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$2.3 Million Verdict Affirmed for Insurance Agent Under Connecticut Franchise Act

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In an Oct. 25, 2005 decision, a Connecticut District Court denied an insurance company's motion to set aside a $2.3 million verdict on the plaintiff-agent's wrongful termination claim, concluding that company's relationship with its independent sales agent constituted a franchise under the Connecticut Franchise Act, §42-133e et seq. ("CFA").

In *Charts v. Nationwide Mutual Insurance Co.*, Nationwide terminated one of its longtime Connecticut-based insurance agents, Alex Charts, pursuant to a contract that permitted Nationwide to terminate the agreement "at anytime after written notice." Charts responded by filing a three-count complaint, alleging violations of the CFA, the Connecticut Unfair Trade Practices Act ("CUTPA") and the common law implied covenant of good faith and fair dealing. Among other things, Charts claimed that his relationship with Nationwide was a franchise under the CFA because the agreement between the parties required him to operate his agency in strict accordance with Nationwide's standards; follow a marketing plan prescribed in large part and controlled by Nationwide; associate with Nationwide's trademarks; and sell products at prices that Nationwide set and controlled. Following a 9-day trial, the jury entered a verdict finding for Charts on all three counts and awarding him $2.3 million in compensatory damages.

Nationwide raised several arguments in its post-trial motions. It first contended that the CFA claims should not have gone to the jury at all. However, the district court, while acknowledging that there was a split of authority among Connecticut trial courts on the issue, held that Nationwide had waived the argument by failing to object to Charts' jury demand at any point before the jury returned its verdict.

The court also rejected Nationwide's assertion that the evidence did not support a finding that Charts was a franchisee under the CFA. The CFA has two requirements for establishing the existence of a franchise: 1) an agreement in which the franchisee is granted the right to engage in the business of offering or selling products or services under a marketing plan or system prescribed in substantial part by the franchisor; and 2) substantial association with the franchisor's trademark, service mark or trade name (unlike many franchise statutes, the CFA does not have a franchise fee requirement).

Nationwide argued that Charts did not have the ability to "sell" insurance policies because the extent of his authority to was to execute non-binding contracts with customers. The court, however, pointed out that Nationwide's position was at odds with the company's pretrial stipulation that Charts was "engaged in the business of selling and servicing Nationwide insurance policies and other related products within the State of Connecticut." Moreover, the court observed that Charts testified at trial that he did, in fact, have the authority to bind Nationwide to insurance contracts. The court also concluded that the evidence supported the jury's finding that Charts operated pursuant to a marketing plan prescribed in substantial part by Nationwide, based on the company's right to approve his advertisements, its customary review of his marketing plans and a company representative's

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admission at trial that Nationwide agents operated under a marketing plan prescribed by the company.

The court also rejected Nationwide's assertion that the jury was required to find that "good cause" existed for the termination. In its post-trial motion, Nationwide claimed that Charts had violated the Connecticut Insurance Code by paying for insurance policies on three occasions. The court, however, noted that Nationwide did not cite these "rebating" incidents in its letter terminating the contract, and that other Nationwide employees had engaged in similar conduct when selling Nationwide policies. Moreover, with respect to the claimed violations of the law, the court concluded that Nationwide waived the right to present this issue to the jury by failing to cite Charts' alleged violations of the law as a grounds for termination at any point during the trial. (Nationwide first raised the issue by filing a proposed supplemental jury instruction, which the court refused to give.) The court also concluded that because there was evidence to support the jury's verdict on the CFA claim, that statutory violation also supported a finding that Nationwide violated CUTPA. It therefore affirmed the jury's $2.3 million verdict, and awarded Charts an additional $750,000 in attorneys' fees on the statutory claims.

In contrast, the court granted Nationwide's motion for judgment as a matter of law on the implied covenant of good faith and fair dealing claim. The court concluded that Charts could not rely on the implied covenant of good faith and fair dealing to amend the plain language of the agency agreement, which provided that Nationwide could terminate the contract "at anytime after written notice." Although Charts introduced evidence that Nationwide's practice was not to terminate sales agents without good cause, the court held that the evidence "was insufficient to alter or amend the plain language of the parties' agreements," and that Charts therefore could not sustain a common law claim for breach of the implied covenant of good faith and fair dealing.

Impact of Decision Unknown

At this point, it is hard to predict the significance of the *Charts* decision. It is certainly possible that because of the unusual breadth of the CFA (which has no franchise fee requirement) and the unique facts and procedural posture of the case, *Charts* turns out to be an anomaly. For example, one wonders whether the court would have reached the same conclusion if Nationwide had timely objected to a jury, and the case had been resolved in a bench trial. Similarly, the district court's decision sustaining the verdict was driven, in large part, on pretrial stipulations and witness testimony that might not be part of the record in future cases.

On the other hand, the district court's analysis sustaining the verdict on the CFA and CUTPA claims, if adopted by other courts, could have significant consequences for any company that does business through independent sales agents. Many states have franchise statutes like Connecti-cut's that restrict a party's right to terminate any business relationship that is considered a franchise. Other states have adopted rigorous presale disclosure requirements that apply to the sale of any franchise.

Before *Charts*, the vast majority of decisions applying the CFA and comparable franchise statutes held that sales agents were not franchisees, in part, because the agents only had the authority to solicit orders, and did not have the right to consummate a sale. *See, e.g., Triangle Trading Co., Inc. v. Robroy Indus., Inc.,* 200 F.3d 1, 5 (1st Cir. 1999); *Kornacki v. Norton Performance Plastics*, 956 F.2d 129, 133 (7th Cir. 1992); *Kent Jenkins Sales, Inc. v. Angelo Bros. Co.*, 804 F.2d 482, 486-87 (8th Cir. 1986); *George R. Darche Assocs., Inc. v. Beatrice Foods Co.*, 538 F. Supp. 429, 433-34 (D.N.J. 1981), *aff'd*, 676 F.2d 685 (3d Cir. 1982); *33 Flavors, Etc. v Bresler's 33 Flavors, Inc.*, 475 F. Supp. 217, 228 (D. Del. 1979); *Stockton v. Sentry Ins. Co.,* 989 S.W.2d 914, 917 (Ark. 1999); *Vitkauskas v. State Farm Mut. Auto Ins.*, 157 Ill. App.3d 317, 323-24, 509 N.E.2d 1385, 1390 (1987); *Zimmer-Jackson Assocs., Inc. v. Department of Labor & Indus.*, 752 P.2d 1095, 1099 (Mont. 1988); *East Wind Express, Inc. v. Airborne Freight Corp.,* 95 Wash. App. 98, 104, 974 P.2d 369, 373 (Wash. App. 1999); *Foerster, Inc. v. Atlas Metal Parts Co.,* 313 N.W.2d 60, 66, 105 Wis.2d 17 29 (1981) (all holding that commissioned sales agents are not franchisees). If that is not the law, many franchisors could find themselves with "hidden franchise" problems with sales agents, area developers and others who have traditionally not been considered franchisees.