICY ANALYSIS], *available at* http://www.oppaga.state.fl.us/MonitorDocs/Reports/pdf/1006rpt.pdf.

[19] Larson v. Lesser, 106 So. 2d 188, 192 (Fla. 1958).

2. The Restricted Commercial Speech Is Not False or Misleading

Second, the commercial speech restricted by Section 626.854(6) is not false or misleading. Section 626.854(6) prohibits a public adjuster from soliciting business from an insured during a certain time period after the event giving rise to the insured's claim; it has nothing to say about the veracity, clarity, or good faith of the public adjuster's communication to the insured. Indeed, it would be nonsensical to inquire into the content of commercial speech that has not been communicated and will vary on a case-by-case basis.

As the Pennsylvania Supreme Court stated in the course of overturning a ban on solicitation by public adjusters during the first twenty-four hours after a disaster or fire, "Every business activity is occasionally abused by dishonest individuals, but that does not make business activity generally false or deceptive."[20] The Florida House of Representatives Staff Analysis for the Bill that enacted Section 626.854(6) provides no specific explanation for the forty-eight-hour ban on solicitation.[21] It therefore appears that, in Florida as in Pennsylvania, "[t]here is no evidence . . . that public adjuster speech within [one or two days] of [the insured event] is so pervasively false that contacts within this time frame could generally be characterized as false or deceptive."[22]

Because the commercial speech restricted by Section 626.854(6) neither pertains to illegal activity nor is false or misleading, Florida must bear the burden of justifying the restriction as constitutionally permissible.[23]

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[20] Ins. Adjustment Bureau v. Ins. Comm'r. for the Cmmw. of Pennsylvania, 542 A.2d 1317, 1321 (Pa. 1988).

[21] *See* Fla. H. Staff Analysis for CS/CS/HB 661, Reg. Sess. (2008) [hereinafter House Staff Analysis].

[22] *Ins. Adjustment Bureau*, 542 A.2d at 1321.

[23] *See* Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 71 n.20 (1983).

C. *The Restriction Is Supported by Three Substantial Government Interests*

The Florida legislature ostensibly enacted Section 626.854(6) to "adequately protect consumers from unscrupulous public adjusters."[24] Thus, Part III.C addresses whether the risk of unscrupulous conduct by public adjusters during the first forty-eight hours after the occurrence of the insured event is sufficient to warrant a substantial government interest in the diminution or elimination of that risk. In particular, Part III.C follows the analysis of *Bradford*, where the Florida Supreme Court found unconstitutional a statute criminalizing certain insurance solicitation by chiropractors when benefits were available and yet also found the statute to be supported by three substantial state interests: the prevention of fraud and misrepresentation, the promotion of ethical conduct by professionals who practice in the State, and the protection of citizens' privacy.[25] These three interests are quite commonly asserted by states to support their regulation of professionals' commercial speech.[26]

The U.S. Supreme Court has made clear that the *Central Hudson* test does not permit the reviewing court to supply a government interest not explicitly proffered by the state.[27] Therefore,

[24] House Staff Analysis, *supra* note 21, at 1.

[25] 787 So. 2d 811, 821 (Fla. 2001).

[26] *See, e.g.*, Edenfield v. Fane, 507 U.S. 761, 768–70 (1993) (finding unconstitutional Florida's ban on in-person solicitation by CPAs); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 460–62 (1978) (finding constitutional the application of disciplinary rules against a lawyer who solicited clients in person and for pecuniary gain); Virginia State Pharm. Bd. v. Virginia Citizens Consumer Council, 425 U.S. 748, 766, 771–72 (1976) (finding unconstitutional a statutory ban on the advertisement of prescription-drug prices) (state's interest in protecting the privacy of pharmacy customers not asserted).

[27] *Edenfield*, 507 U.S. at 768 (citing State Univ. of New York v. Fox, 492 U.S. 469, 480 (1989)). Indeed, the *Central Hudson* test "is essentially a form of [the] intermediate scrutiny," ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1087 (3d ed. 2006), which requires for constitutionality that the restriction on commercial speech be supported by a substantial government interest and narrowly tailored to directly and materially advance that interest, *see supra* note 15 and accompanying text.

Part III.C analyzes the three interests asserted by the State in *Bradford* as those which Florida will most likely argue are served by the restriction imposed by Section 626.854(6).[28]

First, "there is no question that Florida's interest in ensuring the accuracy of commercial information in the marketplace is substantial."[29] Indeed, false or misleading commercial speech may be completely prohibited "without further justification."[30] This does not mean, however, that *potentially* false or misleading speech may be so prohibited.[31] Rather, the U.S. Supreme Court has explained that a ban on "truthful and nonmisleading expression . . . must satisfy the remainder of the *Central Hudson* test . . . ."[32]

Second, Florida has a substantial interest in the promotion of ethical conduct by professionals who practice within its jurisdiction. The U.S. Supreme Court has consistently recognized the state's "strong interest" in upholding "a high degree of professionalism on the part of licensed [professionals]."[33]

Third, Florida has a substantial interest in the protection of insureds' privacy. The U.S. Supreme Court has identified as "compelling" the state interest in averting such forms of "vexatious conduct" as undue influence, overreaching, and intimidation;[34] and the Court has

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[28] *See supra* note 25 and accompanying text.

[29] *Edenfield*, 507 U.S. at 769.

[30] *Id.*

[31] In re R.M.J., 455 U.S. 191, 203 (1982) (striking down as unconstitutional a state rule regulating lawyer advertising).

[32] *Edenfield*, 507 U.S. at 768–69.

[33] *Id.* at 770 (quoting Virginia State Pharm. Bd. v. Virginia Citizens Consumer Council, 425 U.S. 748, 766 (1976)). *See also* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 461 n.17 (1978).

[34] *Ohralik*, 436 U.S. at 462.

characterized this interest in preventing harassment as one of privacy.[35] Importantly, privacy in this context does not refer to the nature of the relationship between the professional and her client, so the argument that privacy is a substantial state interest in the regulation of solicitation by lawyers but not solicitation by public adjusters would be here misplaced.

Thus, the State of Florida has three substantial interests in regulating solicitation by public adjusters: the prevention of fraud and misrepresentation, the promotion of ethical conduct by public adjusters who practice in the State, and the protection of insureds' privacy.

D. *The Restriction Is Not Narrowly Tailored to Directly and Materially Advance the Government's Interests*

A restriction on commercial speech is not constitutionally permissible merely because it is supported by substantial government interests; rather, the *Central Hudson* test also requires that the restriction be narrowly tailored to directly and materially advance those interests.[36] The *Bradford* case explicitly noted the U.S. Supreme Court's insistence that the "harms" to the state be "real" and the restriction "in fact alleviate them to a material degree."[37] Hence, Part III.D analyzes the degree to which the forty-eight-hour ban on solicitation is tailored to meaningfully

[35] *Edenfield*, 507 U.S. at 769.

[36] *See supra* note 15 and accompanying text.

[37] 787 So. 2d 811, 821 (2001) (quoting Florida Bar v. Went for It, Inc., 515 U.S. 618, 626 (1995)). A motion for summary judgment on the question of the forty-eight-hour ban's constitutionality includes this direct-and-material-advancement requirement as part of its substantial-interest analysis and thus concludes that Florida has no substantial interest in the regulation. Plaintiff's Motion for Summary Judgment and Memorandum of Facts and Law in Support of the Motion at 16–17, Kortum v. Sink, No. 2009CA003926 (Fla. Cir. Ct. Dec. 15, 2009), *available at* http://www.fapia.net/index.php?option=com_docman&task=doc_view&gid=66&tmpl=component&format=raw&Itemid=34. In contrast, this Paper reads *Central Hudson* as requiring a distinct analysis of the substantial-interest and direct-and-material-advancement requirements. *See supra* note 15 and accompanying text.

prevent fraud and misrepresentation, promote ethical conduct by public adjusters who practice in Florida, and protect insureds' privacy.[38]

1. The Prevention of Fraud and Misrepresentation

Section 626.854(6) is not narrowly tailored to directly and materially advance Florida's substantial interest in the prevention of fraud and misrepresentation.

First, it is unclear whether the forty-eight-hour ban on solicitation by public adjusters directly and materially prevents fraud and misrepresentation. On one hand, Florida would likely argue that the ban quite directly and materially prevents fraud and misrepresentation because it prohibits the solicitation altogether.[39] A solicitation can hardly be unscrupulous if it is not communicated. On the other hand, a challenger of the restriction would probably counter that the forty-eight-hour ban does little if anything to deter an unscrupulous public adjuster or render an inexpert insured less vulnerable to fraud and misrepresentation. It follows from these arguments that Section 626.854(6) directly and materially prevents fraud and misrepresentation only during the first forty-eight hours after the insured event; after that time, the restriction is obviously toothless. This distinction is relatively unimportant, however, for "the real question is whether the regulation is more restrictive than it need be."[40]

Second, the forty-eight-hour ban on solicitation by public adjusters is unnecessarily restrictive in light of two provisions in the Florida Statutes that prevent fraud and misrepresentation more directly and materially. First, "[i]t is an unfair and deceptive insurance trade practice . . . for a public adjuster or any other person to circulate or disseminate any

[38] These state interests are closely related, and thus courts sometimes analyze one or more of them together. *See, e.g.*, Ins. Adjustment Bureau v. Ins. Comm'r. for the Cmmw. of Pennsylvania, 542 A.2d 1317, 1323–24 (Pa. 1988).

[39] *See Ins. Adjustment Bureau*, 542 A.2d at 1323 (acknowledging a similar argument).

[40] *Id.*

[communication] with respect to the business of insurance which is untrue, deceptive, or misleading."[41] Second, Florida's Department of Financial Services may deny (in the case of an imposter), suspend, or revoke the license of a public adjuster who engages in such unfair and deceptive insurance trade practices and administer a fine against her not to exceed $5,000 per act.[42]

As a substantive matter, the former provision directly proscribes fraud and misrepresentation. As a practical matter, the latter provision materially enforces that proscription. By comparison, Section 626.854(6) simply is not narrowly tailored to directly and materially advance Florida's interest, for "the regulation of misleading and fraudulent behavior may be more directly accomplished through the enforcement of anti-fraud provisions . . . than through the prior restraint of speech."[43]

2. The Promotion of Ethical Conduct by Public Adjusters Who Practice in the State of Florida

Similarly, the forty-eight-hour ban is not narrowly tailored to directly and materially advance Florida's substantial interest in the promotion of ethical conduct by public adjusters who practice in the State.

First, the restriction imposed by Section 626.854(6) does not advance the State's interest directly and materially. The implicit logic of the forty-eight-hour ban is that the insured is especially vulnerable to unscrupulous conduct by public adjusters in the immediate aftermath of the disaster or fire that caused damage to his property. But the vulnerability of the insured bears only indirectly on the scrupulousness of his public adjuster, for an ethical public adjuster will

[41] FLA. STAT. § 626.854(8) (2008).

[42] *Id.* § 626.8698(1).

[43] *Ins. Adjustment Bureau*, 542 A.2d at 1323.

conduct herself scrupulously (and an unethical public adjuster will conduct herself unscrupulously) regardless of the insured's vulnerability. Indeed, to the extent that the insured's short-term vulnerability makes him a more likely victim of undue influence, it also makes him a more likely beneficiary of professional assistance. In any event, since Florida's interest in promoting the ethical conduct of public adjusters does not cease after the expiration of the two-day ban, the restriction imposed by Section 626.854(6) advances that interest only immaterially.

Second, the forty-eight-hour ban is unnecessarily restrictive of public adjusters' and insureds' commercial-speech interests, particularly in light of several provisions of the Florida Statutes that are in fact narrowly tailored to advance the State's interest in the promotion of ethical conduct among public adjusters. The findings and recommendations of the Task Force on Citizens Property Insurance Claims Handling and Resolution (Task Force) were the central focus of the House of Representatives Staff Analysis on which Section 626.854(6) was ultimately based.[44] In addition to general unscrupulousness, the Task Force identified two specific aspects of public insurance adjusting whose regulation would serve the public interest: qualification and fees.[45] The Florida Statutes include provisions narrowly tailored to address each of these concerns.

As to general unscrupulousness, Florida law requires that every insurance adjuster "subscribe to the code of ethics specified" by the Department of Financial Services.[46] As to qualification, every public adjuster must, among other things, be "trustworthy and [have] such [a] business reputation as would reasonably assure that [she] will conduct h[er] . . . business . . .

[44] *See generally* House Staff Analysis, *supra* note 21.

[45] *Id.* at 1.

[46] FLA. STAT. § 626.878.

fairly and in good faith and without detriment to the public";[47] have "had sufficient experience, training, or instruction concerning the adjusting of damages or losses under insurance contracts";[48] and have "passed the examination for a public adjuster's license."[49] Finally, as to fees, a public adjuster may not charge more than ten percent of the amount of claim payments based on emergency events and no more than twenty percent of the amount of all other claim payments.[50] These provisions are sufficient to address all of the major concerns identified by the Task Force; nevertheless, the Florida Legislature has gone further to promote ethical conduct among public adjusters.

For example, public adjusters are prohibited from accepting any compensation "based on a previous settlement or previous claim payments by the insurer . . . ."[51] Instead, a public adjuster's compensation "may be based only on the claim payments or settlement obtained through the work of the public adjuster after entering into the contract with the insured or claimant."[52] This requirement ensures that the insured benefits from every transaction he enters into with a public adjuster. In addition, public adjusters must provide the insured with a written estimate of his loss.[53] This writing requirement helps to ensure that the insured understands and is kept abreast of the public adjuster's work on the insured's behalf.

Thus, the forty-eight-hour ban is unnecessarily restrictive of public adjusters' and

[47] *Id.* § 626.865(1)(c).

[48] *Id.* § 626.865(1)(d).

[49] *Id.* § 626.865(3).

[50] *Id.* § 626.854(11)(b)(1)–(2).

[51] *Id.* § 626.854(11)(a).

[52] *Id.*

[53] *Id.* § 626.854(12).

insureds' commercial-speech interests and advances Florida's interest in promoting ethical standards among public adjusters indirectly and immaterially at best.

3. The Protection of Insureds' Privacy

Lastly, the forty-eight-hour ban on solicitation by public adjusters is not narrowly tailored to directly and materially advance Florida's substantial interest in the protection of insureds' privacy. Just as privacy in this context does not refer to the nature of the relationship between a professional and her client,[54] it also does not refer to the insured's privacy interest in his personal information. Instead, Part III.D.3 analyzes what the U.S. Supreme Court has deemed a state privacy interest in preventing "vexatious conduct" and harassment by professionals.[55]

First, it is unclear whether the restriction imposed by Section 626.854(6) directly and materially prevents fraud and misrepresentation. On one hand, Florida would likely argue, as it would in regard to its interest in preventing fraud and misrepresentation,[56] that the restriction quite directly and materially protects insureds' privacy because it prohibits public adjusters from "initiat[ing] contact or engag[ing] in face-to-face or telephonic solicitation"[57] during the first forty-eight hours after the occurrence of the insured event. Such protection is necessary, Florida's argument would go, to protect vulnerable insureds from the frequent, vehement, intimidating, or vexatious solicitation by public adjusters that the U.S. Supreme Court has indicated gives rise to a substantial state interest.[58] On the other hand, a challenger of the

[54] *See supra* Part III.C.

[55] *See supra* notes 34–35 and accompanying text.

[56] *See supra* note 39 and accompanying text; Ins. Adjustment Bureau v. Ins. Comm'r. for the Cmmw. of Pennsylvania, 542 A.2d 1317, 1323 (Pa. 1988) (acknowledging a similar argument).

[57] FLA. STAT. § 626.865(6).

[58] *See* Edenfield v. Fane, 507 U.S. 761, 769 (1993).

restriction would likely argue that Florida's interest in protecting the privacy of insureds does not cease to be substantial after the first two days following the occurrence of the insured event. From this perspective, therefore, the forty-eight-hour ban cannot be said to directly and materially advance that interest.

Second, the forty-eight-hour ban is in any case unnecessarily restrictive of public adjusters' and insureds' commercial-speech rights. Indeed, the Supreme Court of Pennsylvania found unnecessarily restrictive even a twenty-four-hour ban on solicitation by public adjusters.[59] That court, after correctly identifying the risk to insureds' privacy as one posed by only "*some* public adjusters," determined that, "in light of the other remedies available" to the Commonwealth, public adjusters' "private business interests are more significant" than "the governmental interest of protecting persons who have just suffered the trauma of losing their property . . . ."[60]

Those "other remedies" that so persuaded the Pennsylvania Supreme Court include requirements that public adjusters be bonded; that their contracts be in a form approved by the Insurance Commissioner; that an insured may rescind his contract with a public adjuster within four days of signing; and that public adjusters may be fined or have their licenses suspended or revoked for engaging in fraudulent or misleading conduct.[61] Each of these remedies (or its substantive equivalent) appears in the Florida Statutes.

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[59] *Ins. Adjustment Bureau*, 542 A.2d at 1323–24.

[60] *Id.* The court's balancing here added an unnecessary element of public policy to the traditional framework of the *Central Hudson* test, pursuant to which the analysis at this step should relate solely to the restriction—not to the speech itself. *See supra* note 15 and accompanying text; *infra* note 68 and accompanying text.

[61] *Ins. Adjustment Bureau*, 542 A.2d at 1323.

First, every public adjuster seeking to be licensed in the State of Florida must file with the Department of Financial Services a bond in the amount of $50,000, conditioned on the faithful performance of her duties.[62] Second, public adjusters are required to adjust all claims "in accordance with the . . . applicable laws of [the] state."[63] This is the substantive equivalent of the Pennsylvania requirement that public adjusters' contracts be in a form approved by the Insurance Commissioner, for the Insurance Commissioner presumably reviews the form of public adjusters' contracts to ensure their compliance with applicable Florida law. Third, Florida gives an insured three business days (as opposed to Pennsylvania's four) to rescind his contract with a public adjuster, although this time period is extended to five days during a state of emergency.[64] Finally, public adjusters licensed in Florida, as in Pennsylvania, may be fined or have their licenses suspended or revoked for engaging in fraudulent or misleading conduct.[65]

If "this arsenal of remedies" was enough for the Pennsylvania Supreme Court to find "unjustified" a twenty-four-hour ban on solicitation by public adjusters,[66] it stands to reason that an equivalent arsenal would likely be enough for the Florida courts to find unjustified the forty-eight-hour ban imposed by Section 626.854(6). This is all the more true in light of Florida's ban on solicitation by public adjusters on Sundays and between 8:00 p.m. and 8:00 a.m. on Mondays through Saturdays.[67] *That* restriction is narrowly tailored to directly and materially advance

[62] FLA. STAT. § 626.865(2).

[63] *Id.* § 626.877.

[64] *Id.* § 626.854(7).

[65] *Id.* §§ 626.854(8), 626.8698(1). *See supra* notes 41 and 42 and accompanying text.

[66] *See Ins. Adjustment Bureau*, 542 A.2d at 1323.

[67] FLA. STAT. § 626.854(5).

Florida's substantial interest in protecting insureds' privacy; the forty-eight-hour ban imposed by Section 626.854(6) is not.

IV. PUBLIC-POLICY CONSIDERATIONS

Although the constitutional analysis of Florida's substantial interests should end upon the determination that the forty-eight-hour ban is not narrowly tailored to directly and materially advance those interests, the Florida courts may (as did the Pennsylvania Supreme Court) indulge in a gratuitous analysis of the public-policy arguments advanced by the parties.[68] However, even if the Florida courts restrict themselves to the limited issue of the ban's constitutionality, public-policy considerations remain relevant to the Florida Legislature, which of course has the authority to repeal Section 626.854(6). In any event, public policy dictates the same result as constitutional law: public adjusters should not be prohibited from offering their services to insureds during the first forty-eight hours after the occurrence of an insured event.

For example, Florida might argue that, since most property owners evacuate their homes in the event of a disaster or fire, the restriction imposed by Section 626.854(6) has only a *de minimis* effect on public adjusters—for, during and immediately after the disaster or fire, there is barely anyone from whom the adjusters can solicit business.[69] As an initial matter, this argument makes little sense in light of the lawsuits that have already been filed challenging the restriction[70] and the fact that the restriction was enacted at all. More substantively, the first day or two after the disaster or fire may be the only time when the public adjuster will know where to contact the

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[68] *See Ins. Adjustment Bureau*, 542 A.2d 1317 at 1323–24 ("[b]alancing the governmental interest . . . against that of public adjusters"); *supra* note 60 and accompanying text.

[69] *See* Bobby Marzine Harges, *Disaster Mediations in Mississippi: the Influx of Public Adjusters into Mississippi after Hurricane Katrina Compels the Mississippi Legislature to Enact the Mississippi Public Adjuster Act*, 77 MISS. L.J. 761, 777 (2008).

[70] *See, e.g.*, Complaint, East Coast Public Adjusters, Inc. v. Sink, No. 09-63551CA02 (Fla. Cir. Ct. Aug. 18, 2009).

property owner to offer him her services.[71] The Pennsylvania Supreme Court decided against the Commonwealth on this issue,[72] and there is no reason to think that the Florida courts would not do the same.

Florida might similarly argue that the forty-eight-hour ban gives the insured who does not relocate from his property "a chance to collect [his] thoughts before [entering] into a contractual relationship with a public adjuster."[73] This argument also makes little sense, for property owners are in no position to evaluate the merits of contracting with a public adjuster when "many . . . are not even aware of what [public adjusters] do."[74] Moreover, there is a strong likelihood that an insured who is "reeling from the impact of a disaster [would] appreciate having a consultant to lean on."[75]

Indeed, Florida should acknowledge (by repealing the forty-eight-hour ban) that the vast majority of public adjusters assist the State in its efforts to protect insureds. Public adjusters are professionals with "the kind of familiarity with the claims process"—assessing damages, filing claims, and negotiating with insurance companies[76]—"that few homeowners ever have."[77] This expertise is indispensable for a homeowner who seeks to "get the most out of [his] policy"—especially given insurance companies' "not uncommon" practice of denying otherwise valid

[71] *Ins. Adjustment Bureau*, 542 A.2d at 1323.

[72] *Id*. at 1323–34.

[73] Harges, *supra* note 69, at 777.

[74] Peter C. Beller, *In the Wake of Disaster, Help for Hire*, N.Y. TIMES, Feb. 2, 2006, http://www.nytimes.com/2006/02/02/garden/02adjusters.html?_r=2.

[75] *Id.*

[76] Harges, *supra* note 69, at 762.

[77] Beller, *supra* note 74.

claims "due to certain clauses or omissions in [the] insurance coverage."[78] The unfortunate truth is that "there are a whole lot of not-so-good insurance companies out there" whose so-called independent insurance adjusters are not in fact independent.[79]

The Florida Legislature enacted Section 626.854(6) to protect the vulnerable property owner from public adjusters but enacted no similar restriction to protect him from insurance companies and their independent adjusters—even though, as a general matter, the insured's interest is aligned with the economic interest of his public adjuster but opposed to that of his insurance company. What is more, insurance companies—like public adjusters—will probably seek to initiate contact with insureds in the aftermath of a natural disaster or other event that typically results in numerous insurance claims. In contrast, contact is usually initiated by the insured after an event giving rise to only an isolated claim.[80]

In the absence of a strong public-policy justification for the forty-eight-hour ban, it appears all too likely that Section 626.854(6) is a product of the insurance industry's political influence on the Florida Legislature.[81] Indeed, State Farm and the Florida Insurance Council

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[78] *See* Terri Cullen, *Public Claims Adjusters Offer Valuable Service*, WALL ST. J. ONLINE, Dec. 17, 2002, http://www.realestatejournal.com/buysell/taxesandinsurance/20021217-cullen.html.

[79] *Id.* (quoting Paul Cohen, founder of the consumer-advocacy website *Fight Bad-Faith Insurance Companies*) (internal quotation marks omitted).

[80] There are at least two practical grounds, however, for this apparently lopsided regulation. First, an insurance company that initiated contact with its insureds would almost certainly be unable to reach all of them and settle their claims before the expiration of the forty-eight-hour ban. Second, the insurance company, unlike the public adjuster, already has a professional relationship with the insured and thus would presumably not be an unwelcome contact in the aftermath of the insured event.

[81] *See* Julie Patel, *Battle Brewing Over Public Adjusters*, SUNSENTINEL.COM, Feb. 25, 2010, http://weblogs.sun-sentinel.com/business/realestate/housekeys/blog/2010/02/floridas_three_major_insurance_1.html?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed:+ss-housekeys+%28House+Keys+|+Sun-Sentinel+Blogs (explaining that "Florida's three major insurance trade groups"—the Florida Insurance Council, Property Casualty Insurers Association of America, and the Florida Property Casualty Association—"are lining up behind legislation to restrict how public insurance adjusters operate").

spent a combined $695,000 lobbying the Florida Legislature in 2007, the year before Section 626.854(6) was enacted.[82]

Thus, public policy suggests that Florida should follow the example of the majority of States—including Mississippi, the State with the third-highest number of public adjusters per 100,000 residents[83]—in "not regulat[ing] when a public adjuster can approach an insured to solicit business."[84]

V. CONCLUSION

This Paper has discussed myriad regulations of public insurance adjusting. Of these regulations, only Section 626.854(6) constitutes an unconstitutional restriction on commercial speech. Good public adjusters—the same good public adjusters who challenge the forty-eight-hour ban—should welcome these other regulations as part of the broader effort to establish and maintain the highest standards in their profession. The forty-eight-hour ban is unique among these regulations in that only it, during its time of operation, all-but wholly impedes a public adjuster's ability to go about her work. With the other regulations in place, the forty-eight-hour ban is unnecessary and thus unjustified—as a matter of both law and public policy.

[82] Aaron Deslatte, *Cost to Lobby Florida Lawmakers: $116.5 Million*, ORLANDO SENTINEL, Feb. 16, 2010, http://blogs.orlandosentinel.com/news_politics/2010/02/cost-to-lobby-florida-lawmakers-116-5-million.html/comment-page-1.

[83] PUBLIC-ADJUSTER POLICY ANALYSIS, *supra* note 18, at 4.

[84] Harges, *supra* note 69, at 776.