# BALTIMORE CITY COUNCIL

# PUBLIC SAFETY COMMITTEE

*25-0018*
*Emergency Scene – Unauthorized Persons Prohibited*

# Public Testimony

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# MEMORANDUM

August 6, 2025

**TO:** **Members of the Public Safety Committee of the Baltimore City Council**

**FROM:** **Bruce C. Bereano, Registered Lobbyist for Platinum Emergency Services**

**RE:** **Baltimore City Council Bill No. 25-0018**

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It is my understanding that on Tuesday, September 16th the Public Safety Committee of the Baltimore City Council will take up and consider voting on Council Bill No. 25-0018 concerning Emergency Services - Unauthorized Persons Prohibited.

Very respectfully, based upon first amendment commercial free speech case law enclosed as well as the clear legal doctrine of implied preemption, it will be illegal for the Baltimore City Council to pass and enact Council Bill No. 25-0018 as written and regardless of whatever further amendments were added to the bill.

1. Enclosed are several federal and state court decisions which have declared unconstitutional restrictive legislation in other jurisdictions similar to Council Bill No. 25-0018 on the grounds of violation of commercial free speech.

2. Enclosed is a recent April 1, 2025 Federal 3rd Circuit Appeals Court decision making clear how strong the doctrine of commercial free speech is and how

commercial free speech and personal free speech rights are on the same par and equal to each other under the law and in terms of protections and guarantees.

3. Under the clearly recognized legal doctrine of implied preemption established by the case law of the Supreme Court of Maryland, the Baltimore City Council does not have the legal authority to legislate in this subject area because this subject area has been legislatively preempted by the Maryland State Legislature in the enacted in 2018 and also in 2024 of State wide legislation concerning this subject area as well as defeating and not passing this past 2025 legislative session House Bill 1348 concerning this subject area which bill included a provision for local governments to have the authority to legislate in this subject area.

Accordingly, having legislative and dominated this subject area by the Maryland State Legislature over several years, the Baltimore City Council respectfully is precluded and preempted from legislating in this subject area.

Very respectfully, the February 13, 2025 letter from the Chief Solicitor of the Baltimore City Department of Law, a copy of which I attach, is wrong and unsupportable.

Enclosures

# CITY OF BALTIMORE
# COUNCIL BILL 25-0018
# (First Reader)

Introduced by: Councilmember Ramos
Cosponsored by: Councilmembers Parker, Conway, Schleifer, Middleton, Torrence, Gray, Porter, Blanchard, and Glover
Introduced and read first time: February 10, 2025
Assigned to: Public Safety Committee
REFERRED TO THE FOLLOWING AGENCIES: City Solicitor, Department of Finance, Fire Department, Police Department

A BILL ENTITLED

AN ORDINANCE concerning

**Emergency Scene – Unauthorized Persons Prohibited**

FOR the purpose of prohibiting the presence of an unauthorized person within the boundaries of an emergency scene; establishing certain penalties; defining certain terms; and generally relating to unauthorized persons within the boundaries of an emergency scene.

BY repealing and re-ordaining, with amendments,
Article 9 - Fire Suppression and Prevention
Section 1-2
Baltimore City Code
(Edition 2000)

BY adding
Article 19 - Police Ordinances
Section 25-5
Baltimore City Code
(Edition 2000)

**SECTION 1. BE IT ORDAINED BY THE MAYOR AND CITY COUNCIL OF BALTIMORE**, That the Laws of Baltimore City read as follows:

**Baltimore City Code**

**Article 9. Fire Suppression and Prevention**

**Division I: Fire Operations**

**Subtitle 1. Fire Department**

EXPLANATION: CAPITALS indicate matter added to existing law.
[Brackets] indicate matter deleted from existing law.

**§ 1-2. Control of persons and property at fires.**

(A) *IN GENERAL.*

The Chief of the Fire Department shall, during the occurrence of fires or alarm of fires, have authority for himself, and the power to delegate to his assistants, the authority to control all persons and property in the vicinity of a fire, during the continuance thereof; provided, that the exercise of such authority does not conflict with any law of the United States, or of the State of Maryland.

(B) *ESTABLISHMENT OF EMERGENCY SCENE.*

WHEN RESPONDING TO AN EMERGENCY, THE CHIEF OR THE CHIEF'S DESIGNEE SHALL:

(1) IDENTIFY THE EMERGENCY SCENE, AS DEFINED IN CITY CODE, ARTICLE 19, § 25-5(A);

(2) ESTABLISH THE BOUNDARIES OF THE EMERGENCY SCENE USING:

(I) CAUTION TAPE;

(II) POSTED PERSONNEL; OR

(III) ANOTHER REASONABLE METHOD; AND

(3) AFTER THE FIRE DEPARTMENT COMPLETES THE INVESTIGATION OF THE EMERGENCY, REMOVE ANY BOUNDARIES MARKING THE EMERGENCY SCENE.

(C) *PERSONS PRESENT.*

ONLY AN AUTHORIZED PERSON, AS DEFINED IN CITY CODE, ARTICLE 19, § 25-5(A), MAY BE PRESENT WITHIN THE BOUNDARIES OF AN EMERGENCY SCENE.

## Article 19. Police Ordinances

## Subtitle 25. Loitering

**§ 25-5. EMERGENCY SCENE.**

(A) *DEFINITIONS.*

(1) *IN GENERAL.*

IN THIS SUBSECTION, THE FOLLOWING TERMS HAVE THE MEANINGS INDICATED.

(2) *AUTHORIZED PERSON.*

(I) *IN GENERAL.*

"AUTHORIZED PERSON" MEANS AN PERSON WHO IS GIVEN PERMISSION TO BE PRESENT WITHIN THE BOUNDARIES OF AN EMERGENCY SCENE BY THE CHIEF.

(II) *INCLUSIONS.*

"AUTHORIZED PERSON" MAY INCLUDE:

(A) A FIREFIGHTER;

(B) EMERGENCY MEDICAL SERVICES PERSONNEL;

(C) PERSONNEL FROM THE BALTIMORE POLICE DEPARTMENT;

(D) A VICTIM OF THE FIRE;

(E) A FAMILY MEMBER OF A VICTIM OF THE FIRE;

(F) PERSONNEL FROM THE AMERICAN RED CROSS;

(G) PERSONNEL FROM THE BALTIMORE CITY DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT; OR

(H) AN OFFICIAL, AS DEFINED IN CITY CODE, ARTICLE 8,§ 2-21, WITH IDENTIFICATION ISSUED BY THE CITY.

(3) *CHIEF.*

"CHIEF" MEANS THE CHIEF OF THE BALTIMORE CITY FIRE DEPARTMENT OR THE CHIEF'S DESIGNEE.

(4) *DEPARTMENT.*

"DEPARTMENT" MEANS THE BALTIMORE CITY FIRE DEPARTMENT.

(5) *EMERGENCY SCENE.*

"EMERGENCY SCENE" MEANS THE IMMEDIATE AREA NECESSARY FOR THE DEPARTMENT TO INVESTIGATE AN EMERGENCY.

(B) *PROHIBITED CONDUCT.*

(1) *IN GENERAL.*

A PERSON MAY NOT LOITER WITHIN THE BOUNDARIES OF AN EMERGENCY SCENE.

(2) *EXCEPTION.*

AN AUTHORIZED PERSON, AS DEFINED UNDER SUBSECTION (A)(2) OF THIS SECTION, MAY BE PRESENT WITHIN THE BOUNDARIES OF AN EMERGENCY SCENE.

(C) *SCOPE.*

NO PERSON MAY BE CHARGED WITH A VIOLATION OF THIS SECTION UNLESS AND UNTIL THE ARRESTING OFFICER HAS FIRST WARNED THE PERSON OF THE VIOLATION AND THE PERSON HAS FAILED OR REFUSED TO STOP THE VIOLATION.

(D) *PENALTIES.*

ANY PERSON WHO VIOLATES THE PROVISIONS OF THIS SECTION IS GUILTY OF A MISDEMEANOR AND, ON CONVICTION IS SUBJECT TO A FINE OF NOT MORE THAN $500 OR IMPRISONMENT FOR NOT MORE THAN 90 DAYS, OR BOTH FINE AND IMPRISONMENT.

(E) *EACH VIOLATION A SEPARATE OFFENSE.*

EACH VIOLATION OF THE PROVISIONS OF THIS SECTION IS A SEPARATE OFFENSE.

**SECTION 2. AND BE IT FURTHER ORDAINED,** That this Ordinance takes effect on the 30th day after the date it is enacted.

CITY OF BALTIMORE

BRANDON M. SCOTT
Mayor

DEPARTMENT OF LAW
EBONY M. THOMPSON, CITY SOLICITOR
100 N. HOLLIDAY STREET
SUITE 101, CITY HALL
BALTIMORE, MD 21202

February 13, 2025

The Honorable President and Members
of the Baltimore City Council
Attn: Executive Secretary
Room 409, City Hall
100 N. Holliday Street
Baltimore, Maryland 21202

Re: City Council Bill 25-0018 – Emergency Scene – Unauthorized Persons Prohibited

Dear President and City Council Members:

The Law Department has reviewed City Council Bill 25-0018 for form and legal sufficiency. The bill would add a subsection (b) to Section 1-2 of Article 9 of the City Code to allow the Fire Chief or the Chief's designee to identify the boundaries of any emergency scene with caution tape or other reasonable methods when responding to that emergency. It would prohibit anyone but those authorized to be present in that defined emergency scene area. It would also add a prohibition on loitering in an emergency scene area to Subtitle 25 of Article 19 of the City Code.

The City has broad powers to legislate in the interest of public health, safety and welfare and to exercise the common police power. City Charter, Art. II, §§ (27), (47). Since this bill is within that broad authority, the Law Department can approve it for form and legal sufficiency.

Very truly yours,

Hilary Ruley
Chief Solicitor

cc: Ebony M. Thompson, City Solicitor
Ty'lor Schnella, Mayor's Office of Government Relations
Ashlea Brown, Chief Solicitor
Michelle Toth, Assistant Solicitor
Desiree Lucky, Assistant Solicitor

BALTIMORE CITY
Firefighters
Local 734

1202 RIDGELY STREET, BALTIMORE, MARYLAND 21230-2601 – 410-234-0734 – FAX: 410-837-0733
www.baltimorefirefighters.net

MATTHEW COSTER
President

MICHAEL SCHLEY
1st Vice President

TEMP VACANT
2nd Vice President

TEMP VACANT
Secretary-Treasurer

JENNIFER MUTH
Recording Secretary

**Good afternoon Honorable President and Members of the City Council,**

My name is Matthew Coster, and I am the proud President of Baltimore Firefighters IAFF Local 734. I stand before you today in strong opposition to Council Bill 25-0018.

This legislation, as written, fails to protect anyone operating on a fire scene or fire ground. In fact, it inadvertently causes harm—not only to our firefighters but to the very residents of Baltimore who have just experienced the devastating loss of a fire.

Let me be clear: this bill will *not* improve safety, accountability, or efficiency. What it *will* do is deny fire victims access to critical post-fire

services such as fire mitigation, emergency cleanup, and board-up operations—services that are essential for preserving property, preventing further damage or theft, and maintaining insurance eligibility. These services must be delivered rapidly and at all hours of the day, a standard no city agency is currently equipped to meet.

The Fire Department's responsibility ends once the fire is extinguished. We do not, and cannot, properly secure a property. At best, we may apply plastic sheeting to broken windows or doors—temporary and ineffective measures that leave properties vulnerable. Proposing that another city agency handle board-ups—especially during late-night or weekend fires—is impractical and logistically unrealistic. Delays in securing properties can mean the difference between a family recovering or losing everything they have left.

Mr. Will Karaberis, through Platinum Emergency Services, has been a vital partner in filling this

critical void. His company operates with the utmost professionalism and respect for the fireground. I have personally witnessed his team working hand-in-hand with our incident commanders and firefighters to ensure the safety and security of fire scenes. Not once have his operations interfered with firefighting efforts or caused harm. On the contrary, his services have *reduced* the burden on our personnel and enhanced outcomes for fire victims.

Moreover, Mr. Karaberis has shown unwavering support for our department and our members. He has provided food and water at extended incidents, assisted families of fallen or injured firefighters, contributed to our Widows and Orphans Fund, and helped support a firefighter battling terminal cancer. He exemplifies the community partnership we *should* be encouraging, not legislating out of existence.

This bill also fails to address the very real and growing danger posed by reckless motorists at emergency scenes. In recent years, multiple

firefighters have been seriously injured or forced to retire after vehicles drove over supply lines or struck hydrant connections. Just last week, a firefighter was dragged to the ground and suffered a broken leg and head injury after a driver ran over an active hoseline during a hydrant connection.

If the intent of this legislation is truly safety, then it is misplaced. The focus should be on creating stronger protections for fire and EMS personnel from vehicular hazards, not eliminating the services of a company that has demonstrated nothing but integrity and compassion.

Council Bill 25-0018, in its current form, is not only ineffective but harmful. It offers no measurable safety benefit and strips away a vital layer of support for fire victims and first responders. Worse, it threatens to shutter a local business that exemplifies exactly the kind of partnership and community-minded spirit we should be fostering in Baltimore.

For these reasons, I respectfully and urgently request that you give this bill an *unfavorable* report.

Thank you for your time and commitment to public safety.

Chapter 826

**(House Bill 36)**

AN ACT concerning

**Insurance – Protections After Loss or Damage to Property**

FOR the purpose of prohibiting a public adjuster, or anyone acting on behalf of a public adjuster, from soliciting or attempting to solicit a client ~~within a certain period of time after a loss or damage as covered by an insurance contract or~~ between certain hours; altering the statements that are required to be included in a public adjuster contract; altering a certain rescission period for public adjuster contracts; requiring a public adjuster to provide certain notice to the Maryland Insurance Commissioner under certain circumstances; altering the services with respect to which it is a fraudulent insurance act for a contractor to take certain actions; and generally relating to insurance and protections after loss or damage to property.

BY repealing and reenacting, without amendments,
Article – Insurance
Section 10–411(a)
Annotated Code of Maryland
(2017 Replacement Volume and 2023 Supplement)

BY repealing and reenacting, with amendments,
Article – Insurance
Section 10–411(h), 10–414, and 27–407.2
Annotated Code of Maryland
(2017 Replacement Volume and 2023 Supplement)

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND, That the Laws of Maryland read as follows:

**Article – Insurance**

10–411.

(a) A contract for public adjuster services shall:

(1) be in writing;

(2) be titled "Public Adjuster Contract"; and

(3) contain the following:

(i) the legible full name of the public adjuster signing the contract, as specified in the records of the Administration;

(ii) the permanent business address and phone number of the public adjuster in the public adjuster's home state;

(iii) the license number issued by the Administration to the public adjuster;

(iv) the insured's full name, street address, insurance company name, and policy number, if known or on notification;

(v) a description of the loss and the location of the loss, if applicable;

(vi) a description of services to be provided to the insured;

(vii) the signatures of the public adjuster and the insured;

(viii) the dates when the contract was signed by the public adjuster and the insured, respectively;

(ix) notification to the insured that:

1. the public adjuster may incur out–of–pocket expenses on behalf of the insured; and

2. these expenses incurred by the public adjuster and approved by the insured will be reimbursed to the public adjuster from the insurance proceeds; and

(x) the full salary, fee, commission, compensation, or other consideration the public adjuster is to receive for services.

(h) The public adjuster contract shall contain a statement that:

(1) the insured has the right to rescind or cancel the contract:

~~(I)~~ within ~~3~~ ~~15~~ *10* business days after the date the contract was signed ~~IF THE INSURED IS UNDER THE AGE OF 65 YEARS; OR~~

~~(II) WITHIN 7 BUSINESS DAYS IF THE INSURED IS AT LEAST 65 YEARS OLD~~;

(2) the notice of rescission or cancellation shall be in writing and mailed or delivered to the public adjuster at the address stated in the contract within **[**that 3–business–day**]** **THE** ~~APPLICABLE~~ **TIME** period **SPECIFIED IN ITEM (1) OF THIS SUBSECTION**; **[**and**]**

(3) if the insured exercises the right to rescind or cancel the contract, the public adjuster shall, within 15 business days after the public adjuster receives the notice, return anything of value given by the insured under the contract; AND

**(4) PROVIDES A NOTICE TO THE INSURED THAT A PUBLIC ADJUSTER, OR ANYONE ACTING ON BEHALF OF A PUBLIC ADJUSTER, MAY NOT SOLICIT OR ATTEMPT TO SOLICIT A CLIENT:**

~~**(I) WITHIN 24 HOURS AFTER A LOSS OR DAMAGE AS COVERED BY AN INSURANCE CONTRACT; OR**~~

~~**(II)**~~ **BETWEEN THE HOURS OF 8:00 P.M. AND 8:00 A.M.**

10–414.

(a) A public adjuster is obligated to:

(1) serve with objectivity and complete loyalty the interest of the client alone;

(2) render to the insured the information, counsel, and service that will best serve the insured's insurance claim needs and interests, within the knowledge, understanding, and opinion in good faith of the public adjuster; and

(3) disburse insurance settlement payments received on behalf of the insured within 15 business days after the date of the payment from an insurer.

(b) A public adjuster may not allow an unlicensed employee or representative of the public adjuster to conduct business for which a license is required under this subtitle.

(c) Unless full written disclosure has been made to the insured in accordance with § 10–411 of this subtitle, a public adjuster may not have a direct or indirect financial interest in any aspect of a claim, other than the salary, fee, commission, or other consideration established in the written contract with the insured.

(d) A public adjuster may not acquire any interest in salvage of property subject to a public adjuster contract with the insured unless the public adjuster obtains written permission from the insured.

**(E) A PUBLIC ADJUSTER, OR ANYONE ACTING ON BEHALF OF A PUBLIC ADJUSTER, MAY NOT SOLICIT OR ATTEMPT TO SOLICIT A CLIENT:**

~~**(1) WITHIN 24 HOURS AFTER A LOSS OR DAMAGE AS COVERED BY AN INSURANCE CONTRACT; OR**~~

~~(2)~~ **BETWEEN THE HOURS OF 8:00 P.M. AND 8:00 A.M.**

**(F) (1) A PUBLIC ADJUSTER WHO ENTERS INTO A PUBLIC ADJUSTER CONTRACT DURING, OR WITHIN 72 HOURS AFTER, THE LOSS GIVING RISE TO AN INSURANCE CLAIM SHALL PROVIDE NOTICE TO THE COMMISSIONER THAT THE PUBLIC ADJUSTER HAS ENTERED INTO THE CONTRACT.**

**(2) THE NOTICE REQUIRED UNDER PARAGRAPH (1) OF THIS SUBSECTION SHALL BE:**

**(I) PROVIDED TO THE COMMISSIONER WITHIN 1 BUSINESS DAY AFTER THE PUBLIC ADJUSTER ENTERS INTO THE CONTRACT; AND**

**(II) IN A FORM AND MANNER THE COMMISSIONER DETERMINES.**

27–407.2.

It is a fraudulent insurance act for a contractor offering home repair or remodeling services for damages to a private residence [caused by weather], to directly or indirectly pay or otherwise compensate an insured, or offer or promise to pay or compensate an insured, with the intent to defraud an insurer, for any part of the insured's deductible under the insured's property or casualty insurance policy, if payment for the services will be made from the proceeds of the policy.

SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall take effect October 1, 2024.

**Approved by the Governor, May 16, 2024.**

WES MOORE
Governor

ARUNA MILLER
Lt. Governor

Maryland
INSURANCE ADMINISTRATION

JOY Y. HATCHETTE
Acting Commissioner

ROBERT GUYNN
Associate Commissioner
Insurance Fraud and Producer
Enforcement

200 St. Paul Place, Suite 2700, Baltimore, Maryland 21202
Direct Dial: 410-468-2000 Fax: 410-468-2020
www.insurance.maryland.gov

# BULLETIN 24-18

DATE: July 22, 2024

TO: Public Adjusters and Persons Acting on Behalf of Public Adjusters

RE: Protections after Loss or Damage to Property

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The Maryland Insurance Administration (the "Administration") is issuing this Bulletin to provide notice of and guidance concerning prohibitions and requirements established in 2024 Maryland Laws Ch. 826. This law is codified at §§ 10–411(h), 10-414(e)-(f), and 27-407.2,[1] and will become effective on October 1, 2024.

§ 10–411(h) requires that a public adjuster contract include a statement that:

- The insured has the right to rescind or cancel the contract within ten business days after the date the contract was signed;
- Notice of rescission or cancellation shall be in writing and mailed or delivered to the public adjuster at the address stated in the contract within ten business days after the date the contract was signed;
- If the insured exercises the right to rescind or cancel the contract, the public adjuster shall, within 15 business days after the public adjuster receives the notice, return anything of value given by the insured under the contract; and
- A public adjuster, or anyone acting on behalf of a public adjuster, may not solicit or attempt to solicit a client between the hours of 8:00 p.m. and 8:00 a.m.

§ 10-414(e) prohibits a public adjuster, or anyone acting on behalf of a public adjuster, from soliciting or attempting to solicit a client between the hours of 8:00 p.m. and 8:00 a.m.

§ 10-414(f)(1) requires that a public adjuster who enters into a public adjuster contract during, or within 72 hours after, a loss giving rise to an insurance claim notify the Commissioner that the public adjuster entered into the contract. § 10-414(f)(2) provides that the notice required under §

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[1] Statutes referenced in this Bulletin are within the Insurance Article of the Annotated Code of Maryland.

10-414(f)(1) shall be provided to the Commissioner within one business day after the public adjuster enters into the contract, in a form and manner the Commissioner determines.

**To comply with § 10-414(f), a public adjuster who enters into a public adjuster contract during, or within 72 hours after, a loss giving rise to an insurance claim must electronically submit the Public Adjuster Contract Submission Form that is published to the Administration's website[2] within one business day after entering into the contract.**

When assessing compliance with § 10-414(f), the Administration will apply the guidelines below to determine the date on which the loss giving rise to an insurance claim occurred:

- For claims resulting from hurricanes, tornadoes, windstorms, severe rain, or other weather-related events, the date of loss giving rise to an insurance claim is the date that the hurricane made landfall in the State of Maryland or the tornado, windstorm, severe rain, or other weather-related event is verified to have occurred in Maryland by the National Oceanic and Atmospheric Administration.
- For all other claims, the date of loss giving rise to an insurance claim is the date that the loss was discovered.

The Administration has received questions concerning how it will calculate a business day when assessing compliance with §§ 10–411(h) and 10-414(f). In response to these questions, the Administration hereby clarifies that it interprets "business day," as the term is used §§ 10–411(h) and 10-414(f), to mean any calendar day other than a Saturday, Sunday, or State holiday.

Finally, please be advised that § 27-407.2 has been amended, and now reads as follows:

> It is a fraudulent insurance act for a contractor offering home repair or remodeling services for damages to a private residence, to directly or indirectly pay or otherwise compensate an insured, or offer or promise to pay or compensate an insured, with the intent to defraud an insurer, for any part of the insured's deductible under the insured's property or casualty insurance policy, if payment for the services will be made from the proceeds of the policy.

**Questions about this Bulletin may be directed to:**

- **The Public Adjuster Compliance Information Line at 410-468-2301; or**
- **pubadjcontracts.mia@maryland.gov.**

Joy Hatchette
Acting Commissioner

By: **Signature on Original**
Robert Guynn
Associate Commissioner
Insurance Fraud and Producer Enforcement

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[2] The submission form can be accessed at https://marylandinsurance.jotform.com/241153615968058.

2. in the case of a partnership, is a partner; and

3. in the case of a corporation, is a director, officer, or controlling owner; or

(iii) has direct control over the fiscal management of the business entity.

(c) *Penalty.* — Instead of or in addition to suspending or revoking the license of a public adjuster, the Commissioner may impose on the licensee a penalty of not less than $100 but not exceeding $500 for each violation of this article.

(d) *Penalty — Restitution.* — Instead of or in addition to suspending or revoking the license, the Commissioner may require that restitution be made to any citizen who has suffered financial injury because of the violation of this article.

(e) *Reexamination and reapplication.* — If the license is suspended under this section, the Commissioner may require the individual to pass an examination and file a new application before the suspension is lifted. (An. Code 1957, art. 48A, § 181; 1995, ch. 36; 2004, chs. 290, 291; 2014, ch. 24; 2017, ch. 106.)

**Effect of amendments.** — Chapter 106, Acts 2017, effective January 1, 2018, reenacted the section without change.

**Editor's note.** — Section 2, chs. 290 and 291, Acts 2004, provides that "the provisions of this Act shall apply to a person that is a business entity on January 1, 2005."

*(Section effective January 1, 2018.)*

## § 10-411. Public adjuster contracts.

*(a) Requirements. — A contract for public adjuster services shall:*

*(1) be in writing;*

*(2) be titled "Public Adjuster Contract"; and*

*(3) contain the following:*

*(i) the legible full name of the public adjuster signing the contract, as specified in the records of the Administration;*

*(ii) the permanent business address and phone number of the public adjuster in the public adjuster's home state;*

*(iii) the license number issued by the Administration to the public adjuster;*

*(iv) the insured's full name, street address, insurance company name, and policy number, if known or on notification;*

*(v) a description of the loss and the location of the loss, if applicable;*

*(vi) a description of services to be provided to the insured;*

*(vii) the signatures of the public adjuster and the insured;*

*(viii) the dates when the contract was signed by the public adjuster and the insured, respectively;*

*(ix) notification to the insured that:*

*1. the public adjuster may incur out-of-pocket expenses on behalf of the insured; and*

*2. these expenses incurred by the public adjuster and approved by the insured will be reimbursed to the public adjuster from the insurance proceeds; and*

*(x) the full salary, fee, commission, compensation, or other consideration the public adjuster is to receive for services.*

*(b) Compensation provisions in contract. — (1) The public adjuster contract may specify that the public adjuster be named as a co-payee on an insurer's payment of a claim.*

*(2) If the compensation is based on a share of the insurance settlement, the public adjuster contract shall specify the exact percentage to be paid.*

*(3) (i) A compensation provision in a public adjuster contract may not be redacted in any copy of the contract provided to the Commissioner.*

*(ii) A redaction of a compensation provision constitutes an omission of material fact in violation of this subtitle.*

*(c) Effect of insurer commitment to pay policy limit. — If the insurer, within 72 hours after the time the loss is reported to the insurer, either pays or commits in writing to pay to the insured the policy limit of the insurance policy, the public adjuster:*

*(1) may not receive a commission consisting of a percentage of the total amount paid by an insurer to resolve a claim;*

*(2) shall inform the insured that loss recovery amount might not be increased by the insurer; and*

*(3) may be entitled only to reasonable compensation from the insured for services the public adjuster provides on behalf of the insured, based on the time spent on a claim and expenses incurred by the public adjuster, until the claim is paid or the insured receives a written commitment to pay from the insurer.*

*(d) Written disclosures. — (1) A public adjuster shall provide to the insured a written disclosure signed by the public adjuster and the insured concerning any direct or indirect financial interest that the public adjuster or any immediate family member of the public adjuster has with any other party that is involved in any aspect of the claim, other than the salary, fee, commission, or other consideration established in the written contract with the insured.*

*(2) The disclosure shall include any ownership of, or any compensation expected to be received from, any construction firm, salvage firm, building appraisal firm, motor vehicle repair shop, or any other firm that provides estimates for work, or that performs any work, in conjunction with damages caused by the insured loss on which the public adjuster is engaged.*

*(e) Prohibited provisions. — A public adjuster contract may not contain any provision that:*

*(1) allows the public adjuster's percentage fee to be collected when money is due from, but not yet paid by, an insurance company;*

*(2) allows a public adjuster to collect the entire fee from the first check issued by an insurance company, rather than as a percentage of each check issued by an insurance company;*

*(3) requires the insured to authorize an insurance company to issue a check only in the name of the public adjuster; or*

*(4) precludes either party from pursuing any civil remedy.*

*(f) Separate disclosure document provisions. — Before the signing of the public adjuster contract, the public adjuster shall provide the insured with a separate disclosure document signed by the insured regarding the claim process that substantially states:*

*"(1) Property insurance policies obligate the insured to present a claim to the insurance company for consideration. There are three types of adjusters that could be involved in that process. The definitions of the three types are:*

*(i) "Company adjuster" means an insurance adjuster who is an employee of an insurance company. A company adjuster represents the interest of the insurance company and is paid by the insurance company. A company adjuster will not charge you a fee.*

*(ii) "Independent adjuster" means an insurance adjuster who is hired on a contractual basis by an insurance company to represent the insurance company's interest in the settlement of the claim. An independent adjuster is paid by your insurance company. An independent adjuster will not charge you a fee.*

*(iii) "Public adjuster" means an insurance adjuster who does not work for any insurance company. A public adjuster works for the insured to assist in the preparation, presentation, and settlement of a claim. The insured hires a public adjuster by signing a contract agreeing to pay the public adjuster a fee or commission based on a percentage of the settlement, or another method of compensation.*

*(2) The insured is not required to hire a public adjuster to help the insured meet the insured's obligations under the policy but has the right to do so.*

*(3) The insured has the right to initiate direct communications with the insured's attorney, the insurer, the insurer's adjuster, the insurer's attorney, or any other person regarding the settlement of the insured's claim.*

*(4) A public adjuster is not a representative or an employee of the insurer.*

*(5) The salary, fee, commission, or other consideration of a public adjuster is the obligation of the insured, not the insurer.".*

*(g) Execution; electronic signature. — (1) The public adjuster contract shall be executed in duplicate to provide an original contract to the public adjuster and an original contract to the insured.*

*(2) The public adjuster's original contract shall be available at all times for inspection without notice by the Commissioner.*

*(3) A contract with an electronic signature shall constitute an original contract.*

*(h) Additional required provisions. — The public adjuster contract shall contain a statement that:*

*(1) the insured has the right to rescind or cancel the contract within 3 business days after the date the contract was signed;*

*(2) the notice of rescission or cancellation shall be in writing and mailed or delivered to the public adjuster at the address stated in the contract within that 3-business-day period; and*

*(3) if the insured exercises the right to rescind or cancel the contract, the public adjuster shall, within 15 business days after the public adjuster receives the notice, return anything of value given by the insured under the contract.*

*(i) Notice of insured's rights. — The public adjuster shall give the insured written notice of the insured's rights under the Maryland Consumer Protection Act.*

(2017, ch. 106.)

**Section effective January 1, 2018.** — Section 2, ch. 106, Acts 2017, provides that "this Act shall take effect January 1, 2018, and shall apply to all public adjuster licenses issued or renewed on or after January 1, 2018."

*(Section effective January 1, 2018.)*

## § 10-412. Deposit of settlement funds.

*A public adjuster who receives, accepts, or holds any funds on behalf of an insured toward the settlement of a claim for loss or damage shall deposit the funds in a noninterest-bearing escrow or trust account in a financial institution that is federally insured in the public adjuster's home state or where the loss occurred.*

(2017, ch. 106.)

**Section effective January 1, 2018.** — Section 2, ch. 106, Acts 2017, provides that "this Act shall take effect January 1, 2018, and shall apply to all public adjuster licenses issued or renewed on or after January 1, 2018."

*(Section effective January 1, 2018.)*

## § 10-413. Records.

*(a) Required. — (1) A public adjuster shall maintain a complete record of each transaction entered into as a public adjuster.*

*(2) The records required by this section shall include:*

*(i) the name of the insured;*

*(ii) the date, location, and amount of the loss;*

*(iii) a copy of the contract between the public adjuster and the insured;*

*(iv) the name of the insurer and the amount, expiration date, and number of each policy carried with respect to the loss;*

*(v) an itemized statement of the insured's recoveries;*

*(vi) an itemized statement of all compensation received by the public adjuster, from any source, in connection with the loss;*

*(vii) a register of all money received, deposited, disbursed, or withdrawn in connection with a transaction with an insured, including:*

*1. fees, transfers, and disbursements from a trust account; and*

*2. all transactions concerning all interest-bearing accounts;*

*(viii) the name of the public adjuster who executed the public adjuster contract;*

*(ix) the name of the attorney representing the insured, if applicable; and*

*(x) the name of the claims representative of the insurance company.*

*(b) Maintenace and availability for examination. — (1) The records shall be:*

*(i) maintained for at least 5 years after the termination of the transaction with an insured; and*

*(ii) open to examination by the Commissioner at all times.*

*(2) Any records required to be maintained under this section may be stored in an electronic format.*

*(c) Submission to Commissioner. — Records submitted to the Commissioner in accordance with this section that contain information that the public adjuster identifies in writing as proprietary:*

*(1) shall be treated as confidential by the Commissioner; and*

*(2) may not be subject to Title 4, Subtitle 2 of the General Provisions Article.*

(2017, ch. 106.)

**Section effective January 1, 2018.** — Section 2, ch. 106, Acts 2017, provides that "this Act shall take effect January 1, 2018, and shall apply to all public adjuster licenses issued or renewed on or after January 1, 2018."

*(Section effective January 1, 2018.)*

## § 10-414. Duties.

*(a) In general. — A public adjuster is obligated to:*

*(1) serve with objectivity and complete loyalty the interest of the client alone; and*

*(2) render to the insured the information, counsel, and service that will best serve the insured's insurance claim needs and interests, within the knowledge, understanding, and opinion in good faith of the public adjuster.*

*(b) Unlicensed employees or representatives. — A public adjuster may not allow an unlicensed employee or representative of the public adjuster to conduct business for which a license is required under this subtitle.*

*(c) Interest in claim without disclosure prohibited. — Unless full written disclosure has been made to the insured in accordance with § 10-411 of this subtitle, a public adjuster may not have a direct or indirect financial interest in any aspect of a claim, other than the salary, fee, commission, or other consideration established in the written contract with the insured.*

*(d) Interest in salvage of property without written permission prohibited. — A public adjuster may not acquire any interest in salvage of property subject to a public adjuster contract with the insured unless the public adjuster obtains written permission from the insured.*

(2017, ch. 106.)

**Section effective January 1, 2018.** — Section 2, ch. 106, Acts 2017, provides that "this Act shall take effect January 1, 2018, and shall apply to all public adjuster licenses issued or renewed on or after January 1, 2018."

*(Section effective January 1, 2018.)*

## § 10-415. Ethical requirements.

*(a) In general. — A public adjuster shall adhere to the following general ethical requirements:*

*(1) a public adjuster may not undertake the adjustment of any claim if the public adjuster is not competent and knowledgeable as to the terms and*

*conditions of the insurance coverage, or that otherwise exceeds the public adjuster's current expertise;*

*(2) a public adjuster may not make a statement that the public adjuster knows to be false or with reckless disregard as to the statement's truth or falsity concerning the qualifications or integrity of any person engaged in the business of insurance to any insured client or potential insured client;*

*(3) a public adjuster may not represent or act as a company adjuster or as an independent adjuster on the same claim;*

*(4) the public adjuster contract may not be construed to prevent an insured from pursuing any civil remedy after the rescission or cancellation period under § 10-411(h) of this subtitle; and*

*(5) a public adjuster may not enter into a contract or accept a power of attorney that vests in the public adjuster the effective authority to choose the persons who shall perform repair work.*

*(b) Agreement to settlement without insured's knowledge and consent prohibited. — A public adjuster may not agree to any loss settlement without the insured's knowledge and consent.*

(2017, ch. 106.)

**Section effective January 1, 2018.** — Section 2, ch. 106, Acts 2017, provides that "this Act shall take effect January 1, 2018, and shall apply to all public adjuster licenses issued or renewed on or after January 1, 2018."

*(Section effective January 1, 2018.)*

## § 10-416. Reports.

*(a) Report of administrative actions. — (1) A public adjuster shall report to the Commissioner, within 30 days after the final disposition of the matter, any administrative action taken against the public adjuster in another jurisdiction, or by another governmental unit in the State.*

*(2) The report shall include:*

*(i) a copy of any order;*

*(ii) any consent to an order; and*

*(iii) any other relevant legal documents.*

*(b) Report of criminal prosecutions. — (1) Within 30 days after the initial pretrial hearing date, a public adjuster shall report to the Commissioner any criminal prosecution of the public adjuster undertaken in any jurisdiction.*

*(2) The report shall include:*

*(i) a copy of the initial filed complaint;*

*(ii) any order resulting from the hearing; and*

*(iii) any other relevant legal documents.*

(2017, ch. 106.)

**Section effective January 1, 2018.** — Section 2, ch. 106, Acts 2017, provides that "this Act shall take effect January 1, 2018, and shall apply to all public adjuster licenses issued or renewed on or after January 1, 2018."

518 Pa. 210
Supreme Court of Pennsylvania.

INSURANCE ADJUSTMENT BUREAU, Appellant,
v.
The INSURANCE COMMISSIONER FOR the COMMONWEALTH of PENNSYLVANIA, Appellee.

Argued Dec. 10, 1987. | Decided May 20, 1988.

Partnership engaged in the business of negotiating casualty loss claims on behalf of insured property owners filed complaint in equity seeking preliminary injunction against implementation of amendment to public adjuster and public adjuster solicitor law prohibiting solicitation of business by public adjusters or public adjuster solicitors within 24 hours of disaster or fire. The Commonwealth Court, No. 611 C.D. 1984, 108 Pa.Cmwlth. 418, 530 A.2d 132, granted summary judgment in favor of the Commonwealth, and partnership appealed. The Supreme Court, No. 120 E.D. Appeal Docket, 1987, Flaherty, J., held that statute impermissibly burdened free speech rights.

Reversed.

West Headnotes (4)

[1] **Constitutional Law**
Commercial Speech in General

Party seeking to uphold restriction on commercial speech which is not false or deceptive carries burden of justifying it. U.S.C.A. Const.Amend. 1.

3 Cases that cite this headnote

[2] **Constitutional Law**
Unfair Trade Practices

**Constitutional Law**
Business or Professional Services

**Insurance**
Adjusters

Speech of public adjusters within 24 hours of disaster was not so pervasively false or deceptive as to relieve Commonwealth of burden of justifying statute prohibiting solicitation of business by public adjusters or public adjuster solicitors within 24 hours of disaster or fire. 63 P.S. § 1605(a); U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

[3] **Constitutional Law**
False, Untruthful, Deceptive, or Misleading Speech

If commercial speech is false or deceptive, regulation thereof is presumed constitutional. U.S.C.A. Const.Amend. 1.

3 Cases that cite this headnote

[4] **Constitutional Law**
Unfair Trade Practices

**Constitutional Law**
Business or Professional Services

**Insurance**
Adjusters

Speech activity of public adjusters and public adjuster solicitors in soliciting business within 24 hours of disaster or fire involved commercial speech, and statute prohibiting such solicitation impermissibly burdened free speech rights. 63 P.S. § 1605(a); Const. Art. 1, § 7.

7 Cases that cite this headnote

**Attorneys and Law Firms**

**1317 *211 Gregory J. Boles, Alan E. Kear, Philadelphia, for appellant.

Jerome T. Foerster, Deputy Atty. Gen., for appellee.

*212 Before NIX, C.J., and LARSEN, FLAHERTY, McDERMOTT, ZAPPALA and PAPADAKOS, JJ.

## OPINION OF THE COURT

FLAHERTY, Justice.

On February 28, 1984 the Insurance Adjustment Bureau (the Bureau), a partnership engaged in the business of negotiating casualty loss claims on behalf of insured property owners, filed a complaint in equity addressed to the original jurisdiction of Commonwealth Court seeking, inter alia, a preliminary injunction enjoining the implementation of an amendment to the Public Adjuster and Public Adjuster Solicitor law, Act of December 20, 1983, P.L. 260, No. 72, 63 P.S. § 1601-1608. The amendment, in pertinent part, provides:

> No public adjuster or public adjuster solicitor shall solicit a client for employment within twenty-four hours of a fire or other catastrophe or other occurrence which is the basis of the solicitation. With respect to a fire, the 24-hour period shall begin at such time as the fire department in charge determines that the fire is extinguished.

63 P.S. § 1605(a). The Bureau's claim was that this portion of the amendment infringed upon its rights and its customers' rights to freedom of speech, due process, and equal protection under the Pennsylvania and the United States Constitutions.

**1318 Commonwealth Court conducted a hearing on April 26, 1984 and granted the Bureau's Motion for Preliminary Injunction. On December 20, 1984 Commonwealth Court overruled preliminary objections filed by the Commonwealth and directed the Commonwealth to answer the complaint and petition. The Bureau then filed a motion for summary judgment, and on August 13, 1987, after a hearing, a three judge panel of Commonwealth Court denied the Bureau's motion for summary judgment, dissolved the preliminary injunction, dismissed the complaint and granted summary judgment in favor of the Commonwealth, 530 A.2d 132. The Bureau's petition for reargument and application *213 for injunction pending appeal were denied and on September 10, 1987, the Bureau appealed to this Court from the judgment of Commonwealth Court. [1]

The Bureau now asserts that the statute's twenty-four hour ban on solicitation impermissibly restricts freedom of speech; that it violates the Bureau's right to equal protection of the law, that it is an unlawful exercise of the police power and an unlawful special law under the Pennsylvania Constitution designed to benefit a special interest; and that the statute is excessively vague in violation of the Bureau's due process right to receive notice of prohibited conduct.

### I.

The statute defines "public adjuster" as a person or entity who adjusts loss claims on behalf of an insured, and "public adjustor solicitor" as a person who solicits contracts for public adjusting services. 63 P.S. § 1601. The Bureau claims that insured property owners, following a loss, often fail to take necessary steps to protect their property and receive a prompt and fair claim settlement. An insured may be emotionally distraught, he may be too busy or otherwise committed, or he may not have the ability or understanding necessary to process his own claim. In any event, public adjusters typically arrange emergency protection of damaged property, secure temporary lodging for displaced persons, advise insureds regarding their rights and duties under their insurance contracts, consult with insurance companies, and commence inventory and appraisal of the loss.

The twenty-four hour restriction is significant to public adjusters and public adjuster solicitors because, prior to the amendment, they routinely approached property owners *214 within hours of a disaster, explaining their services, and, if a contract was signed, beginning work. They assert that contacting the victims of a disaster within twenty-four hours of the disaster is often necessary in order to locate the property owner before he moves to an unlisted, temporary location because of the disaster.

The Commonwealth, on the other hand, claims that the statute prohibiting solicitation of business by public adjusters or public adjuster solicitors within twenty-four hours of a disaster or fire is permissible, in part, because it is only a time, place and manner regulation. Additionally, the Commonwealth argues that if public adjusters and public adjuster solicitors are allowed to solicit business within twenty-four hours of a disaster they may utilize fraudulent practices at a time when victims of disaster are especially vulnerable, and they might, in the course of pursuing their

commercial interests, destroy evidence or otherwise impede a criminal investigation.

The Bureau, however, argues that the public is adequately protected by licensing requirements and by various sanctions which may be imposed against members of the insurance adjustment industry. Public adjusters and public adjuster solicitors are licensed by the Commonwealth, subject to revocation or suspension of their license, and bonded. They may not conduct business without a signed, written contract, **1319 and the form of the contract must be approved by the Insurance Commissioner. The statute requires that any contract secured by a public adjuster or public adjuster solicitor may be rescinded within four days of signing, and there are civil and criminal penalties for violation of any provision of the act, including provisions of the act which prohibit, inter alia, misrepresentation, misappropriation of money, or fraudulent practices. 63 P.S. §§ 1603-1608.

II.

Because we agree with the Bureau that the portion of the statute about which they complain impermissibly burdens their right of free speech, we do not address the other *215 issues raised, but confine our discussion to the aspect of the case concerning the freedom of speech.

The First Amendment to the United States Constitution provides, in pertinent part:

> Congress shall make no law ... abridging the freedom of speech, or of the press....

The Pennsylvania Constitution provides:

> The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty....

Art. I, Sect. 7.

Because the United States Supreme Court has addressed problems relating to commercial speech in a series of opinions, our approach here will be to follow the minimum standards of analysis and substantive protection as required by that Court under the federal Constitution. Having completed our analysis based on federal minimum requirements, we will then consider whether the resolution of this particular case is more appropriately treated under the Pennsylvania Constitution or the United States Constitution.

In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976), the United States Supreme Court, for the first time, brought within the protection of the First Amendment a type of communication which it referred to as commercial speech.[2] In this case, a consumer group challenged *216 a state law prohibiting pharmacists from advertising the price of prescription drugs.[3] The Court observed that speech does not lose its First Amendment protection because it is an advertisement, or because it appears in a format which is sold for profit, or because it solicits a purchase. **1320 *Id.* at 761, 96 S.Ct. at 1825, 48 L.Ed.2d at 358. Speech which does no more than propose a commercial transaction, according to the Court, "is not so removed from any 'exposition of ideas' and from truth, science, morality and arts in general ..." that it lacks all protection from the First Amendment. *Id.* This is so because the free flow of commercial information "is indispensable to the proper allocation of resources in a free enterprise system." *Id.* at 765, 96 S.Ct. at 1827, 48 L.Ed.2d at 360.

The Court also stated, however, that even though commercial speech is protected, it may be subject to some regulation. Time, place and manner restrictions have often been approved, provided that they are imposed without reference to the content of the speech, that they serve significant government interests, and that they leave open "ample alternative channels for communication of the information." *Id.* at 771, 96 S.Ct. at 1830, 48 L.Ed.2d at 364. *217 Additionally, the Court pointed out that false, misleading or untruthful speech does not enjoy First Amendment protection, and that the case at bar did not involve the special considerations pertinent to a case in which the proposed transactions or the advertisements themselves are illegal, nor did it involve the the electronic broadcasting media, which, again, requires a special analysis. *Id.* In fact, the issue involved in *Virginia Pharmacy* was simply:

> whether a State may completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of

> that information's effect upon its disseminators and its recipients.

*Id.* at 772, 96 S.Ct. at 1831, 48 L.Ed.2d at 365. Because the prohibition was total, but without commenting on the applicability of its ruling to professions other than pharmacists, the Court held that the advertising ban was impermissible.

These fundamental ideas were reaffirmed seven years later in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 103 S.Ct. 2875, 77 L.Ed.2d 469 (1983), a case involving a challenge to a federal statute which prohibited the mailing of unsolicited advertisements of contraceptives. Concerning the difference in levels of protection offered commercial and noncommercial speech, the Court stated:

> [A]s a general matter, "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." With respect to noncommercial speech, this Court has sustained content-based restrictions only in the most extraordinary circumstances. By contrast, regulation of commercial speech based on content is less problematic. In light of the greater potential for deception or confusion in the context of certain advertising messages, content-based restrictions on commercial speech may be permissible. See *Friedman v. Rogers*, 440 U.S. 1, 59 S.Ct. 887, 99 L.Ed.2d 100 (1979) (upholding prohibition on use of trade names by optometrists).

463 U.S. at 65, 103 S.Ct. at 2879, 77 L.Ed.2d at 476 (footnotes ***218** and citations omitted).[4]

The *Bolger* Court also discussed the situation in which noncommercial information was joined together with advertising:

> We have made clear that advertising which "links a product to a current public debate" is not thereby entitled to the constitutional protection afforded noncommercial speech. A company has the full panoply of protections available to its direct comments on public issues, so there is no reason for providing similar constitutional protection when such statements are made in the context of commercial transactions. Advertisers should not be permitted to immunize false or misleading product information from government regulation simply by including references to public issues.

463 U.S. at 68, 103 S.Ct. at 2881, 77 L.Ed.2d at 478 (footnotes and citations omitted).

****1321** [1] [2] [3] Finally, the *Bolger* Court summarized the process of determining what protection is available for a particular instance of commercial speech:

> "The protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation." *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. [557] at 563, 100 S.Ct. 2343 [2350], 65 L.Ed.2d 341 [ (1980) ]. In *Central Hudson* we adopted a four-part analysis for assessing the validity of restrictions on commercial speech. First, we determine whether the expression is constitutionally protected. For commercial speech to receive such protection, "it at least must concern lawful activity and not be misleading." Id., at 566, 100 S.Ct. 2343 [2351], 65 L.Ed.2d 341. Second, we ask whether the governmental ***219** interest is substantial. If so, we must then determine whether the regulation directly advances the government interest asserted, and whether it is not more extensive than necessary to serve that interest. Ibid.

463 U.S. at 68-69, 103 S.Ct. at 2881, 77 L.Ed.2d at 478-79.[5]

Our first task, thus, is to determine whether the speech activity in this case is commercial or noncommercial; then we must apply the four-part test articulated in *Bolger*.

Perhaps there is no more difficult problem in the area of commercial speech than to define what distinguishes commercial from noncommercial speech. Justice Stevens points out in his concurring opinion in *Bolger* that "we must be ***220** wary of unnecessary insistence on rigid classifications, lest speech entitled to 'constitutional protection be inadvertently suppressed.' " 463 U.S. at 81, 103 S.Ct. at 2888, 77 L.Ed.2d at 487. Justice Stevens goes on:

> I agree, of course, that the commercial aspects of a message may provide a justification for regulation that is not present when the communication has no commercial character. The interest in protecting consumers from commercial harm justifies a requirement that advertising be truthful; no such interest

> applies to fairy tales or soap operas. But advertisements may be complex mixtures of commercial and noncommercial elements: the noncommercial message does not obviate the need for appropriate commercial regulation ...; conversely, the commercial element does not necessarily provide **1322 a valid basis for noncommercial censorship.

*Id.*

In this case, as in *Virginia Pharmacy* and *Bolger*, the speech has both an informational and a commercial character. The informational aspect is that potential customers are customarily told something of the provisions of a typical insurance policy, of ways in which the insurance company's interest may not coincide with the interests of the policyholder, and of some actions which need to be taken under the typical policy to protect the policyholder's interests. The commercial aspect is that the public adjuster or the public adjuster solicitor is attempting to sell his services. A similar situation arose in *Bolger*, where informational pamphlets accompanied advertisements for contraceptives. One of these pamphlets, entitled "Condoms and Human Sexuality," referred to the seller's brand of condoms by name; the other, "Plain Talk About Venereal Disease," referred to condoms only generically except for a reference on the last page which identified the seller as a distributor of a particular brand of prophylactics. The Court concluded that although no single feature of the informational pamphlets may have compelled the conclusion that they were commercial, the combination of the fact that they were *221 conceded to be advertisements, that they made reference to a specific product, and that they were economically motivated supported the conclusion that the informational pamphlets were commercial speech. 463 U.S. at 66-67, 103 S.Ct. at 2879-80, 77 L.Ed.2d at 477-78.

[4] In the present case, as in *Bolger*, the speech advertises the services of public adjusters as well as informs the potential customer; the speech makes reference to a particular service to be performed by the public adjuster; and it is economically motivated. Keeping in mind Mr. Justice Stevens' concern that commercial speech may not be so easy to distinguish from noncommercial speech in all cases, we conclude, as did the *Bolger* Court, that the speech at issue in this case is commercial. [6]

Next, under the four-part test mentioned earlier, our inquiry is whether the expression is constitutionally protected. As a threshhold matter, commercial speech deserving of constitutional protection must "concern lawful activity and not be misleading." The Commonwealth expresses the concern in this case that the speech at issue is misleading and that it may be used to perpetrate a fraud, particularly if it occurs immediately after a disaster, when the property owner may be vulnerable to overreaching. That some public adjusters and public adjuster solicitors may mislead potential customers does not, of course, establish that all persons in the public adjusting business commit fraud. In fact, in the absence of evidence that the overwhelming volume of public adjusting activity in Pennsylvania is based on misleading speech, we will treat public adjusting as a lawful business activity, just as we would any other business activity, which may be subject to abuse by a few individuals. *See* p. 1321, n. 5 supra. The solicitations involved in this case, therefore, are lawful activity which *222 have not been shown on this record to be pervasively misleading. [7]

**1323 Next, we must ask whether the governmental interest in regulation is substantial. It is self-evident that the protection of consumers from misleading and fraudulent business activity and the preservation of the scene of a disaster for criminal investigation are substantial governmental interests.

Having said this, however, we must determine whether the regulation directly advances the governmental interest and, lastly, whether it is not more extensive than necessary. Arguably, the ban on speech does advance the government's stated interest, for if there is no commercial speech activity, there cannot possibly be any fraud or misleading, but the real question is whether the regulation is more restrictive than it need be.

Because public adjusters and public adjuster solicitors are licensed and must satisfy the Insurance Commissioner that *223 they will "transact business ... in such manner as to safeguard the interest of the public," 63 P.S. § 1602(6), and because conduct which indicates untrustworthiness may result in the revocation of the license, 63 P.S. § 1606(a)(1-13), it is our view that the regulation of misleading and fraudulent behavior may be more directly accomplished through the enforcement of anti-fraud provisions of the act than through the prior restraint of speech. Moreover, the public is protected by the fact that public adjusters and public adjuster solicitors must be bonded, by the fact that their sales contracts must be

in a form approved by the Insurance Commissioner, and by the fact that any person entering into a contract with a public adjuster or public adjuster solicitor may rescind the contract within four days of signing. 63 P.S. § 1605.

Public adjusters and public adjuster solicitors may be fined or have their licenses suspended or revoked for a myriad of reasons, including "material misrepresentation of the terms and effect of any insurance contract; engaging in ... any fraudulent transaction with respect to a claim or loss ...; misrepresentation of the services offered or the fees or commission to be charged; conversion; violation of any rule promulgated under the act; and the commission of fraudulent practices. 63 P.S. § 1606(a)(1-13). Furthermore, a violation of any provision of the act shall be a misdemeanor and subject to a fine of $500 to $1,000 for each violation, 63 P.S. § 1607, and the provisions of the statute are supplementary to all other civil and criminal remedies. 63 P.S. § 1608(c). It is plain that persons who have been victimized by misleading speech of public adjusters or public adjuster solicitors have at their disposal a number of administrative, civil and criminal remedies. In light of this arsenal of remedies, it is our view that the imposition of prior restraints on the speech of public adjusters and public adjuster solicitors is unjustified.

The Commonwealth, of course, asserts that the restrictions involved in this case are only time, place and manner restrictions, since public adjusters and public adjuster solicitors *224 are not banned altogether from soliciting business. Although it is true that the restriction in this case affects only twenty-four hours, the period of time immediately following the disaster may be the only time during which the property owner can be located before moving to an unknown address because of the disaster which has affected his property. Balancing the governmental interest of protecting persons who have just suffered the trauma of losing their property from potentially misleading speech of *some* public adjusters against that of the public adjusters and public adjuster solicitors in informing a likely prospect of the nature and value of their services, we find that the private business **1324 interests are more significant in light of the other remedies available, should there be fraud or misleading speech. In short, the Commonwealth's goals in this case are more appropriately accomplished through regulation of practices than through prior restraint of speech.

As we stated earlier, our approach in this case has been to follow the federal analysis as set out by the United States Supreme Court in order to determine whether the statute meets the minimum federal standards as required by that Court. It is axiomatic, of course, that the states, once they have complied with federal constitutional requirements, are free to impose their own more stringent requirements pursuant to their own constitutions.

The federal analysis requires that a court determine, ultimately, whether the regulation is more extensive than necessary to accomplish a legitimate, important governmental purpose. Fundamentally, this determination requires a balancing of the interests of government against those of the entity or individual whose speech has been regulated, and this balancing will depend upon the perspective of the balancer. Reasonable minds can disagree as to how extensive any given regulation should be with respect to its purpose, and the perspective of the United States Supreme Court on this issue may not be the same as that of a court *225 within a state jurisdiction. The differences of opinion may be based in part on differing jurisprudential theories of the function and responsibilities of government, but they may be based also on a regional, versus a national perspective.

Our perspective is that in the commercial speech area, we should tread carefully where restraints are imposed on speech if there are less intrusive, practicable methods available to effect legitimate, important government interests. Here, the balance of interests should be resolved in favor of the challenger because less intrusive methods were available to effect the governmental objectives.

We hold, therefore, that the Pennsylvania Constitution, Article I, Section 7, will not allow the prior restraint or other restriction of commercial speech by any governmental agency where the legitimate, important interests of government may be accomplished practicably in another, less intrusive manner. Since the legitimate governmental goals in this case could be accomplished by enforcement of civil, criminal and administrative remedies already in place, Commonwealth Court was in error in upholding the validity of the statute's restriction on speech.

The order of Commonwealth Court is reversed.

**III.**

STOUT, J., did not participate in the consideration or decision of this case.

**All Citations**

518 Pa. 210, 542 A.2d 1317, 56 USLW 2689

Footnotes

1 In addition to its appeal, The Bureau has petitioned this Court to restore its injunction pending appeal. Although the briefs received in this case indicate that the parties have directed most of their attention to the question of whether the Bureau's injunction should be reinstated pending appeal, because we are now addressing the merits of the case, not the interim question of injunction, there is no need to decide whether the injunction should be reissued.

2 Although purely commercial speech was unprotected prior to 1976, there were indications as early as 1973 that this might change. In *Pittsburgh Press v. Human Relations Commission*, 413 U.S. 376, 93 S.Ct. 2553, 37 L.Ed.2d 669 (1973) the Court upheld an ordinance prohibiting newspapers from advertising employment opportunities which were categorized by sex on the grounds that the discriminatory hirings proposed by the advertisements were illegal. While the Court acknowledged that the advertisements were "commercial speech," which was regulatable under the law at that time, it declined to uphold the ordinance on that ground.

Then in 1975 the Court took another step towards granting some First Amendment protection to commercial speech in a case in which it struck down a Virginia statute which made illegal the circulation of a publication which encouraged abortion. In that case, a New York referral agency placed an ad in Virginia indicating that abortions were legal in New York and that its referral services were available. *Bigelow v. Virginia*, 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975). In *Bigelow*, however, the issue of commercial speech was still not squarely before the court because the advertisement in question contained not only commercial information, but also noncommercial information of clear public interest which was entitled to First Amendment protection in its own right.

It was not until 1976, therefore, that the issue of purely commercial speech came squarely before the Court in *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976), where the issue was simply whether a pharmacist was entitled to advertise the prices of his prescription drugs.

3 The Court held that the consumer group had standing to challenge the statute because the protection afforded by the First Amendment "is to the communication, to its source and to its recipients, both.... If there is a right to advertise, there is a reciprocal right to receive the advertising, and it may be asserted by these appellees." *Id.* at 757, 96 S.Ct. at 1823, 48 L.Ed.2d at 355.

4 This is consistent with the Court's statement in *Virginia Pharmacy*, supra, that although commercial speech may perform the important function of facilitating the flow of information, some regulation is permissible. See text, supra. *See also Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 638, 105 S.Ct. 2265, 2275, 85 L.Ed.2d 652, 664 (1985).

5 We note our agreement with the Bureau that in cases involving the constitutional challenge to a restriction on commercial speech which is not false or deceptive, "The party seeking to uphold a restriction on commercial speech carries the burden of justifying it." *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, n. 20, 103 S.Ct. 2875, n. 20, 77 L.Ed.2d 469, 480, n. 20. *See also Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 105 S.Ct. 2265, 85 L.Ed.2d 652, 666, 670 (1985).

The Commonwealth claims, in effect, that some speech at issue in this case has been and might in the future be false or deceptive. There is no evidence, however, that public adjuster speech within twenty-four hours of a disaster is so pervasively false that contacts within this time frame could generally be characterized as false or deceptive. Every business activity is occasionally abused by dishonest individuals, but that does not make business activity generally false or deceptive. For these reasons, it is our view that the record does not support the claim that the speech at issue was false or deceptive, and since the case involves commercial speech, the Commonwealth should have had the burden of justifying the restriction on speech. Commonwealth Court, therefore, was in error in applying the traditional standard of review for constitutional challenges to statutes: viz., that "enactments of the General Assembly enjoy a strong presumption of constitutionality with all doubts resolved in favor of sustaining the constitutionality of the legislation."

If Commonwealth Court's analysis were accepted, it would have the effect of emasculating the four-part test just cited from *Bolger*. Future Pennsylvania courts handling commercial speech cases, therefore, should be careful to require the party seeking to uphold the restriction to justify it, and not, in this area at least, to apply any presumptions in favor of constitutionality. If the case involves a claim that the commercial speech activity in question is false or deceptive, the court must receive evidence on that issue and, depending on its determination as to whether falsehood and deception

are involved, apply the appropriate standard of proof. If the court is satisfied that the speech in question is false or deceptive, then the usual presumption in favor of constitutionality of the regulation would apply.

6 For a discussion of problems associated with the classification of commercial and noncommercial speech, *See* Farber, "Commercial Speech and First Amendment Theory," 74 N.W.U.L.R. 372, 377 (1979).

7 The Commonwealth relies in part on *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978) to argue that the solicitations involved in this case should be regulatable. In *Ohralik* an attorney personally visited accident victims for the purpose of offering his professional services. As part of its rationale in upholding the Ohio restriction against such solicitations, the Court stated:

> Unlike a public advertisement, which simply provides information and leaves the recipient free to act upon it or not, in-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection. The aim and effect of in-person solicitation may be to provide a one-sided presentation and to encourage speedy and perhaps uninformed decisionmaking; there is no opportunity for intervention or counter-education by agencies of the Bar, supervisory authorities, or persons close to the solicited individual. The admonition that "the fitting remedy for evil counsels is good ones" is of little value when the circumstances provide no opportunity for any remedy at all.

*Id.* at 457, 98 S.Ct. at 1919, 56 L.Ed.2d at 454 (footnotes omitted).

While this statement of the evils of personal solicitation is compelling, it must be remembered that *Ohralik* involved the actions of an attorney. Because attorneys are often highly skilled and persuasive, because they owe a fiduciary duty to their clients, and because attorneys, as officers of the court, have traditionally been held to a standard of conduct that precludes the *appearance* of impropriety as well as actual impropriety, the restrictions of the *Ohralik* decision are not applicable here.

**End of Document**

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

2019

| | | |
|---|---|---|
| NATIONAL FIRE ADJUSTMENT COMPANY, INC., | ) | |
| Plaintiff | ) | |
| v. | ) | No. 1:18-cv-00008-LEW |
| ERIC A. CIOPPA, SUPERINTENDENT OF THE MAINE BUREAU OF INSURANCE, | ) | |
| Defendant | ) | |

**DECISION AND ORDER**

The Plaintiff, National Fire Adjustment Company, Inc., seeks a declaratory judgment stating that the Defendant, Eric Cioppa, cannot enforce 24-A M.R.S. § 1476, which requires that public adjusters adhere to a 36-hour waiting period before soliciting business from Maine citizens or offering a contract for public adjustment services. According to Plaintiff, the statute violates Plaintiff's first amendment speech rights. The parties request a judgment on a stipulated record.

**BACKGROUND**

National Fire Adjustment Company, Inc. ("Plaintiff" or "NFA") provides licensed public insurance adjustment services for clients who have suffered property damage in the State of Maine. *Stip. Facts* ¶ 14. NFA holds an active resident adjuster license from the State of Maine's Department of Professional and Financial Regulation, Bureau of

Insurance. *Id.* ¶ 15.

It is the nature of NFA's business to enter into contracts with property owners after the property owners suffer a loss insured by an insurance company. When a property owner retains NFA's services, NFA's employees provide loss-adjustments services to the property owner, which services, ideally, will provide the property owner with a method for adjusting (placing a value on) the insured loss that is more favorable to the property owner than the method used by adjusters employed or contracted by the property owner's insurance company. By providing this service, NFA's adjusters (sometimes called "public adjusters") help ensure that property owners settle coverage claims with their insurance companies for fair value. *Id.* ¶ 6. In return for their services, public adjusters charge a fee to the policyholder. The fee is usually a percentage of the overall damage recovery paid by the insurance company. *Id.*

Since 1997, through the Maine Insurance Code, the State of Maine has restricted the ability of public adjusters to solicit business within a 36-hour window following a loss. In its current form,[1] the so-called "36-Hour Rule" reads as follows:

> **1. Solicitation.** An adjuster seeking to provide adjusting services to an insured for a fee to be paid by the insured may not solicit or offer an adjustment services contract to any person for at least 36 hours after an accident or occurrence as a result of which the person might have a potential claim.

[1] The Legislature amended the 36-Hour Rule both before and after its initial passage. In its initially proposed form, the Rule stated that public adjusters "may not solicit or otherwise offer adjustment services." Stip. Facts ¶ 35, citing L.D. 335, § 1 (118th Legis. 1997). As first enacted, the Rule stated that public adjusters "may not solicit or offer an adjustment services contract." *Id.* ¶ 37, citing Comm. Amend. A to L.D. 335 (118th Legis. 1997).

24-A M.R.S. § 1476(1).[2]

When it reviewed the merits of the proposed legislation, and in the course of deliberations that resulted in amendments to the 36-Hour Rule, the Legislature did not consider or rely on any factual findings of fraudulent, misleading, intrusive, or otherwise concerning communications by public adjusters. *Stip. R.* ¶ 43.

Defendant Eric Cioppa is the Superintendent of the Maine Bureau of Insurance. *Id.* ¶ 24. The Maine Bureau of Insurance is one of five agencies within the State of Maine's Department of Professional and Financial Regulation. *Id.* ¶ 25. The Maine Bureau of Insurance regulates the State's insurance industry, including by licensing insurance adjusters and imposing discipline for violations of the State's insurance laws. *Id.* ¶ 26. In addition to other duties, Superintendent Cioppa is charged with protecting consumers from misleading or fraudulent business activities. *Id.* ¶ 27.

Adjusters in Maine must be licensed and are governed by a comprehensive state regulatory scheme to protect the public from misleading or fraudulent business activities. *Id.* ¶¶ 28-29. Among other tools in his enforcement arsenal, Superintendent Cioppa is authorized to revoke, suspend, place on probation, or otherwise limit the licensure of adjusters, and to impose civil penalties and restitution orders, for violations of any law

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[2] In addition to imposing the 36-Hour Rule, the statute also provides that a contract for public adjuster services may be rescinded by the property owners within two business days of its execution:

> 2. Contract provision. Any such adjustment services contract must contain a provision, prominently printed on the first page of the contract, stating that the person contracting with the adjuster has the option to rescind the contract within 2 business days after the contract is signed.

*Id.* § 1476(2). Plaintiff does not challenge the contract rescission provision.

enforced or rule adopted by the Superintendent. *Id.* ¶¶ 29-33.

Superintendent Cioppa has imposed discipline on public adjusters, including suspensions from practice and civil penalties, for violations of the 36-Hour Rule. *Id.* ¶ 46. For example, in October 2012, Superintendent Cioppa suspended a public adjuster's license for 30 days and ordered him to pay a $500 civil penalty because he had violated the 36-Hour Rule. The adjuster left two telephone messages concerning his services for property owners who experienced a fire-related loss. *Id.* ¶ 47.

NFA has two employees who work as adjusters in Maine, both of whom are duly-licensed. *Id.* ¶ 17. Superintendent Cioppa is not aware of any evidence that NRA's Maine-based adjusters have engaged in any false or misleading statements in their communications with clients regarding NFA's public insurance adjustment services. *Id.* ¶ 23. NFA has instructed its adjusters in Maine to adhere to the 36-Hour Rule. *Id.* ¶ 48. NFA's public adjusters in Maine are presently adhering to the 36-Hour Rule to avoid discipline by the Superintendent. *Id.* ¶ 49. NFA's public adjusters in Maine have created time-keeping and alert systems to ensure that they wait the full 36 hours after a fire before contacting a property owner. *Id.* ¶ 50.

In addition to the foregoing stipulated facts, the parties have stipulated to the following facts concerning the impact of the 36-Hour Rule on public insurance adjustment services. Accordingly, the Court accepts it as established that the first 36 hours after a fire are a critical time for public adjusters to communicate with potential clients about their services; that the first 36 hours after a fire can be stressful, hectic, and traumatic for property owners who have suffered damage; that property owners may relocate to

temporary housing immediately after a fire loss, so that there may be a very short period of time for a public adjuster to locate and communicate with the policyholder; that property owners may agree to cleaning or tear-down services immediately after suffering a property loss, impeding the ability of public adjuster to assess the value of the loss; and that, by logical extension, NFA public adjusters' adherence to the 36-Hour Rule is causing NFA's public adjusters to lose business on an ongoing basis. *Id.* ¶¶ 7-12, 51.

Performing public insurance adjusting services for policyholders in accordance with Maine law is a lawful business activity and is not inherently misleading. *Id.* ¶ 13.

**DISCUSSION**

Plaintiff argues the 36-Hour Rule violates the First Amendment because it is a "content- and speaker-based restriction on speech [that] is presumptively unconstitutional viewpoint discrimination." Pl.'s Mot. for Disposition of Liability Issues by Judgment on a Stip. R. at 2, ECF No. 21 ("Pl.'s Mot."); *see also* Complaint ¶¶ 4-5. In the alternative, Plaintiff argues the Rule imposes burdens that either do not advance the State's interest or sweep more broadly than necessary to achieve the stated interest. Pl.'s Mot. at 2; Complaint ¶ 44. Defendant argues the 36-Hour Rule directly advances a substantial governmental interest and is no more burdensome than is necessary to serve that interest. Defendant's Mem. of Law for Disposition on a Stip. R. at 7 ("Def.'s Mem.").

The First Amendment, made applicable to the States by the Fourteenth Amendment, prohibits the States from, among other things, abridging the freedom of speech. *Janus v. Am. Fed'n of State, Cnty, and Mum. Emp.*, 138 S. Ct. 2448, 2463 (2018). Persons subjected to a deprivation of their speech rights may, pursuant to 42 U.S.C. § 1983, bring an action

in federal court to obtain declaratory or injunctive relief against the official charged with the enforcement of a state law that abridges the freedom of speech.

So called "commercial speech," varyingly defined in Supreme Court precedent but understood to encompass speech uttered to market goods and services, is protected under the First Amendment. *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 762 (1976). More precisely, providers of good and services and consumers are entitled to engage in commercial speech activity without unduly burdensome interference by the government. *Id.* at 756, 762-64.

> Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.

*Id.* at 765. As set out in *Virginia Board of Pharmacy*, Plaintiff's interest in marketing its services to prospective clients is, beyond debate, deserving of protection under the First Amendment. Moreover, the stipulated facts demonstrate that Plaintiff's speech is in fact burdened by Maine's 36-Hour Rule. Plaintiff thus has standing to press the claim. *See Van Wagner Boston, LLC v. Davey*, 770 F.3d 33, 37 (1st Cir. 2014); *Ramirez v. Sanchez Ramos*, 438 F.3d 92, 98 (1st Cir. 2006).[3]

As an initial step in analyzing whether the 36-Hour Rule complies with the First

[3] I make the observation concerning standing only because Defendant appears to contest the issue, albeit obliquely. Def.'s Mem. at 7 & n.4.

Amendment, I must consider whether the Rule should be labeled "content-based" or "content-neutral." Plaintiff, hoping for application of strict scrutiny, advocates the former label. Pl.'s Mot. at 7-10. Defendant, seeking intermediate scrutiny, nominates the latter. Def.'s Mem. at 10-13.

Content-based regulations burden the messenger because his or her message is disfavored. *E.g.*, *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018) (invalidating state law that compelled licensed pregnancy-related clinicians to convey a message preferred by the state); *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015) (invalidating municipal code that categorized signs based on the type of information conveyed, affording greater of lesser permission on that basis). Content-based regulations are presumptively violative of expressive rights and will stand only where the regulation is narrowly tailored to serve a compelling state interest. *Becerra*, 138 S. Ct. at 2371; *Reed*, 135 S. Ct. at 2231. By comparison, content-neutral regulations burden the messenger to advance an interest other than message bias. *Rideout v. Gardner*, 838 F.3d 65, 71-72 (1st Cir. 2016), *cert. denied*, 137 S. Ct. 1435 (2017) (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). "Content-neutral restrictions are subject to intermediate scrutiny, which demands that the law be 'narrowly tailored to serve a significant governmental interest.'" *Id.* (quoting *Rock Against Racism*, 491 U.S. at 791). The distinction between a regulation narrowly tailored to a compelling interest, and one narrowly tailored to a significant interest, is that the latter is not required to be "the least restrictive or least intrusive means" of serving the ends in question. *Id.* (quoting *Rock Against Racism*, 491 U.S. at 798).

Plaintiff argues the 36-Hour Rule is content-based because it disfavors the expressive activity of public adjusters as compared to the expressive activity of insurance company adjusters, who do not have to wait 36 hours before engaging in loss adjustment activity. Pl.'s Mot. at 7-8. I am not entirely persuaded that the 36-Hour Rule imposes any message bias as between public adjusters and insurance company adjusters. As Defendant observes, Def.'s Mem. at 8, public adjusters and insurance company adjusters stand in different positions because the insurance company adjusters work at the invitation of the property owner. Should an insurance company adjuster arrive and communicate with the property owner within 36 hours of a covered loss, he or she will do so in fulfillment of a contractual obligation to do so, not opportunistically to solicit a contract for adjustment services. On the other hand, it is at least conceivable that the insurance company adjuster could take steps that compromise, or possibly even settle, a claim for coverage within the 36-hour window, while the property owner is presumed to be experiencing a great deal of emotional disturbance. Consequently, it is at least conceivable[4] that the 36-Hour Rule might not be even-handed in some instances because, oddly enough, it sweeps too narrowly by not constraining insurance company adjuster speech.

Although I am not convinced on the basis of the stipulated record that the 36-Hour Rule was designed to favor one speaker over another, as was the case in *Virginia Board of Pharmacy* (invalidating restrictions on pharmacy price advertisement), *Reed* (invalidating

[4] The parties have stipulated that insurance adjusters have been known to take steps within the 36-hour window that compromise the ability of others to fully evaluate the extent of a loss.

message-based sign regulation), and *Sorrell v. IMS Health*, 564 U.S. 552 (2011) (invalidating content- and speaker-based burdens that restricted only commercial behavior involving the exchange of information), it nevertheless strikes me as an inescapable conclusion that the Rule is the product of a paternalistic distaste for commercial speech[5] that transpires when one party to a communication is presumptively in a state of emotional upset. Given this basic underlying reality, asking whether the Rule is designed to regulate content or is a neutral regulation directed at commerce or conduct[6] is, frankly, like asking whether a new penny is stamped with Lincoln's head or the Union shield. There is room for both stamps, it so happens.[7]

As late as the middle part of the last century the Supreme Court likely would not have questioned the authority of the States to shield consumers from the perceived harms of a well-timed marketing pitch, *cf. Breard v. Alexandria*, 341 U.S. 622, 641-42 (1951) (sustaining conviction for violation of anti-solicitation ordinance that prohibited solicitors, peddlers, hawkers, itinerant merchants, and transient vendors from going to private residences uninvited); *Valentine v. Chrestensen*, 316 U.S. 52, 55 (1942) (sustaining prohibition on the distribution of handbills containing "commercial advertising matter"), but over the last 70 years there has been such a decided pendulum shift that one cannot

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[5] One of the greatest curiosities of the jurisprudence concerning commercial speech is that "commercial speech" is itself a pejorative term that conveys a measure of bias.

[6] "It is also true that the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011).

[7] In *Reed*, the Supreme Court observed that "a content-based law that restricted the political speech of all corporations would not become content neutral just because it singled out corporations as a class of speakers." 135 S. Ct. at 2230 (citing *Citizens United v. FEC*, 558 U.S. 310, 340-41 (2010)).

help but surmise that a majority of the justices on the Supreme Court are of the view that the Free Speech Clause was as much inspired by de Gournay as by Milton, Locke, or Mill. Given this pendulum shift, I fail to see how Defendant can expect me to articulate why the 36-Hour Rule is anything other than a vestige of an earlier era's bias against commercial speech in general. However, the other stamp fits too, and the Supreme Court has held that a state's interest in preventing a harm can be exercised in a manner that prevents a particular message from being received in the first place. *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 631 (1995) (applying intermediate scrutiny after observing that "the harm posited by the Bar is as much a function of simple receipt of targeted solicitations within days of accidents as it is a function of the letters' contents"). Consequently, I will apply the intermediate scrutiny test set forth in *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*, 100 S. Ct. 2343 (2005).

The *Central Hudson* test has four parts:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

447 U.S. at 566. The parties agree that the speech of public adjusters is lawful and not misleading. The remaining issues are whether the government interest is substantial, and, if so, whether the regulation advances the interest without overburdening legitimate expression.

I find the interest to be "substantial." Defendant explains that the interests advanced

by the 36-Hour Rule are professional regulation and consumer protection. Def.'s Mem. at 8-9, 16. "Most notably," says Defendant, the Rule protects the privacy of "vulnerable" property owners by sparing them the indignity of "cold-call solicitations." *Id.* at 8-9, 14. While many philosophers would say that intellect is without purpose in the absence of passion, there are those who would also allow that strong passions are the enemy of reason. Most people can imagine, if they have not experienced, how an extreme misfortune can temporarily undermine the ability to make sound decisions. Additionally, the Supreme Court has held, specifically, that "targeted solicitations within days of accidents" are a "harm" that the State of Florida could redress in the context of attorney regulation.[8] *Went For It, Inc.*, 515 U.S. at 631. As resilient as the people of Maine may be, I cannot say they are any less susceptible to "targeted solicitations within days of accidents" than the people of Florida. Moreover, I think that common sense supports the finding that the average person would prefer the solicitation mail at issue in *Went for It*, to the cold-call knock at the door that is at issue in this case.

Defendant also argues the 36-Hour Rule is particularly weighty because it seeks to maintain professional standards. A speech-related regulation of "professional conduct" will be tolerated if it imposes only an "incidental" burden on speech activity. *Becerra*, 138

[8] Plaintiff says Defendant's showing on the interest issue is inadequate. Although the opinion expressed in *Breard* as to the constitutionality of absolute prohibition on cold-call solicitations has been discredited, the *Breard* Court took it as a given that the public, as a general rule, harbors an aversion to cold-call solicitation. 341 U.S. at 626-27 & n.3. *See also Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 627-28 (1995) (observing that the Bar mustered an "anecdotal record . . . noteworthy for its breadth and detail," but also stating, "we do not read our case law to require that empirical data come to us accompanied by a surfeit of background information. . . . [and] are satisfied that the ban on direct-mail solicitation in the immediate aftermath of accidents . . . targets a concrete, nonspeculative harm"). Plaintiff has not persuaded me that it would be improper for me to similarly credit Defendant's assertions about the desire of many property owners that the immediate aftermath of a fire loss not include cold-call solicitations.

S. Ct. at 2373. For example, in *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978), the Supreme Court upheld the imposition of professional sanctions against a lawyer who engaged in personal solicitation of accident victims at the hospital and in their homes. The Court specifically held "that the State – or the Bar acting with state authorization – constitutionally may discipline a lawyer for soliciting clients in person, for pecuniary gain, under circumstances likely to pose dangers that the State has a right to prevent." *Id.* at 449. Although the rationale for the holding rested heavily on "the profession's ideal of the attorney-client relationship," *id.* at 454, the solicitation restriction in *Ohralik* was also absolute, *id.* at 453 n.9, and was not limited as to time or place, as it is here. Moreover, the underlying interest, said to be the prohibition of barratry, champerty, and maintenance, *id.* at 454 n.11, is not entirely absent from the public adjuster's business formula.[9] For these reasons, in my estimation, the State's interest in professional regulation is not insubstantial in this case.

Finally, I must consider whether the 36-Hour Rule advances the interest in question, and whether it is permeable enough to stand against the first amendment gale whipped up by Plaintiff. On the first of these issues, I conclude that the Rule advances a privacy interest, although some of the argument advanced by Defendant is not helpful on that point (see below). In addition, the Rule advances the interest in professional regulation and consumer protection; specifically, the creation of a buffer period in which property owners

[9] "The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically be 'officers of the courts.'" *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975).

cannot compromise their rights through a contingent-fee contract. Therefore, I reach the issue of permeability.

Defendant argues the 36-Hour Rule is exceptionally permeable to speech activity. Specifically, Defendant states:

> The 36-Hour Rule limits only the soliciting or offering of an "adjustment services contract . . . to an insured for a fee" during the 36-hour period. The statute does not prohibit a public adjuster from communicating with victims (e.g., via direct discussion or dissemination of generic best-practices information; responding to consumer-initiated contacts; engaging in promotional advertising or untargeted mailers to the public; etc.)—so long as the adjuster does not solicit or offer a fee-for-service contract during that time. Further, the public adjuster would be unimpeded in asking the victim if it would be okay for the adjuster to take pictures of the scene, or to recommend that the victim preserve certain things (i.e., not to immediately agree with the company adjuster to cleaning or tear-down services).

Def.'s Mem. at 9-10.[10] In reply, Plaintiff argues that the actual language of the 36-Hour Rule is not that permissive. Pl.'s Mot. at 9. Plaintiff has a point. The Rule states that public adjusters "may not solicit or offer an adjustment services contract." 24-A M.R.S. § 1476(1). The Legislature's use of the disjunctive "or" reflects its understanding that solicitation is not the same thing as making an offer. Black's Law Dictionary tells us that the term "solicitation" includes "[a]n attempt or effort to gain business," and provides as an example attorney advertisements. Black's Law Dictionary (10th ed. 2014).

It is an age-old maxim that a statute must be construed according to its ordinary meaning, "for were a different rule to be admitted, no [person], however cautious and

[10] Defendant's argument that the Rule allows for so much communication is incompatible with Defendant's argument that the rule promotes a privacy interest. However, I do not credit Defendant's suggestions as to the amount of speech activity permitted by the Rule.

intelligent, could safely estimate the extent of his [or her] engagements, or rest upon his own understanding of a law, until a judicial construction ... had been obtained." *Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 89–90 (1821). Consistent with this maxim, a Maine court construing the 36-Hour Rule would treat the question as one of law, would give the words "their plain and ordinary meaning," and would seek to avoid treating words and phrases as mere "surplusage." *Passamaquoddy Water Dist. v. City of Eastport*, 1998 ME 94, ¶ 5, 710 A.2d 897, 899. Based on my reading of the 36-Hour Rule, the ban on "solicitation" is exceedingly broad and acts as a powerful deterrent to even educational outreach activity within the 36-hour window. In my view, it is extremely unlikely that the average property owner through an exercise of common sense would regard educational outreach activity as anything other than solicitation. If offense was taken by a property owner, and if Defendant received a complaint, it seems to me that Defendant would be equally hard-pressed to draw clear lines between educational speech and solicitation speech, especially where the speaker is only present on the scene to serve a commercial interest. In any case, Plaintiff's speech rights should not rest precariously on how Defendant chooses to characterize certain speech when the distinction between the two, in the world of three dimensions, appears to be tissue thin. I expect that Defendant likewise would prefer a less slippery footing upon which to ground his enforcement and disciplinary actions. The benefit of giving words in the statute their plain and ordinary meaning, is that the public charged with knowledge of and compliance with its prohibitions do not need to guess correctly as to the meaning that the official charged with its enforcement may give it. The people of Maine are governed by laws, not by the intention of legislators or the state officials charged with enforcement

of the laws. The text of the statute is the law, even if, as Defendant urges, it is not what was intended.[11] Were it otherwise, it would be like emperor Caligula posting edicts high up on the pillars, so that they could not easily be read.

In short, it stands to reason that Plaintiff does not believe it can communicate with property owners to share its knowledge or describe its services during the 36-hour period without getting scorched. Moreover, given Defendant's argument, it is apparent that Defendant perceives the need to make some allowances for the communication of information related to loss adjustment services. Defendant has also agreed to a stipulation that the burden is significant from an economic perspective. Still, it does not necessarily follow that Plaintiff's inability to strike while the iron is hot is offensive to the Free Speech Clause of the First Amendment.

While I accept that the 36-Hour Rule imposes an opportunity cost for Plaintiff – the parties have stipulated to that effect – I nevertheless conclude that, to the extent the 36-Hour Rule prohibits the actual offer of a public adjustment contract, the 36-hour delay is an "incidental" imposition that serves a substantial consumer protection interest. However, I also conclude that the ban on all solicitation activity, temporary as it may be, is an excessively paternalistic prior restraint on speech and, as such, sweeps more broadly than

[11] I do not find any support in the record that there is a difference between the language used in the statute and what the legislature intended. Even if there was such evidence, I would not credit it in the least. To the extent that there is any difference between what the legislature intended, assuming that such a thing is ever knowable, and the plain language of the law it passed, that is a problem for the political branch to address. The Court is not equipped with the metaphysical ability to divine the potpourri of the legislators' individual and collective intent as to what they thought the bill might be during debate, committee markup and final passage. Even if armed with such an ability, it would be distinctly undemocratic to rely on the Court, fingers crossed, as the Oracle of Delphi to reveal what was intended by the law even if it flies in the face of what the law says.

is necessary to serve the stated interests. Public adjusters are not attorneys subject to the heightened professional standard at work in *Ohralik*, and their services are lawful and not inherently misleading. Moreover, the privacy concern has been given little weight in other cases involving bans on direct solicitation activity. In my view, the interests in professional regulation and privacy do not support the temporary ban on solicitation speech. While it is understandable that many individuals would prefer not to receive solicitation of this kind shortly after suffering a loss, there are others who may welcome and benefit from the public adjuster's message. Those who are offended by such activity are, of course, free to express their view and turn away unwelcome callers. Our free speech rights demand a certain degree of personal fortitude.

Finally, in terms of the interest in consumer protection, prohibiting the offer of contract for 36 hours and allowing for rescission for another 48-hours is a fully adequate means of serving that interest.[12] It is not necessary to ban all solicitation as well. Permitting lawful solicitation that is not inherently misleading, while prohibiting conduct that involves closing a contract, in my view achieves the balance commanded by the Free Speech Clause or, more precisely, the intermediate-scrutiny, commercial-speech wax applied to the Free Speech Clause (and discussed in three concurring opinions) in *Central*

[12] Other courts have similarly overturned state laws restricting solicitation activity by public adjusters. *See Atwater v. Kortum*, 95 So.3d 85, 87 (Fla. 2012) (concluding that a 48-hour ban on solicitation and any "contact" was excessive); *Ins. Adjustment Bureau v. Ins. Comm'r for Commonwealth of Pa.*, 542 A.2d 1317, 1323-24 (1988) (concluding that requirements of a bond, a form contract, a four-day rescission period, and a prohibition on misrepresentation were protection enough and invalidating a 24-hour ban on solicitation as an excessive prior restraint on speech).

*Hudson*. I therefore grant Plaintiff partial relief, solely with respect to the prohibition against solicitation.[13]

## CONCLUSION

Plaintiff's request for judgment on the stipulated record is granted in part and denied in part. The Court hereby declares as unconstitutional, in violation of the Free Speech Clause, that portion of 24-A M.R.S. § 1476(1) that prohibits solicitation of public adjuster services.[14]

**SO ORDERED.**

Dated this 8th day of January, 2018.

/s/ Lance E. Walker
**LANCE E. WALKER**
**UNITED STATES DISTRICT JUDGE**

[13] In fashioning a remedy, the Court can wield a carving knife rather than an axe. "Severability is a matter of state law," *R.I. Med. Soc'y v. Whitehouse*, 239 F.3d 104, 106 (1st Cir. 2001), and "Maine law mandates that the 'provisions of the statutes are severable,'" *IMS Health Corp. v. Rowe*, 532 F. Supp. 2d 183, 186 (D. Me. 2008) (quoting 1 M.R.S.A. § 71(8)). "An invalid portion of a statute or an ordinance will result in the entire statute or ordinance being void only when it is such an integral portion of the entire statute or ordinance that the enacting body would have only enacted the legislation as a whole." *Kittery Retail Ventures, LLC v. Town of Kittery*, 2004 ME 65, ¶ 18, 856 A.2d 1183, 1190. Here, the two prohibitions in the 36-Hour Rule are severable for purposes of remedy.

[14] The stipulated facts do not describe circumstances suggesting the need for injunctive relief at this time.

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## *MEMORANDUM*

TO: *Ronald J. Papa, SPPA, President, National Fire Adjustment Company, Inc.*

*FROM: Carol J. Garvan, Esq. & Valerie Z. Wicks, Esq., Johnson, Webbert & Young, LLP*

*RE: First Amendment Victory—NFA v. Cioppa, 1:18-cv-00008-LEW*

*DATE: March 6, 2019*

On January 8, 2019, Judge Lance E. Walker of the United States District Court for the District of Maine ruled that Maine's 36-hour ban on public adjusters' solicitation of customers is an unconstitutional restriction on free speech.[1] As a result of Judge Walker's ruling, public adjusters in Maine may now communicate directly with potential customers in the immediate aftermath of a loss without fear of violating Maine law.

The statute will now read as follows:

1. **Solicitation.** An adjuster seeking to provide adjusting services to an insured for a fee to be paid by the insured may not ~~**solicit or**~~ offer an adjustment services contract to any person for at least 36 hours after an accident or occurrence as a result of which the person might have a potential claim.[2]

By the statutory text, public adjusters no longer have any "wait time" after an accident or occurrence before they can contact, counsel, and otherwise communicate with

[1] *Nat'l Fire Adjustment Co., Inc. v. Cioppa*, No. 1:18-cv-00008-LEW, 2019 U.S. Dist. LEXIS 4857 (D. Me. Jan. 8, 2019).

[2] 24-A M.R.S. § 1476(1) (strike-through and emphasis added).

damage victims. Public adjusters must, however, still wait 36 hours after an accident or occurrence to offer adjustment services contracts to damage victims.

Going forward, public adjusters should be mindful of the distinction between solicitation and offering of contracts. Within the first 36 hours after an accident or occurrence, public adjusters may, for example, initiate direct discussions with potential customers about their services, provide advice to potential customers about engaging with insurance company adjusters, take part in educational outreach about public adjustment services, respond to consumer-initiated contacts, and engage in targeted promotional advertising to potential customers. Public adjusters may not, however, actually offer an adjustment services contract to potential customers until the 36-hour period has run. Put differently, public adjusters will be in compliance with 24-A M.R.S. § 1476(1) if they engage in solicitation of damage victims, but will run afoul of the statute if they actually offer or enter into public adjustment services contracts with damage victims within the 36-hour period after the loss.

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# Maine's "36-Hour Rule" Deemed Unconstitutional

Feb 05, 2019 By Merlin Law Group

MAINE, PUBLIC ADJUSTERS
Tags: Regulation, State Legislation

One of the strongest tools in an insured's arsenal is a good public adjuster. If lucky, most insureds will only suffer a property loss once or twice in a lifetime. Not dealing with claims handling on a day to day basis, navigating the claims process can be not only confusing and tedious, but costly as well if the insured does not know when they are being treated unfairly.

Some states have laws in place that limit when licensed public adjusters can contact an insured with a potential need for the public adjuster's services. Termed "solicitation," Maine's 36-hour rule in the Insurance Code provided:

> "1. Solicitation. An adjuster seeking to provide adjusting services to an insured for a fee to be paid by the insured may not solicit or offer an adjustment services contract to any person for at least 36 hours after an accident or occurrence as a result of which the person might have a potential claim

The National Fire Adjustment Company, Inc. ("NFA") provides licensed public adjuster services in Maine. NFA sued the superintendent of the Maine Bureau of Insurance, arguing the rule violates the First Amendment of the U.S. Constitution. The NFA argued the rule was "a content and speaker based restriction of speech" that was "presumptively unconstitutional viewpoint discrimination." In the alternative, it was argued that the Rule imposed burdens that neither advanced the State's interests, nor achieved its stated interest, as it swept more broadly than necessary. It was asserted that public adjusters' adherence to the Rule was causing NFA's public adjusters to lose business on an ongoing basis. (As any public adjuster working in a state with similar restrictions knows, it only stops public adjusters that follow the rule, those that are unlicensed or unscrupulous will often swoop in, regardless of the Rule).

The Federal District Court, in its decision, applied the "intermediate scrutiny test" which first determines whether the expression is protected speech by the First Amendment (for commercial speech, it must concern lawful activity and not be misleading); next it looks at whether the governmental interest is "substantial"; and if yes to both, it must be determined whether the regulation directly advances the government interest asserted, and if it is more extensive than necessary to serve that interest.

The court determined that the Rule's ban on "solicitation" was "exceedingly broad" and acted as "a powerful deterrent to even educational outreach activity within the 36-hour window", and that the ban on all solicitation activity, temporary as it might be, was "an excessively paternalistic prior restraint on speech" and, as such, swept more broadly than necessary to serve the stated interests of the State.

The case is *National Fire Adjustment Co., Inc. v. Cioppa*, No. 1:18-cv-00008 (D. Me. Jan. 8, 2019).

# Florida Adjusters Win Free Speech Case Against 48-Hour Solicitation Rule

By Brent Kallestad (https://www.insurancejournal.com/author/brent-kallestad/) | July 9, 2012



Article (https://www.insurancejournal.com/news/southeast/2012/07/09/254804.htm)

13 Comments (https://www.insurancejournal.com/news/southeast/2012/07/09/254804.htm#comments)

A 2008 Florida law establishing a 48-hour moratorium on public adjusters has been ruled unconstitutional by the Florida Supreme Court on grounds that it restricts commercial speech.

The decision was a blow to the insurance industry and Chief Financial Officer Jeff Atwater, who appealed a lower court ruling that was unanimously upheld by the state's highest court. Public adjusters serve as advocates for policyholders while negotiating insurance claims. The overturned law had prevented them from getting involved in insurance cases for at least 48 hours (https://www.insurancejournal.com/news/southeast/2011/09/22/216819.htm) after the occurrence of an event.



The association representing Florida public adjusters applauded the ruling.

"The ban on solicitation is a violation of public adjusters' free speech rights — and more importantly, an unfair rule that put policyholders at a disadvantage," said Harvey Wolfman, president of the Florida Association of Public Insurance Adjusters. "Thanks to this ruling, we can help more policyholders in those critical first hours when they need it most."

Atwater's office, however, did not quibble with the ruling.

"The office respects the Supreme Court's authority and its ruling in this case," said Atwater spokeswoman Alexis Lambert, who added that Atwater's role in the case was one intended to support consumers.

The insurance industry, however, sided with Atwater's challenge largely because many commercial insurers provide their own adjusters to assist in claims.

"CFO Atwater and the Office of Insurance Regulation provide safeguards for hurricane victims that they will be treated fairly by the adjuster dispatched by their insurance company," said Sam Miller, vice president of the Florida Insurance Council, an industry group. "There is no need for a public adjuster who must be paid by the policyholder. Unlike legal fees in lawsuits against insurers, fees for a public adjuster come from the insurance settlement."

Public adjusters have been held to increased scrutiny in recent years, largely as a result of thousands of claims that drifted in over a five-year period in the aftermath of Hurricane Wilma in the fall of 2005. The scrutiny also has resulted from sinkhole claims in the greater Tampa Bay area that have slammed commercial carriers and the state-backed Citizens Property Insurance Corp.

The Florida Legislature passed the law four years ago to create the waiting period before property owners would be able to receive any information from public adjusters about potential damages in the aftermath of a storm.

"The statute unconstitutionally restricts the commercial speech of public adjusters because it is not narrowly tailored to serve the state's interests in ensuring ethical conduct by public adjusters and protecting homeowners," the court said.

The lawsuit was originally brought by in October 2009 by public adjuster Frederick W. Kortum against Atwater's predecessor, former CFO Alex Sink. A trial court ruled in favor of the state, but that decision was then overturned by the 1st DCA (https://www.insurancejournal.com/news/southeast/2010/12/30/116049.htm) and affirmed by the Supreme Court ruling.

Arlman, you said it better than anyone else. We had a very large hailstorm in our city more than a year ago, and the losses that PA's are involved in are the biggest problems... read more (/news/southeast/2012/07/09/254804.htm?comments#comment-226757)

*Glenn Doerfler* says: JULY 13, 2012 AT 11:19 PM

Hi J.S. I don't interpret the law at all. I said the carriers are making decisions that disregard Florida Statute (that is what I feel is the binding authority in a majority o... read more (/news/southeast/2012/07/09/254804.htm?comments#comment-226544)

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# Insurance Bills Begin to Move in Texas Legislature

May 5, 2021




Article (https://www.insurancejournal.com/news/southcentral/2021/05/05/612843.htm)

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Numerous insurance-related bills have been filed during the current Texas legislative session and many of them have begun moving in the Texas House and Senate.

Among those bills that have recently been acted on and are of interest to the insurance industry include legislation addressing commercial vehicle accident lawsuits, COVID-19 lawsuit protections for businesses, and policyholder/insurer cooperation in resolving auto insurance claims.



**HB19**

One of the most high-profile bills, if passed and signed by the governor, would have a big impact on the commercial auto insurance market, as it aims to limit lawsuits following commercial vehicle crashes. The insurance industry-supported House Bill 19 (https://www.insurancejournal.com/news/southcentral/2021/03/25/606980.htm), by Rep. Jeff Leach, among other things, would require a two-part trial in civil actions involving a commercial motor vehicle if requested in a motion by the defendant.



Its identical companion bill in the Senate is Senate Bill 17 by Sen. Larry Taylor.

HB19 passed the House of Representatives on April 30 with the addition of two amendments, "which included a technical amendment and an amendment requiring TDI to study the impact of the legislation on the insurance industry," according to the Insurance Council of Texas.

Texans for Lawsuit Reform and the Keep Texas Trucking Coalition supports HB19, as does the Independent Insurance Agents of Texas, the Insurance Council of Texas, and the American Property Casualty Insurance Association (APCIA), which says it is concerned about the increase in attorney involvement in automobile accidents in Texas.

The bill's opponents say it's giveaway to trucking companies and insurers. Texas Watch, which describes itself as a consumer advocacy organization, said on its website that the bill gives "trucking corporations less incentive to follow safety measures" and makes "it harder to punish trucking companies through our courts when they violate safety standards."

**SB6**

The IIAT also is backing SB6 by Sen. Kelly Handcock and its companion, HB3659 by Rep. Jeff Leach, which aim to protect businesses from lawsuits arising from COVID-19 claims. Early in the 2021 legislative session, Gov. Greg Abbott said COVID-19 lawsuit protections (https://www.insurancejournal.com/news/southcentral/2021/01/26/598959.htm) for businesses was one of his priorities.

SB6 passed the Texas Senate in early April and now is being considered in the House. According to the bill's legislative analysis: "S.B. 6 provides retroactive civil liability protections for large and small businesses, religious institutions, non-profit entities, healthcare providers, first responders, and educational institutions.

"The bill also extends current immunity that healthcare volunteers have during a man-made or natural disaster to include a health care provider that is getting paid during a man-made disaster, natural disaster, or a health care emergency.

"Lastly, S.B. 6 provides civil liability protections to a person who designs, manufactures, sells, labels, or donates certain products that have a defect or inadequate instructions unless the person had knowledge of the issue and acted with actual malice."

SB6 is broadly supported by business and insurance industry groups but opposed by various consumer advocacy groups, as well as trial lawyers.

**SB1602**

SB1602 by Sen. Larry Taylor is another bill that IIAT says it is following closely.

The legislation takes targets insureds and/or insurers who refuse to cooperate a "claim investigation, settlement, or defense."

According to the bill's legislative analysis, most personal auto insurance policies require the parties' cooperation after a claim is filed. However, the analysis states: "there is no real incentive for the insured, or the insurance company, to adhere to this requirement. The only recourse against either when a claim is denied is for the injured party to file a lawsuit. The insurance company gets out of paying a claim and the insured does not have a claim on their record unless the injured party goes to court."

The analysis further states that the legislation's intent is to provide "an incentive for the insurance company to do all possible to contact their insured to get them to cooperate. This also gives the insured the incentive to cooperate or they will receive a 10-day notice of cancellation and be forced to find coverage elsewhere."

Opposition from "insurance companies that have been using this practice to avoid paying legitimate claims based on the failure to cooperate," is possible, the analysis states.

SB1602 passed the Senate on April 28 and has been referred to the insurance committee in the House.

The 87th Regular Session of the Texas Legislature convened on Jan. 12 and ends on May 31. The state legislature meets bi-annually on odd-numbered years.

TOPICS TEXAS (/TEXAS/)



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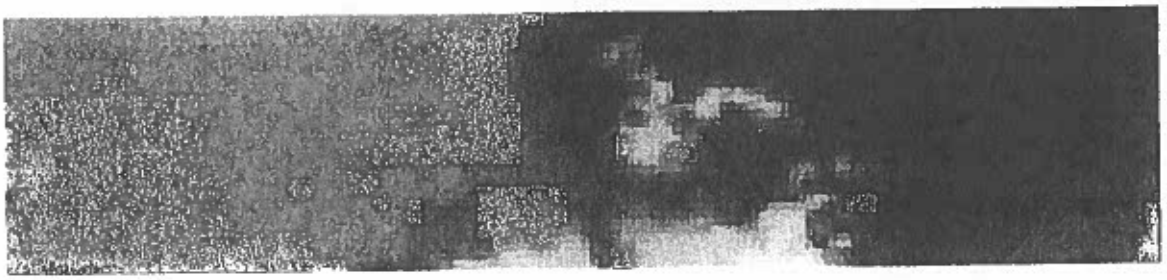

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**PRECEDENTIAL**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 24-1097

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VETERANS GUARDIAN VA CLAIM
CONSULTING LLC;
JOHN F. RUDMAN; ANDRE JESUS SOTO,
Appellants

v.

MATTHEW J. PLATKIN, in his official capacity
as Attorney General of New Jersey

---

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 3:23-cv-20660)
District Judge: Honorable Michael A. Shipp

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Argued: November 8, 2024

Before: KRAUSE, BIBAS, and SCIRICA, *Circuit Judges*

(Filed: April 1, 2025)

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OPINION OF THE COURT

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BIBAS, *Circuit Judge*.

The marketplace of ideas is not just a metaphor. Many Americans, from journalists to playwrights to therapists, speak for a living. Laws that bar these professionals from earning money on that speech limit their ability to speak and so must survive First Amendment scrutiny. New Jersey recently passed one such law, banning charging for some advice on how to claim veterans benefits. Because this law likely burdens speech, yet the District Court thought otherwise and so denied a preliminary injunction, we will vacate and remand.

## I. NEW JERSEY DOUBLY RESTRICTS CHARGING FOR ADVICE ABOUT CLAIMING VETERANS BENEFITS

Veterans who are left disabled by their service qualify for benefits. But first, they must claim them. To do that, they send a form to the Department of Veterans Affairs (VA) listing their disabilities and explaining how their service caused or aggravated them. The VA reviews the information and decides what benefits, if any, each veteran can get. For some, the story ends there: They get the benefits they earned and enjoy a grateful

nation's compensation. Others get less happy news: The VA has awarded them less than they think they deserve. They can appeal by filing a notice of disagreement, triggering review by the Board of Veterans' Appeals. 38 U.S.C. § 7105(a), (b)(3).

Because this benefits bureaucracy can be frustrating, many veterans seek help submitting claims. And because the VA pays out billions per year, a booming industry of consultants has sprung up to help veterans claim benefits in exchange for a cut of the payout. As the benefits-consulting industry has grown, so have worries about veterans getting ripped off.

To prevent that abuse, an elaborate federal code regulates the people whom veterans can hire to help them get benefits. Two rules are relevant here. First, before anyone "may act as an agent or attorney in the preparation, presentation, or prosecution of any claim" for veterans benefits, he must be accredited by the VA. 38 U.S.C. § 5901(a); 38 C.F.R. § 14.629(b)(1); *accord* 38 C.F.R. § 14.636(b). Second, these agents and attorneys may not charge for any services that they provide before the VA's initial benefits decision. 38 U.S.C. § 5904(c)(1); 38 C.F.R. § 14.636(c). Though federal law sets these rules, it does not empower the VA or anyone else to enforce them.

New Jersey took that job upon itself. It passed a law that it says mirrors federal law but adds civil-enforcement mechanisms. Under Section (a)(1) of New Jersey's law, "[n]o person shall receive compensation for advising or assisting" anyone with "the preparation, presentation, or prosecution of any claim" for veterans benefits, except as allowed by federal law. N.J. Stat. Ann. § 56:8-228(a)(1), (d). And under Section (a)(4), "[n]o person shall receive any compensation for any services

rendered before" a veteran appeals the VA's initial benefits decision to the Board of Veterans' Appeals. § 56:8-228(a)(4).

New Jersey's law is a problem for Veterans Guardian, a nationwide consulting company that charges veterans for advice on how to claim benefits. Fearing that its business model violated the law, it closed its doors in the state. The law is also a problem for John Rudman and Andre Soto, two New Jersey veterans who had planned to use Veterans Guardian's services.

Veterans Guardian, Rudman, and Soto sued New Jersey's Attorney General, claiming that the law violates their First Amendment rights and seeking a preliminary injunction. The District Court declined to grant the injunction, and now they appeal.

On appeal from the denial of a preliminary injunction, we normally "review the District Court's factual findings for clear error, its legal rulings de novo, and its ultimate decision for abuse of discretion." *Del. State Sportsmen's Ass'n v. Del. Dep't of Safety & Homeland Sec.*, 108 F.4th 194, 198 (3d Cir. 2024). But in First Amendment cases, we must examine the whole record independently, drawing our own inferences and deferring to factual findings only if they are about witness credibility. *Child Evangelism Fellowship of N.J. v. Stafford Twp. Sch. Dist.*, 386 F.3d 514, 524 (3d Cir. 2004) (Alito, J.); *Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 156–57 (3d Cir. 2002).

## II. PRELIMINARY INJUNCTIONS ARE EXTRAORDINARY REMEDIES

"A preliminary injunction is an extraordinary remedy granted in limited circumstances." *Issa v. Sch. Dist.*, 847 F.3d 121, 131 (3d Cir. 2017). Whether a plaintiff can get one depends on whether (1) he is likely to succeed on the merits, (2) he will suffer irreparable harm without preliminary relief, (3) the balance of equities favors an injunction, and (4) an injunction is in the public interest. *Winter v. NRDC*, 555 U.S. 7, 20 (2008).

The first two factors are "gateway factors": A plaintiff must satisfy them both to be eligible for preliminary relief. *Reilly v. City of Harrisburg*, 858 F.3d 173, 179 (3d Cir. 2017). But they are not equally demanding.

On the first factor, a likelihood of success on the merits means only a "reasonable probability" of success—odds that are "significantly better than negligible but not necessarily more likely than not." *Id.* at 176, 179. And though plaintiffs usually bear the burden of showing that they are likely to succeed, that burden flips in First Amendment cases. *Greater Phila. Chamber of Com. v. City of Philadelphia*, 949 F.3d 116, 133 (3d Cir. 2020). Because "[t]he government bears the burden of proving that" a law complies with the First Amendment, it also bears the burden of proving that a plaintiff is unlikely to succeed on the merits. *Id.*

The standard for irreparable harm is more demanding: The plaintiff must show that it is more likely than not. *Reilly*, 858 F.3d at 179. That said, a violation of First Amendment rights presumptively inflicts irreparable harm. *Del. State*, 108 F.4th at 204.

If both gateway factors are satisfied, the court must still weigh all four factors before *granting* preliminary relief. *Id.* at 202–03; *see also Winter*, 555 U.S. at 26, 31–33 (denying preliminary injunction solely on the balance of equities and public interest). It should also consider whether the injunction is needed to keep the case alive until the court can award final relief. *Del. State*, 108 F.4th at 200–03.

* * * * *

Courts typically start with the merits. The District Court also stopped there, deciding that Veterans Guardian was unlikely to succeed and so the court did not need to reach the remaining preliminary-injunction factors. That holding rested on several mistakes, as we go on to explain. First, the District Court held that New Jersey's law did not even trigger the First Amendment. We disagree: Veterans Guardian is likely engaged in speech, which New Jersey's law burdens. Second, the District Court analyzed New Jersey's law as a monolithic whole, when the law imposes two separate burdens on speech that must be analyzed separately. But though we correct these oversights, the record is not developed enough for us to decide the serious constitutional questions that the merits raise, let alone to weigh the other preliminary-injunction factors. So we will remand for the District Court to reconsider Veterans Guardian's motion with the benefit of a fuller record and our guidance.

## III. New Jersey's Law Likely Burdens Speech, so It Must Satisfy the First Amendment

Veterans Guardian has a reasonable probability of showing that its services are speech and that New Jersey's law

burdens that speech. So the state must show that its law satisfies the First Amendment.

### A. Veterans Guardian is likely to succeed in showing that its services are speech

At this early stage, Veterans Guardian need show only a reasonable probability of success on the merits, including showing that its services are speech. On the current record, they are.

Professional services delivered by speaking or writing are speech. *King v. Governor of N.J.*, 767 F.3d 216, 224–25 (3d Cir. 2014), *abrogated on other grounds by Nat'l Inst. of Fam. & Life Advocs. v. Becerra* (*NIFLA*), 585 U.S. 755 (2018). Veterans Guardian delivers professional services by speaking and writing. It advises clients about how to claim benefits: what disabilities to claim, what evidence to include, and how to fill out forms. That advice is likely speech. *See Upsolve, Inc. v. James*, 604 F. Supp. 3d 97, 112 (S.D.N.Y. 2022) (distinguishing conduct of filing motions from speech of offering legal advice).

### B. Laws that forbid charging for speech burden speech

If indeed Veterans Guardian's services are speech, then New Jersey's law burdens it. The District Court thought otherwise because New Jersey does not bar giving advice but only charging for it. So, the court reasoned, the law does not burden the plaintiffs' First Amendment rights because it regulates not speech but conduct.

Yet laws that ban charging for speech burden the right to speak. Supreme Court cases establish this. *See United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 468–70 (1995); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims*

*Bd.*, 502 U.S. 105, 115–16 (1991); *see also Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781, 801 (1988) ("[A] speaker is no less a speaker because he or she is paid to speak."). Common sense agrees. Someone who cannot earn money from speaking has less incentive to speak and so will speak less. *Nat'l Treasury Emps. Union*, 513 U.S. at 468–70. Indeed, many canonical examples of protected speech involve professionals speaking for pay: think of novelists, speechwriters, and newspaper columnists. A law that allowed their speech but banned their livelihoods would reduce how much they could speak, which in turn would dam up the flow of ideas in our democracy. By barring payment for speech, New Jersey's law burdens the right to speak.

The District Court thought otherwise, misreading a passing comment in *Expressions Hair Design v. Schneiderman*, 581 U.S. 37 (2017). In that case, the Supreme Court observed that a hypothetical law setting sandwich prices at $10 would target conduct, even though it would also require delis to write "$10" on their menus and quote that price to inquiring customers. *Id.* at 47. Because "the law's effect on speech would be only incidental to its primary effect on conduct," the Court noted, it would not pose a First Amendment problem. *Id.*

The District Court thought that *Expressions Hair Design* meant that price restrictions cannot implicate the First Amendment. But a law regulating the price of sandwiches burdens the conduct of selling sandwiches. By contrast, a law regulating the price of speech burdens speech.

## IV. There Is No Separate Category of Professional Speech

Having decided that the First Amendment applies, we next ask how strong its protections are. Our circuit used to carve out a separate category of professional speech and give it less protection. *King*, 767 F.3d at 232. But seven years ago, in *NIFLA v. Becerra*, the Supreme Court clarified that there is no separate category of professional speech. 585 U.S. at 767–68. With few exceptions, the same First Amendment principles apply when professionals speak to clients as when anyone else talks. *Id.* That said, *NIFLA* confirms that lesser scrutiny is warranted where there is "persuasive evidence of a long (if heretofore unrecognized) tradition to that effect." *Id.* at 767 (cleaned up). And it preserved two exceptions when regulations of professional speech get reviewed more deferentially: (1) "laws that require professionals to disclose factual, noncontroversial information in their commercial speech" and (2) regulations of "professional conduct, even though that conduct incidentally involves speech." *Id.* at 768 (internal quotation marks omitted).

New Jersey tries to jam its law into *NIFLA*'s second exception by arguing that the law regulates price instead of speech, that it regulates speech incidental to illegal conduct, and that Section (a)(1) is a neutral professional licensing scheme. *Id.* at 768–70; *United States v. Hansen*, 599 U.S. 762, 783 (2023); Appellee's Br. 20–28. The first two arguments do not work, and the record is too sparse for us to confidently decide the third.

Start with New Jersey's contention that its law targets only the conduct of charging money. As we discussed above,

pricing regulations are not exempt from the First Amendment—restricting compensation to licensed counselors still imposes a financial burden on speech.

Second, Veterans Guardian's speech is not integral to illegal conduct. Because New Jersey reads its law as mirroring federal requirements, it argues that any speech it bans must be integral to breaking federal law. That argument is wrong twice over. For one, Veterans Guardian's speech is not just one step in service of some separately illegal act, unlike the speech involved in soliciting a crime, demanding ransom, or posting a "White applicants only" sign as part of hiring discrimination. *See Hansen*, 599 U.S. at 783; *Rumsfeld v. FAIR*, 547 U.S. 47, 62 (2006). Veterans Guardian's speech is the core of what it does. For another, though New Jersey says federal law outlaws Veteran Guardian's activities, that federal law is equally subject to the First Amendment. Veterans Guardian does not challenge the federal scheme, and we take no position on whether it is valid. But states cannot immunize their laws from constitutional scrutiny by pointing to a federal scheme that may suffer the same constitutional defects. To hold otherwise would let states end-run around the First Amendment.

Finally, New Jersey attempts to frame Section (a)(1), which incorporates federal accreditation requirements, as a neutral licensing scheme regulating professional conduct. Appellee's Br. 20–21. Yet we have very little information on how the federal accreditation scheme works or what it covers. The District Court ruled on a different basis and did not address whether the law should be viewed as a professional licensing scheme or whether, as a licensing scheme, it would fit within *NIFLA*'s

second exception. We leave it to the District Court to consider those questions in the first instance on remand.

When it does, it should reconsider one more part of its reasoning. It held that New Jersey's law was content neutral in part because the state did not intend to suppress disfavored ideas. But courts judge laws based on their *effects* on speech, not just on legislatures' purposes or motives. *United States v. O'Brien*, 391 U.S. 367, 383 (1968); *Reed v. Town of Gilbert*, 576 U.S. 155, 165–66 (2015). For instance, they usually decide whether a law is content based—and so presumptively unconstitutional—by judging whether it "single[s] out any topic or subject matter for differential treatment." *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 596 U.S. 61, 71 (2022); *Reed*, 576 U.S. at 163–64; *Camp Hill Borough Republican Ass'n v. Borough of Camp Hill*, 101 F.4th 266, 269–70 (3d Cir. 2024). We take no position on whether this law is content neutral, leaving that to the District Court on remand. But when it does reach that question, its answer should be based on whether the law applies to speech based on its content or topic, regardless of the legislature's good intentions.

## V. COURTS MUST ANALYZE PLAINTIFFS' CHALLENGES TO SEPARATE PROVISIONS SEPARATELY

The District Court also overlooked that New Jersey's law restricts speech in two different ways. It considered the first way: It thought that Section (a)(1) bars charging for claims advice without VA accreditation. That limits *who* can charge for advice—only people accredited by the VA.

But it did not consider the second way: Section (a)(4) bars accepting pay for services done before a veteran files a notice

of disagreement (the equivalent of a notice of appeal). N.J. Stat. Ann. § 56:8-228(a)(4). That limits *when* people can charge for advice—only after a veteran appeals. And it imposes that total ban on everyone, even licensed counselors. It might also limit *what* advice people can charge for. If some choices in the initial claim cannot be changed on appeal (for instance, what disability the veteran claimed for), then by limiting paid advice to appeals, the law would effectively bar paid advice about these aspects of a claim. Either way, Sections (a)(1) and (a)(4) impose separate limits on speech and must be analyzed separately.

On remand, the District Court should distinguish these sections and test the constitutionality of each.

## VI. Section (a)(4)'s Constitutionality Is a Serious Question

Distinguishing Section (a)(4) is especially important because we seriously doubt that it is constitutional. True, New Jersey has a strong interest in protecting veterans from fraud and predatory pricing. *See Heffner v. Murphy*, 745 F.3d 56, 92 (3d Cir. 2014). But any law pursuing this interest must be tailored to it. New Jersey has not pointed to any evidence that a ban on pre-appeal counseling fees furthers its interest. In fact, the state never even raised its concern that pre-appeal fees are exploitative until oral argument before us.

Either way, New Jersey's law must satisfy some form of heightened scrutiny. Though we need not decide which tier applies, we are skeptical that at least Section (a)(4) is tailored enough to satisfy even intermediate scrutiny. Under that standard, New Jersey would need to show that "alternative measures that burden substantially less speech would fail to achieve the

government's interests." *Bruni v. City of Pittsburgh*, 824 F.3d 353, 367 (3d Cir. 2016) (quoting *McCullen v. Coakley*, 573 U.S. 464, 495 (2014)). At oral argument, New Jersey asserted that Section (a)(4)'s ban protects veterans because no one needs paid help to file a claim: The first stage is simple, and other services will help claimants for free. But New Jersey could use less-restrictive alternatives; for instance, it could require paid advisers to tell veterans that they can get free help elsewhere. It has never explained why a more targeted solution would not work.

Still, the current record is too thin to resolve this question. In moving for a preliminary injunction, plaintiffs challenged both Sections (a)(1) and (a)(4) without analyzing them separately. Then the District Court ignored (a)(4). So that section has never gotten adequate briefing or produced a well-developed record. We will leave that task to the District Court on remand.

## VII. The District Court Should Find More Facts

The District Court will need to gauge New Jersey's interests and the law's tailoring, and it may need to weigh preliminary-injunction factors other than the merits. Each inquiry is riddled with unknowns.

Start with New Jersey's interests. They depend on how often paid services covered by the law are predatory, how often they are merely useless, and how often they are valuable. The record contains no answers. Nor does it show how big a problem paid consultants are. Though the District Court noted that "benefits consultants and other businesses ha[ve] defrauded veterans of over $414 million," the document it relies on lumps together *all sources* of fraud, from identity theft to "bogus investment

schemes" and "sweepstakes and lotteries." App. 17, 217. In fact, this document lists the eleven most common sources of fraud, but predatory benefits-claiming services are not among them.

The extent of tailoring is also foggy. Neither the District Court nor the parties have discussed whether less restrictive alternatives to Sections (a)(1) and (a)(4) would have achieved New Jersey's interests. And each section raises its own questions that the record does not answer. Section (a)(1) purports to fight exploitation by forcing providers to follow federal law. But how effective is federal law at stopping fraud and incompetence? And at what cost to speech? Section (a)(4) bans paid advice before appeal. The weight of this burden depends in part on whether the appeal is too late to offer some advice. Is it? On remand, the District Court should fill these gaps.

* * * * *

Advice about claiming veterans benefits appears to be speech. But when weighing preliminary injunctions, courts must proceed cautiously and be wary of locking in their views on the merits. *Del. State*, 108 F.4th at 203. And though there are many non-merits factors, the District Court never analyzed them. We will remand to let it fill in the record and apply the law that we have laid out here.

KRAUSE, *Circuit Judge*, concurring.

I join the majority opinion in full but write separately with some observations about the review of reasonable professional licensing schemes in the wake of *National Institute of Family and Life Advocates v. Becerra* (*NIFLA*), 585 U.S. 755 (2018).

On the one hand, *NIFLA* established that professional speech, as a whole, is not a unique category subject to lesser protections than other protected speech and cautioned against giving states "unfettered power" to impose content-based restrictions on speech "by simply imposing a licensing requirement." *Id.* at 773. Taken to the extreme, the Court observed, states could enact onerous licensing laws that, in effect, "impose invidious discrimination of disfavored subjects," *id.* (internal quotation marks omitted), for example, by restricting publishers from printing books by certain authors or lawyers from advocating for clients outside the courtroom—all under the guise of regulating professional conduct, *cf. Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991) (striking down the "Son of Sam" law placing financial disincentives on convicts speaking about their crimes); *NAACP v. Button*, 371 U.S. 415, 433, 444 (1963) (holding a law "proscribing any arrangement by which prospective litigants are advised to seek the assistance of particular attorneys" unconstitutional).

Indeed, the Court has long cautioned that states may neither "foreclose the exercise of constitutional rights by mere labels" nor ignore those rights "under the guise of prohibiting professional misconduct." *Button*, 371 U.S. at 429, 439. Thus, in *NIFLA*, the Court determined California's law requiring licensed clinics to disclose the availability of services that "in

no way relate[d] to the services that licensed clinics provide," 585 U.S. at 769, was a content-based regulation of speech and therefore identified no reason to shield it from strict scrutiny[1]—notwithstanding its commercial context, *id.* at 766, 773.

On the other hand, *NIFLA* confirmed that more deferential scrutiny continues to apply in the commercial context where there is "'persuasive evidence . . . of a long (if heretofore unrecognized) tradition' to that effect," and it identified two such situations. *Id.* at 767–68 (quoting *United States v. Alvarez*, 567 U.S. 709, 722 (2012)). The first was "laws that require professionals to disclose factual, noncontroversial information in their 'commercial speech,'" like the fee disclaimer regulation for lawyers in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 650–53 (1985). *Id.* at 768. And the second was for "regulations of professional conduct that incidentally burden speech." *Id.* at 769. In support of both exceptions, the Court cited *Ohralik v. Ohio State Bar Association*, in which the Court held that a state can discipline a lawyer for in-person solicitation in certain circumstances, 436 U.S. 447, 449 (1978),

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[1] The Court did not foreclose that some reason may exist to "treat[] professional speech as a unique category that is exempt from ordinary First Amendment principles," but it did not decide that issue because the challenged regulation failed under intermediate scrutiny. *Nat'l Inst. of Fam. & Life Advocs. v. Becerra* (*NIFLA*), 585 U.S. 755, 773 (2018). Of course, under ordinary First Amendment principles, "content-based regulations of speech are subject to strict scrutiny." *Id.* at 767; *see also Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565–66 (2011).

reasoning the solicitation ban was more like a conduct regulation in which speech "is an essential but subordinate component," *id.* at 457, and observing "that the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity," *id.* at 456 (listing examples of "communications that are regulated without offending the First Amendment").

As another example of *NIFLA*'s second category, the Court cited *Planned Parenthood of Southeastern Pennsylvania v. Casey*, which "rejected a free-speech challenge to [an] informed consent requirement" for an abortion procedure, explaining that the law "regulated speech only 'as part of the *practice* of medicine, subject to reasonable licensing and regulation by the State.'" *NIFLA*, 585 U.S. at 770 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992)). Even though the regulations in *Ohralik* and *Casey* were content based, in that they targeted certain subject matter in the context of regulating a particular profession,[2] the *NIFLA* Court cited them as part of our Nation's "long . . . tradition" of professional-conduct regulations that incidentally burden speech and nevertheless are excepted from the demands of strict scrutiny. *Id.* at 767–68 (quoting *Alvarez*, 567 U.S. at 722).

That long tradition of professional licensing schemes in our law dates back well before the Founding, with deep roots in English law. In the Middle Ages, craft guilds, chartered by the monarch, functioned as early licensing authorities, with

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[2] *See City of Austin v. Reagan Nat'l Advert. of Austin*, 596 U.S. 61, 69 (2022); *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

membership a prerequisite to entering trades like weaving and goldsmithing.[3] As early as 1421, doctors in England petitioned Parliament to exclude unqualified practitioners,[4] and the Royal College of Physicians was established in 1518 to grant licenses and regulate the practice of medicine.[5] Membership in the English Inns of Court, founded in the mid-fourteenth century, ensured the qualifications of those practicing law.[6] And by the seventeenth century, licensing schemes governed the

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[3] *See* Stella Kramer, *The English Craft Gilds and the Government* 17 (1905); Paul J. Larkin, Jr., *Public Choice Theory and Occupational Licensing*, 39 Harv. J.L. & Pub. Pol'y 209, 212–13 (2016) [hereinafter Larkin].

[4] John H. Raach, *English Medical Licensing in the Early Seventeenth Century*, 16 Yale J. Biology & Med. 267, 268 (1944).

[5] B. Abbott Goldberg, *Horseshoers, Doctors and Judges and the Law on Medical Competence*, 9 Pac. L.J. 107, 122 (1978). The College was established by a charter issued by King Henry VIII in 1518 and confirmed by Parliament in 1522. Parliament initially authorized the licensing of physicians by bishops in 1511, but the effect of that law was undercut by the establishment of the College. *Id.; see* 3 Henry VIII ch. 11, *reprinted in* Charles Goodall, *Royal College of Physicians of London Founded and Established by Law* 1 (M. Flesher ed., 1684) [hereinafter Goodall]; 14, 15 Henry VIII ch.5, *reprinted in* Goodall at 5.

[6] Jonathan Rose, *The Legal Profession in Medieval England: A History of Regulation*, 48 Syracuse L. Rev. 1, 24 (1998); *see also id.* at 5 ("[M]edieval regulation reveals the foundation for the modern control of the admission and the conduct of practicing lawyers.").

professions of tavern owner, peddler, coach driver, and many more on that side of the Atlantic.[7]

Credentialing practices followed the colonists to early America, where the medical and legal professions were among the first to be licensed and regulated,[8] along with traders, tanners, printers, peddlers, boat pilots, tavern and innkeepers, distillers, and purveyors of liquor.[9] By the early-nineteenth century, licensing schemes expanded to include barbers, boarding house operators, insurance agents, midwives, real estate brokers, steamboat operators, embalmers, horseshoers,

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[7] Thomas K. Urdhal, *The Fee System in the United States*, 77–80 (1898) [hereinafter Urdhal].

[8] *Id.* at 102–03, 128–29; Barlow F. Christensen, *The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors-or Even Good Sense?*, 5 Am. Bar Found. Rsch. J. 159, 163 (1980) ("The earliest legislation 'for the better regulation of attorneys and the great fees exacted by them' was enacted in 1642-43. It severely limited fees [and] prohibited pleading without a license from the court."); Lawrence M. Friedman, *Freedom of Contract and Occupational Licensing 1890-1910: A Legal and Social Study*, 53 Cal. L. Rev. 487, 494 (1965) ("The licensing of inn-keepers and of lawyers went back to colonial times and indeed to English practice."). By the late-nineteenth century, "more than half of the states required licenses to practice as a physician, dentist, pharmacist, or lawyer." Larkin, *supra* note 3, at 213.

[9] Urdhal, *supra* note 7, at 97 n.1, 100 & n.5, 102–05; Larkin, *supra* note 3, at 212–13; *see also, e.g.*, Act of Oct. 25, 1710, *reprinted in* 1 *Acts of Assembly, Passed in the Colony of Virginia, from 1662 to 1715*, at 325 (1727) (requiring license for sale of alcohol).

undertakers, veterinarians, auctioneers, and pawnbrokers, among many others.[10]

The inevitable challenges to these regulatory regimes gave the Supreme Court opportunity to explain their place in our legal system and to acknowledge their importance. In rejecting a challenge to a medical licensing regime in 1889, for example, the Supreme Court recognized the inherent authority of the states to prescribe regulations to combat "consequences of ignorance and incapacity, as well as of deception and fraud,"

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[10] Larkin, *supra* note 3, at 213; Urdhal, *supra* note 7, at 129; *see also, e.g.*, *Laws of the State of New-Jersey* 19–20, 235–40, 246, 355, 416 (William Patterson ed., 1800) (licensing hunters, tavern owners, innkeepers, hawkers, peddlers, petty chapmen, and fishermen); Act of Sept. 17, 1807, *reprinted in Laws of the Indiana Territory* 340–44 (1807) (requiring a license to practice as an "Attorney or Counsellor at Law"); 1 *The General Laws of Massachusetts, From the Adoption of the Constitution to February*, 1822, at 92, 100–01, 199, 297–304, 348, 417, 473–74, 535 (Theron Metcalf ed., 1823) (licensing tree cutters, estate executors and administrators, attorneys, innholders, tavern keepers, victuallers, liquor retailers, vintners, auctioneers, public good sellers, and carriage drivers); Act of Mar. 10, 1832, *reprinted in* 2 *The General Public Statutory Law and Public Local Law of the State of Maryland* 1032–34 (Clement Dorsey ed., 1840) (requiring two years of legal study and evidence of good character to be admitted as an attorney). By 1935, "architects, barbers, beauticians, chiropractors, civil engineers, embalmers, registered nurses, optometrists, osteopaths, real estate brokers and sale personnel, surveyors, and veterinarians" were licensed in more than half the states. Larkin, *supra* note 3, at 213 n.16.

and to fulfill the government's responsibility "from time immemorial, to exact in many pursuits a certain degree of skill and learning upon which the community may confidently rely."[11] *Dent v. West Virginia*, 129 U.S. 114, 122 (1889). While the Court has also policed the constitutional bounds of such regulations, particularly after the incorporation of the First Amendment, *see Gitlow v. New York*, 268 U.S. 652 (1925); *Stromberg v. California*, 283 U.S. 359 (1931), and as legislatures in the twentieth century increasingly targeted the speech of professionals,[12] it has continued to recognize that

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[11] *See also Reetz v. Michigan*, 188 U.S. 505, 506 (1903) (observing that "[t]he power of a state to make reasonable provisions for determining the qualifications of those engaging in the practice of medicine . . . is not open to question").

[12] *See, e.g.*, *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795–802 (1988) (applying traditional First Amendment principles when reviewing disclosure and licensing requirements of professional fundraisers); *In re Primus*, 436 U.S. 412, 432 (1978) (subjecting South Carolina's criminal punishment of a lawyer "soliciting a prospective litigant by mail, on behalf of the ACLU" to "exacting scrutiny"); *Bhd. of R.R. Trainmen v. Virginia ex rel. Va. State Bar*, 377 U.S. 1, 6–8 (1964) (holding that the Virginia Bar's ban on labor union's solicitation of personal injury cases amongst its members violated the First Amendment, as the union was not engaging in the practice of law); *see also Reed*, 576 U.S. at 167 (observing that *NAACP v. Button* properly recognized that a state's interest in "regulation of professional conduct," namely "prohibiting 'improper solicitation' by attorneys," did not exempt the law from normal First Amendment principles (quoting *NAACP v. Button*, 371 U.S.

states "have broad power to establish standards for licensing practitioners and regulating the practice of professions," *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975); *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 625 (1995) (same); *see also Gunn v. Minton*, 568 U.S. 251, 264 (2013) (recognizing that states "have 'a special responsibility for maintaining standards among members of the licensed professions'" (quoting *Ohralik*, 436 U.S. at 460)).

Against the backdrop of this long tradition, it would be anomalous indeed to read *NIFLA* as an endorsement of heightened scrutiny for all professional licensing schemes. After all, the Supreme Court "does not normally overturn, or [] dramatically limit, earlier authority *sub silentio*," *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000), and, as a general rule, we "leav[e] to th[e] [Supreme] Court the prerogative of overruling its own decisions," *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (quoting *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989)). If anything, *NIFLA* confirms that lesser scrutiny applies to licensing regimes that "regulate[] speech only 'as part of the *practice* of [a profession],'" 585 U.S. at 770 (quoting *Casey*, 505 U.S. at 884), and by highlighting that strict scrutiny did not apply to the regulations in *Ohralik* and *Casey*, the Court made clear that some restrictions of speech, though content based, remain subject to more deferential review as burdens incidental to the regulation of professional conduct.

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415, 438 (1963)); *Holder v. Humanitarian L. Project*, 561 U.S. 1, 27–28 (2010) (applying strict scrutiny to a law barring organizations from giving material support to terrorist organizations in the form of speech).

With its recent grant of certiorari in *Chiles v. Salazar*, No. 24-539, 2025 WL 746313, at *1 (U.S. Mar. 10, 2025), the Court may bring greater clarity, but for now, in the wake of *NIFLA*, whether a particular component of a licensing scheme imposes a content-based regulation on professional speech subject to strict scrutiny, *id.* at 767, or "regulate[s] speech only 'as part of the *practice* of [a profession], subject to reasonable licensing and regulation by the State," *id.* at 770 (quoting *Casey*, 505 U.S. at 884), must be decided on a case-by-case basis.[13]

Here, as the majority observes, we have little information on the workings of New Jersey's accreditation scheme for veterans benefits counselors, and the District Court ruled on a different basis. Maj. Op. 12. We, thus, leave the application of *NIFLA* in this case to the District Court in the first instance.

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[13] *Compare Billups v. City of Charleston*, 961 F.3d 673, 683 (4th Cir. 2020) (holding the burden on speech was not merely incidental because the ordinance "completely prohibit[ed] unlicensed tour guides from leading visitors on paid tours—an activity which, by its very nature, depends upon speech or expressive conduct"), *with Cap. Associated Indus., Inc. v. Stein*, 922 F.3d 198, 207–08 (4th Cir. 2019) (upholding "UPL statutes [that] don't target the communicative aspects of practicing law, such as the advice lawyers may give to clients" but, instead, "focus more broadly on the question of who may conduct themselves as a lawyer").

# HOUSE BILL 1348

I3 5lr3331

By: **Delegate Amprey**
Introduced and read first time: February 7, 2025
Assigned to: Economic Matters

Committee Report: Favorable with amendments
House action: Adopted
Read second time: March 15, 2025

CHAPTER _____

AN ACT concerning

~~**Consumer Protection – Solicitation Following a Disaster – Prohibition**~~
**Home Improvement Contractors – Disaster Mitigating Services – Regulation and Prohibition**

FOR the purpose of altering the definition of "home improvement" to include the provision of certain disaster mitigating services for purposes of licensing and regulation of home improvement contractors; authorizing a certain owner to rescind a home improvement contract for disaster mitigating services under certain circumstances; authorizing the governing body of a county to impose certain limitations on in–person solicitation of a victim of a disaster by a contractor offering disaster mitigation services; ~~prohibiting a contractor or person acting on behalf of a contractor from soliciting or attempting to solicit a disaster victim within a certain period of time after a disaster; establishing that a violation of this Act is an unfair, abusive, or deceptive trade practice;~~ and generally relating to solicitation following a disaster.

~~BY repealing and reenacting, with amendments,~~
~~Article – Commercial Law~~
~~Section 13–301(14)(xlii)~~
~~Annotated Code of Maryland~~
~~(2013 Replacement Volume and 2024 Supplement)~~

~~BY repealing and reenacting, without amendments,~~
~~Article – Commercial Law~~
~~Section 13–301(14)(xliii)~~
~~Annotated Code of Maryland~~

EXPLANATION: **CAPITALS INDICATE MATTER ADDED TO EXISTING LAW.**
**[**Brackets**]** indicate matter deleted from existing law.
Underlining indicates amendments to bill.
~~Strike out~~ indicates matter stricken from the bill by amendment or deleted from the law by amendment.

~~(2013 Replacement Volume and 2024 Supplement)~~

~~BY adding to~~
~~Article – Commercial Law~~
~~Section 13–301(14)(xliv) and 14–1328~~
~~Annotated Code of Maryland~~
~~(2013 Replacement Volume and 2024 Supplement)~~

BY repealing and reenacting, with amendments,
Article – Business Regulation
Section 8–101 and 8–501(c)(1)(viii) and (ix)
Annotated Code of Maryland
(2024 Replacement Volume)

BY adding to
Article – Business Regulation
Section 8–501(c)(1)(x), 8–501.1, and 8–507
Annotated Code of Maryland
(2024 Replacement Volume)

BY repealing and reenacting, without amendments,
Article – Business Regulation
Section 8–501(c)(2) and (3) and (f)
Annotated Code of Maryland
(2024 Replacement Volume)

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND, That the Laws of Maryland read as follows:

~~Article – Commercial Law~~

~~13–301.~~

~~Unfair, abusive, or deceptive trade practices include any:~~

~~(14) Violation of a provision of:~~

~~(xlii) Section 12–6C–09.1 of the Health Occupations Article; [or]~~

~~(xliii) Title 14, Subtitle 48 of this article; or~~

~~(XLIV) SECTION 14–1328 OF THIS ARTICLE; OR~~

~~14–1328.~~

~~(A) (1) IN THIS SECTION THE FOLLOWING WORDS HAVE THE MEANINGS INDICATED.~~

~~(2) "CONTRACTOR" MEANS A PERSON, OTHER THAN AN EMPLOYEE OF AN OWNER, WHO PERFORMS OR OFFERS OR AGREES TO PERFORM ANY OF THE FOLLOWING FOR AN OWNER:~~

~~(I) THE ADDITION TO OR ALTERATION, CONVERSION, IMPROVEMENT, MODERNIZATION, REMODELING, REPAIR, OR REPLACEMENT OF A BUILDING OR PART OF A BUILDING, OTHER THAN NEW CONSTRUCTION, THAT IS USED OR DESIGNED TO BE USED AS A RESIDENCE OR A STRUCTURE ADJACENT TO THAT BUILDING;~~

~~(II) AN IMPROVEMENT TO LAND ADJACENT TO THE RESIDENCE;~~

~~(III) CONSTRUCTION, IMPROVEMENT, OR REPLACEMENT, ON LAND ADJACENT TO THE RESIDENCE, OF A DRIVEWAY, FALL OUT SHELTER, FENCE, GARAGE, LANDSCAPING, DECK, PIER, PORCH, OR SWIMMING POOL;~~

~~(IV) A SHORE EROSION CONTROL PROJECT, AS DEFINED UNDER § 8–1001 OF THE NATURAL RESOURCES ARTICLE, FOR A RESIDENTIAL PROPERTY;~~

~~(V) CONNECTION, INSTALLATION, OR REPLACEMENT IN THE RESIDENCE OF A DISHWASHER, DISPOSAL, OR REFRIGERATOR WITH AN ICEMAKER TO EXISTING EXPOSED HOUSEHOLD PLUMBING LINES;~~

~~(VI) INSTALLATION IN THE RESIDENCE OF AN AWNING, FIRE ALARM, OR STORM WINDOW; OR~~

~~(VII) WORK DONE ON INDIVIDUAL CONDOMINIUM UNITS.~~

~~(3) (I) "DISASTER" MEANS A SERIOUS EVENT THAT CAUSES HARM TO A HOME, BUILDING, OR OTHER STRUCTURE.~~

~~(II) "DISASTER" INCLUDES A FIRE, FLOOD, HURRICANE, OR OTHER NATURAL EVENT THAT CAUSES HARM.~~

**Article – Business Regulation**

8–101.

(a) In this title the following words have the meanings indicated.

(b) "Commission" means the Maryland Home Improvement Commission.

(c) "Contractor" means a person, other than an employee of an owner, who performs or offers or agrees to perform a home improvement for an owner.

(d) "Contractor license" means a license issued by the Commission to act as a contractor.

**(E) "DISASTER MITIGATING SERVICES" INCLUDES:**

**(1) BOARDING UP WINDOWS OR DOORS TO SECURE A BUILDING;**

**(2) DEMOLITION OF A STRUCTURE TO PREVENT FURTHER DAMAGE;**

**(3) SETTING WATER MITIGATION EQUIPMENT;**

**(4) TARPING OR CAULKING A ROOF OR BUILDING AFTER DAMAGE; AND**

**(5) SECURING A WALL OR ROOF TO PREVENT FURTHER DAMAGE.**

**[**(e)**] (F)** "Fund" means the Home Improvement Guaranty Fund.

**[**(f)**] (G)** "Hearing board" means a home improvement hearing board appointed by the Commission under § 8–313 of this title.

**[**(g)**] (H)** (1) "Home improvement" means:

(i) **1.** the addition to or alteration, conversion, improvement, modernization, remodeling, repair, or replacement of a building or part of a building that is used or designed to be used as a residence or dwelling place or a structure adjacent to that building; or

**[**(ii)**] 2.** an improvement to land adjacent to the building; **OR**

**(II) THE PROVISION OF DISASTER MITIGATING SERVICES FOR A BUILDING OR PART OF A BUILDING THAT IS USED OR DESIGNED TO BE USED AS A RESIDENCE OR DWELLING PLACE OR A STRUCTURE ADJACENT TO THAT BUILDING.**

(2) "Home improvement" includes:

(i) construction, improvement, or replacement, on land adjacent to the building, of a driveway, fall–out shelter, fence, garage, landscaping, deck, pier, porch, or swimming pool;

(ii) a shore erosion control project, as defined under § 8–1001 of the Natural Resources Article, for a residential property;

(iii) connection, installation, or replacement, in the building or structure, of a dishwasher, disposal, or refrigerator with an icemaker to existing exposed household plumbing lines;

(iv) installation, in the building or structure, of an awning, fire alarm, or storm window; and

(v) work done on individual condominium units.

(3) "Home improvement" does not include:

(i) construction of a new home;

(ii) work done to comply with a guarantee of completion for a new building project;

(iii) connection, installation, or replacement of an appliance to existing exposed plumbing lines that requires alteration of the plumbing lines;

(iv) sale of materials, if the seller does not arrange to perform or does not perform directly or indirectly any work in connection with the installation or application of the materials;

(v) work done on apartment buildings that contain four or more single–family units; or

(vi) work done on the commonly owned areas of condominiums.

**[(h)] (I)** "Home improvement contract" means an oral or written agreement between a contractor and owner for the contractor to perform a home improvement.

**[(i)] (J)** (1) "License" means, except where it refers to a license other than one issued under this title, a license issued by the Commission.

(2) "License" includes:

(i) a contractor license; and

(ii) a salesperson license.

**[(j)] (K)** "Licensed contractor" means a person who is licensed by the Commission to act as a contractor.

**[(k)] (L)** "Owner" includes a homeowner, tenant, or other person who buys, contracts for, orders, or is entitled to a home improvement.

**[(l)] (M)** "Salesperson" means a person who sells a home improvement.

[(m)] **(N)** "Salesperson license" means a license issued by the Commission to sell a home improvement.

[(n)] **(O)** "Sell a home improvement" means:

(1) to negotiate or offer to negotiate a home improvement contract with an owner; or

(2) to seek to get a home improvement contract from an owner.

[(o)] **(P)** "Subcontractor" means a person, other than a laborer or supplier of materials, who makes an oral or written agreement with:

(1) a contractor to perform all or part of a home improvement contract; or

(2) another subcontractor to perform all or part of a subcontract to a home improvement contract.

8–501.

(c) (1) In addition to any other matters on which the parties lawfully agree, each home improvement contract shall contain:

(viii) a notice that gives the telephone number and website of the Commission and states that:

1. each contractor must be licensed by the Commission; and

2. anyone may ask the Commission about a contractor; [and]

(ix) a notice set by the Commission by regulation that:

1. specifies the protections available to consumers through the Commission; and

2. advises the consumer of the right to purchase a performance bond for additional protection against loss; **AND**

**(X) IF THE CONTRACT IS FOR THE PROVISION OF DISASTER MITIGATING SERVICES, NOTICE OF THE OWNER'S RIGHT TO RESCIND THE CONTRACT UNDER § 8–501.1 OF THIS SUBTITLE.**

(2) If payment for work performed under the home improvement contract will be secured by an interest in residential real estate, a written notice in not smaller than 10 point bold type that is on the first page of the contract shall state in substantially the

following form: "This contract creates a mortgage or lien against your property to secure payment and may cause a loss of your property if you fail to pay the amount agreed upon. You have the right to consult an attorney. You have the right to rescind this contract within 3 business days after the date you sign it by notifying the contractor in writing that you are rescinding the contract."

(3) The notice under paragraph (2) of this subsection shall be independently initialed by the homeowner.

(f) (1) Except as provided in paragraph (2) of this subsection, a home improvement contract for the installation of a solar energy generating system on the roof of a building shall include the installation of a barrier that meets industry standards to prevent wildlife intrusion and damage to the solar energy generating system or the underlying roof.

(2) A home improvement contract for the installation of a solar energy generating system on the roof of a building is not required to include the installation of a barrier as specified under paragraph (1) of this subsection if the customer has waived the installation of the barrier after being informed of the cost of the barrier and the risks of not installing a wildlife barrier.

**8–501.1.**

**(A) (1) AN OWNER MAY RESCIND A HOME IMPROVEMENT CONTRACT FOR DISASTER MITIGATING SERVICES WITHIN 5 DAYS AFTER ENTERING INTO THE CONTRACT.**

**(2) AN OWNER THAT RESCINDS A HOME IMPROVEMENT CONTRACT IN ACCORDANCE WITH THIS SECTION MAY NOT BE REQUIRED TO PAY MORE THAN THE AMOUNT OF THE PENALTY INDICATED IN THE CONTRACT.**

**(B) A HOME IMPROVEMENT CONTRACT FOR DISASTER MITIGATING SERVICES SHALL:**

**(1) COMPLY WITH THE REQUIREMENTS OF § 14–302 OF THE COMMERCIAL LAW ARTICLE; AND**

**(2) INCLUDE THE FOLLOWING LANGUAGE, WHICH SHALL BE INITIALED BY THE OWNER:**

**"DURING THE FIRST 5 DAYS AFTER THIS CONTRACT IS SIGNED, THE OWNER HAS THE RIGHT TO RESCIND THE CONTRACT AND BE LIABLE ONLY FOR A PENALTY IN AN AMOUNT NOT TO EXCEED $ _____ (FILL IN AMOUNT).".**

**8–507.**

(A) IN THIS SECTION, "DISASTER" MEANS A SERIOUS EVENT THAT:

(1) CAUSES HARM TO A HOME, BUILDING, OR OTHER STRUCTURE; AND

(2) REQUIRES EMERGENCY RESPONSE SERVICES.

(B) THIS SECTION DOES NOT APPLY TO A CONTRACTOR, OR A PERSON ACTING ON BEHALF OF A CONTRACTOR, WHO IS ENGAGED IN AN ONGOING BUSINESS RELATIONSHIP, OTHER THAN MERE SOLICITATION, WITH A VICTIM OF A DISASTER BEFORE THE DISASTER OCCURS.

(C) FOR PURPOSES OF THIS SECTION, THE EXISTENCE OF A DISASTER IS NOT CONTINGENT ON THE DECLARATION OF A STATE OF EMERGENCY BY THE FEDERAL GOVERNMENT OR THE GOVERNOR UNDER § 14–107 OF THE PUBLIC SAFETY ARTICLE, OR A LOCAL DISASTER DECLARATION AS DEFINED UNDER § 14–110.5 OF THE PUBLIC SAFETY ARTICLE.

~~(D) A CONTRACTOR, OR A PERSON ACTING ON BEHALF OF A CONTRACTOR, MAY NOT SOLICIT OR ATTEMPT TO SOLICIT A DISASTER VICTIM WITHIN 48 HOURS AFTER A DISASTER.~~

~~(E) A VIOLATION OF SUBSECTION (D) OF THIS SECTION IS:~~

~~(1) AN UNFAIR, ABUSIVE, OR DECEPTIVE TRADE PRACTICE, AS DEFINED UNDER TITLE 13 OF THIS ARTICLE; AND~~

~~(2) SUBJECT TO THE ENFORCEMENT AND PENALTY PROVISIONS OF TITLE 13 OF THIS ARTICLE.~~

(D) THE GOVERNING BODY OF A COUNTY MAY IMPOSE LIMITATIONS ON IN–PERSON SOLICITATION OF A VICTIM OF A DISASTER BY A CONTRACTOR OFFERING DISASTER MITIGATION SERVICES, INCLUDING LIMITATIONS ON THE HOURS DURING WHICH AND AREAS WITHIN WHICH IN–PERSON SOLICITATION MAY OCCUR.

SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall take effect October 1, 2025.