

# The Texas Lawbook

Free Speech, Due Process and Trial by Jury

## Kirkland's Fielding Explains Why a Win for a Door-to-Door Solicitor Is Actually Positive

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Jeremy Fielding put himself through college at Brigham Young University by spending his summers selling pest control door-to-door. The experience led several of Fielding's co-workers to start their own pest control companies.

One of them, Utah-based Aptive Environmental, recently called Fielding, who pursued a career in the law after his college pest control days. Now a partner in Dallas at Kirkland & Ellis, Fielding just scored a significant appellate win for Aptive against the Colorado town of Castle Rock, which attempted to place a curfew on when Aptive could sell its services door-to-door.

The win was significant for business and constitutional reasons alike, according to Fielding. From a business standpoint, the ruling allows Aptive to obtain more customers by selling door-to-door after 7 p.m., when people are actually home from work. Fielding said door-to-door sales are a substantial element of Aptive's business model, which heavily relies on college-aged sales reps who sell service packages over the summer.

"Aptive sells hundreds of thousands of service plans each summer to these people it originally meets for the first time on their doorsteps," Fielding said.

More broadly, the ruling, handed down last Friday by the U.S. Court of Appeals for the 10th Circuit, is the first in the nation to uphold the ban of a commercial solicitation curfew under the Central Hudson test.

While there have been other appellate rulings around the country that banned solicitation curfews for all kinds of speech — religious, political and commercial — there had not been a protection singling out commercial speech because it is widely considered a less-protected form of speech than the other two.

"There has never been a federal appellate court decision involving a curfew that applies only to commercial solicitors," Fielding said. "This opinion is the first of its kind in that respect."

Moreover, Fielding said, the ruling protects

the First Amendment rights of corporations, even if their avenue of commercial speech — soliciting door-to-door — is generally unpopular with the public.

"Door-to-door solicitation is an easy target for elected officials," he said. "There is a natural constituency against it ... even people that happily end up purchasing products from solicitors don't start out their day hoping to have someone knock on their door during dinner.

"It's a reminder that — even if regulating unpopular commercial speech — the government must make sure its proposed regulations materially solve real problems and in a manner that more narrowly-tailored regulations would not," he said.

Fielding said the ruling will have important ramifications for other industries, including increasingly active efforts by government to regulate the advertising and marketing of disfavored products, such as sugary drinks, alcohol and vape products.

The Town of Castle Rock did not indicate that it would try to appeal the ruling.

"We believe the best use of resources is to take a forward-looking view as to how we might develop a future curfew ordinance, with community input, that furthers our desire and commitment to protecting the safety and privacy of our residents," a spokesperson with the town said.

The town's outside lawyer, Brian Connolly of Denver firm Otten Johnson, did not respond to a request for comment.

Founded just five years ago, Aptive now operates in 26 states and is already one of the five largest pest control companies in America. Aptive has significant operations in Texas — its website lists six office locations across Austin, Houston, San Antonio and Dallas-Fort Worth. Aptive's VP of Corporate and Compliance Counsel is Viviana Harrington, who is based in Houston and, according to her LinkedIn profile, joined the company last month.

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Aptive has run into curfew issues with town authorities as the company has expanded its geographic reach, Fielding said. As that began happening, Aptive called Fielding, who had a track record of successfully negotiating with town authorities on behalf of solicitors. Recently, he obtained a settlement against North Texas' City of Colleyville to lift its 5 p.m. solicitation curfew against another company, Moxie Pest Control, on the eve of a trial.

Fielding did not hesitate to take on Aptive as a client.

"Given the four years I spent selling door-to-door during the summers, representing Aptive felt like I was 'coming home.' I learned so much from my experience selling door-to-door — about resiliency and hard work and the art of persuasion," Fielding said. "This was my chance to give back."

He said another big factor was that he believed in the company's cause.

"The government's commitment to free speech is not tested when the speech in question is popular," he said. "Instead, that commitment is weighed when the speech is unpopular and some folks (who might have the ear of their city council members or legislators) want to prohibit it ... this makes it politically easy to pass ordinances restricting the speech."

"The problem is that these ordinances then take the choice away from the many, many other people that DO want to buy Aptive's services."

Fielding said he and law partner Jon Kelley, who both joined Kirkland last fall from Lynn Pinker Hurst & Schwegmann, addressed problematic curfews in "literally hundreds" of city ordinances across the country. Once the lawyers sent letters to the cities identifying the constitutional problems with their ordinances, "99% of these cities agreed to repeal" them, he said.

Castle Rock was the only municipality not to, which led Aptive to sue the city in 2017. After a March 2018 bench trial, a federal court in Denver ruled in Aptive's favor, holding that Castle Rock's 7 p.m. to 9 a.m. curfew was unconstitutional.

At trial and on appeal, which went to oral argument in March 2019, Fielding said his side argued that Aptive "places a high priority on maintaining a strong relationship with the cities in which it sells," which involves appreciating and supporting "narrowly-tailored regulations" that are targeted toward the residents' safety.

Castle Rock was Exhibit A for having such restrictions, which Aptive embraced. Castle

Rock requires all solicitors to register with the town and pass a background check, and it forbids solicitors from knocking on the doors of residents who have opted out by placing "No Soliciting" signs on their property (Mark Curriden, we're looking at you and your "Go Away" doormat).

"We pointed out that these other existing aspects of the solicitation ordinance served to keep residents safe and protect their privacy," Fielding said. "With these existing regulations already protecting resident safety and privacy, we pointed out that the curfew was superfluous and a needless additional restriction."

The 10th Circuit agreed, holding that Castle Rock's curfew "unconstitutionally burdens Aptive's First Amendment Rights" and that Castle Rock failed to "demonstrate that the curfew advances its substantial interests in a direct and material way."

The 10th Circuit pointed out the fact that Castle Rock problematically excluded political and religious solicitors from its ordinance.

"When an ordinance makes these sorts of facial distinctions, e.g., between those soliciting for religious purposes and those soliciting for commercial gain, not only the Supreme Court, but our court, has expressly held that it 'contemplates a distinction based on content,'" the opinion says.

"And so, because the 2014 ordinance creates a content-based distinction which determines which solicitors the curfew applies between commercial and noncommercial speech, we must reject any argument that the curfew is either not subject to First Amendment scrutiny at all or can be analyzed merely as a content-neutral line, place and manner restriction."

While Fielding handled oral argument before the 10th Circuit, he said former Lynn Pinker colleagues David Coale and Paulette Minter provided significant assistance on the appeal.