Alert

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COZEN O'CONNOR

Texas Supreme Court Rejects Free Speech and Due Process Challenges to Public Adjuster Regulations

A roofing contractor called Stonewater Roofing, Ltd. (Stonewater) challenged a Texas statute regulating public adjusters' conduct on the basis that the statute violates free speech and due process rights under the First and Fourteenth Amendments of the United States Constitution. If Stonewater had prevailed, fundamental parts of the statute would have been struck down, and the remaining parts of the statute would have been incoherent, leaving the common law and insurance treatises to govern public adjusters' conduct. However, in a well-reasoned, methodical opinion for the majority, Justice John Devine rejected the constitutional challenges. Justice Devine reasoned that the statute regulates nonexpressive conduct, not speech, and is clear enough to pass constitutional muster. The Court reversed the Amarillo Court of Appeals' contrary judgment and rendered judgment dismissing Stonewater's claims.[1]

Background

Justice Devine began by reviewing the statute that regulates public adjusters, Texas Insurance Code §4102. The Texas Legislature adopted the statute in 2003 to "close a gap in the regulatory scheme and address concerns that unscrupulous contractors were preying on unwary Texas in the aftermath of catastrophic weather events." The statute defines public adjusters as representatives of the insured in negotiating the settlement of claims for damage to real or personal property. Public adjusters are permitted to engage in investigation, adjustment, advice, and settlement of insurance claims in a limited way. Justice Devine noted that, like adjusters representing insurers, the statute requires public adjusters to be licensed. He also noted that the statute prohibits a dual role – acting as both contractor and public adjuster for the insured and falsely advertising the ability to do so. Violations of the statute entail administrative, civil, and criminal penalties.

While Stonewater was a professional roofer, it was not a licensed public adjuster under Texas Insurance Code §4102. Nevertheless, its website made sweeping claims about insurance expertise, insurance claim settlements, and involvement in repairs.

When a dissatisfied customer sued Stonewater for violations of Texas Insurance Code §4102, Stonewater pivoted and filed a collateral declaratory judgment action against the Texas Department of Insurance to invalidate the public adjuster licensing requirement and the dual role prohibition. Stonewater contended that these provisions, both facially and as applied to the roofer's alleged conduct, infringe speech protected by the First Amendment and are void for vagueness under the Fourteenth Amendment's due process clause. The Texas Department of Insurance answered and filed a motion to dismiss under Texas Rule of Civil Procedure 91a. The Department argued that the statute regulates conduct, not speech, and clearly proscribed Stonewater's conduct without being vague.

The trial court granted the Rule 91a motion. The Amarillo Court of Appeals reversed and remanded. The Court of Appeals reasoned that the regulations triggered strict scrutiny. The Court of Appeals opined that the Texas Department of Insurance failed to develop its argument fully and that Stonewater's website advertisements and representations in contracts were not clearly proscribed under the statute. The Texas Supreme Court granted the Texas Department of Insurance's petition for review of the Court of Appeals' decision.

Discussion

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Justice Devine reviewed Rule 91a. The Rule authorizes dismissal of an action that “has no basis in law or fact.” Under Rule 91a, “a cause of action has no basis in law if the allegations, taken as true, together with inferences reasonably drawn from them, do not entitle the claimant to the relief sought.”

First Amendment: Free Speech

Justice Devine noted that the First Amendment is applied to the states through the Fourteenth Amendment and protects "one of our most cherished liberties, the right to speak or not speak." Justice Devine opined that it was unnecessary to dive into the arcana of the appropriate degree of judicial scrutiny. Rather, under Rule 91a, the Court was tasked with determining whether the First Amendment applies at all. Justice Devine asserted that the answer depends on whether the challenged statute is directed at protected speech (as Stonewater contends) or not (as the Texas Department of Insurance contends). Justice Devine wrote that "we have little trouble concluding that sections 4102.051(a) and 4102.163(a) do not regulate speech protected by the First Amendment," that the parties were misreading the statute, and that the statutes operate narrowly.

Regarding the statute's licensure requirement, Justice Devine emphasized the state's power to license professional activities: the mandate to obtain a license pertains to status or capacity, not speech. Justice Devine opined that while the statute prohibits a person from holding himself out as a public adjuster when he is not licensed, which act involves expression, the state can regulate false commercial speech about licensure.

Regarding the dual role prohibition, Justice Devine emphasized that the statute regulates what persons may not do: undertake business relationships, giving rise to a conflict of interest. Justice Devine described obtaining a public adjuster license as an economic choice to be licensed or not, but the statute does not dictate, proscribe, or otherwise limit expression. Finally, Justice Devine observed that the statute prohibits advertising that is illegal under the statute. Therefore, such advertising is not entitled to protection under the First Amendment.

Justice Devine summarized

The nub of the dispute concerns the scope of the defined profession itself, which in turn determines whether the licensing and dual-capacity laws apply to a commercial engagement. In section 4102.001(3), the Public Insurance Adjusters Act subjects a person to regulation as a public insurance adjuster if that person “[1] for direct, indirect, or any other compensation . . . [2] acts on behalf of an insured [3] in negotiating for or effecting [4] the settlement of a claim or claims for loss or damage under any policy of insurance covering real or personal property.” Stonewater construes negotiating for or effecting as entirely communicative and thus dispositive of the definition's expressive aim. But this selective reading of the statutory language misses the forest for the trees. The gravamen of the defined profession is the role a person plays in a nonexpressive commercial transaction, not what anyone may or may not say. Giving effect to all of its language, section 4102.001(3) targets nonexpressive commercial activities, not speech.

Justice Devine concluded that Stonewater had not stated a cognizable First Amendment claim, and the trial court properly sustained the Texas Department of Insurance’s Rule 91a challenge.

Fourteenth Amendment: Vagueness

Next, Justice Devine considered whether the Texas Department of Insurance was correct that because Stonewater's facial vagueness claim has no basis in law, its as-applied vagueness claim also fails as a matter of law. In other words, is the statute so clear that Stonewater cannot mount a successful facial attack on the statute?

Justice Devine wrote, "Our analysis is focused on the effect of vagueness as applied to Stonewater's alleged conduct because that is how TDI's Rule 91a motion framed the issues." The opinion continued: Under settled constitutional law principles, a vague statute offends due process in two ways. First, it fails to give fair notice of what conduct may be punished, forcing ordinary people to guess at the statute's meaning. Second, the statute's language is so unclear that it invites arbitrary or discriminatory enforcement. Stonewater asserts that the Public Insurance

Adjuster Act's licensing and dual-capacity provisions flunk the due-process inquiry for both reasons.

Justice Devine then examined authorities regarding constitutional standards regulating speech and statutes that authorize penalties for certain speech, emphasizing that a statute must provide fair notice of prohibited conduct. Justice Devine reasoned that the Texas Department of Insurance's view of prohibited public adjuster activity was oversimplified, while Stonewater's interpretation misunderstood the statute's application:

In this case, the regulated relationship is what proves problematic for Stonewater under the allegations in the pleadings, which we take as true under Rule 91a. Although Stonewater is not a licensed public insurance adjuster, its form contracts expressly authorize it to negotiate with the insurance company on the customer's behalf and perform construction work upon insurance approval. Stonewater's website messaging also describes the roofer as "The Leader In Insurance Claim Approval," a "Trusted Roofing and Insurance Specialist[]," "highly experienced with the insurance claims process," and the developer of "a system which helps [its] customers settle their insurance claims as quickly, painlessly and comprehensively as possible." These contracting and advertising activities, viewed together or in their respective buckets, fall plainly within the scope of a public insurance adjuster as statutorily defined and regulated.

Justice Devine concluded by re-emphasizing that the statute need only provide fair notice, not provide an exhaustive articulation of prohibited conduct, a standard that it easily surpassed. Therefore, Stonewater's as-applied and facial vagueness claims failed as a matter of law.

Commentary

The Stonewater case presents an interesting intersection of constitutional law and insurance regulation. Stonewater’s challenge to the statute was definitely creative. However, the statute has been relied upon by consumers, public adjusters, and insurers alike for twenty years without constitutional challenge, which made the challenge seem far-fetched. The Court may have also disliked a non-public adjuster challenging the public adjuster statute since Stonewater’s purpose for doing so was so clearly self-serving rather than benefitting a broad body of stakeholders.

Insurance is heavily regulated in Texas. Although Justice Devine did not state it, his analysis suggests that the Court was loathe to strike down a consumer protection statute and upset that regulatory balance. Thus, the Court’s opinion maintains the status quo in the regulation of public adjusters in Texas. For additional information, read the author’s authoritative law review article regarding What Public Insurance Adjusters Can and Cannot Do Under Texas Law, published in the *Journal of Consumer & Commercial Law.*

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[1]See Tex. Dep’t of Ins. v. Stonewater Roofing, Ltd. Co., 2024 Tex. LEXIS 440 (Tex. June 7, 2024).