Advisory

AUGUST 2013

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Recent Second Circuit Decision Determines that Insurance Agent was Not a Franchisee Under Connecticut Franchise Act

On June 24, 2013, the Second Circuit Court of Appeals affirmed a summary judgment decision by the U.S. District Court for the District of Connecticut holding that the Connecticut Franchise Act ("CFA") did not apply to the relationship between an insurance agent and an insurer that was at issue in that case. While the appeals court did not adopt a blanket rule that an insurance agent can never be a franchisee under the CFA, its affirmance of the district court's decision establishes that insurance agents face an uphill battle to demonstrate that the CFA applies to them.

In Garbinski v. Nationwide Mutual Insurance Company, No. 3:10-cv-1191 (VLB), 2012 WL 3027918 (D. Conn. July 24, 2012), Gregory Garbinski sued Nationwide Mutual Insurance Company after it terminated his agent agreement. One of Garbinski's many claims was that the termination violated the CFA. By way of background, in 2003, Garbinski purchased the books of business from two retiring Nationwide agents. He then opened his own independent agency and entered into an agent agreement with Nationwide regarding the books of business he just purchased. The agreement characterized Garbinski as an independent contractor and provided that Nationwide would own the policies he sold, but gave Garbinski the right to service the policies and paid him a commission based on the amount of premiums he procured for Nationwide. The agent agreement also required him to pay all of his own expenses and allowed him to sell other insurers' policies. Nationwide terminated its agreement in 2009, after an intoxicated Garbinksi threatened his wife with a gun at his home and engaged in a three-hour police standoff.

Nationwide argued that the CFA did not apply because Garbinski did not satisfy the Connecticut Supreme Court's test for determining who is a franchisee under the CFA, which requires proof that a "franchisee must have the right to offer, sell or distribute goods or services. Second, the franchisor must substantially prescribe a marketing plan for the offering, selling or distributing of good or services." The district court found that "an insurance agency in general and Garbinski's agency in particular" does not satisfy the test for three reasons. First, Nationwide did not prescribe a marketing plan because Garbinski had "an enormous amount of discretion" in how he sold insurance. Second, Nationwide and Garbinski did not have an exclusive relationship, i.e., Garbinski could also sell policies from other insurers. The court highlighted how different this was from a typical franchise relationship, noting that, for example, a customer cannot walk into Dunkin' Donuts and buy a Starbucks coffee. Third, Garbinski "did not undertake the risk attendant to a franchise which the act seeks to mitigate" because he was able to sell other companies' policies and was not required to buy a product from Nationwide before reselling it to the public.

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On appeal, Garbinski v. Nationwide Property and Casualty Insurance Company, 2013 WL 3155933, --- Fed. Appx. --- (2d Cir. June 24, 2013) the appellate court affirmed the district court's decision. After first cautioning that it was not commenting "on whether an insurance agent may ever be a franchisee," the appellate court then held that no "reasonable jury could find that Garbinski and Nationwide entered into a franchise relationship as contemplated" by the CFA. It explained that Garbinski did not "have the right to offer, sell or distribute goods or services" as required by the CFA because, "unlike a typical franchise," he "did not buy the insurance products from Nationwide before reselling them," had no "minimum sales quota," and was a "commissioned sales representative" who never owned the policies.