

Independent Insurance Agent was Franchisee, Says Connecticut Jury

by Joseph J. Fittante, Jr. and Mary B. Stanley

On December 9, 2004, an eight person jury in the United States District Court in Connecticut awarded Alex Charts, an independent insurance agent representing Nationwide Mutual Insurance Company, \$2.3 million based on Nationwide's violation of the Connecticut Franchise Act. *Charts and Charts Ins. Assoc., Inc. v. Nationwide Mutual Ins. Co. et al.*, Bus. Franchise Guide (CCH) ¶ 12,987 (D. Conn. Dec. 9, 2004).

The case, which had been pending for seven years, arose out of Nationwide's January 1996 termination of its 23 year relationship with Charts, who had sold insurance exclusively for Nationwide. At the time of termination, Nationwide apparently failed to provide Charts with the reason for termination of the relationship. After termination, Charts filed suit alleging, among other things, that the relationship constituted a franchise relationship under the Act and that the termination was without good cause in violation of the Act.

The Connecticut Franchise Act defines a franchise as any arrangement in which a franchisee is granted the right to offer, sell or distribute goods or services under a marketing plan prescribed in substantial part by the franchisor and the operation of the franchisee's business pursuant to such plan is substantially associated with the franchisor's trademark, trade name or other commercial symbol.

At trial, Charts asserted that his relationship with Nationwide satisfied the franchise definition under the Act because he was required to operate his insurance agency in accordance with Nationwide's standards, to follow a marketing plan prescribed and controlled by Nationwide, and to associate with Nationwide's trademarks in the operation of his business. Nationwide countered that the agreements between the parties expressly stated that the parties' relationship was that of principal-agent and that Connecticut had expressly recognized that a principal-

agent relationship was not a franchise relationship. Nationwide stipulated that it controlled the pricing and availability of its products sold by Charts, was able to audit Charts' insurance agency books and records at any time, required Charts to comply with advertising rules prescribed by Nationwide, and maintained supervisory responsibility over Charts' performance and business operations.

Charts alleged that his termination was without good cause and instead was in retaliation for going over the head of Nationwide's Connecticut market manager with complaints about Charts' supervisor. Nationwide, however, asserted that the agreement allowed Nationwide to terminate without cause and, in any event, the termination was with good cause – namely, Charts' practice of purchasing and paying for insurance policies on individuals who were not his relatives. Apparently, Charts would receive commissions on these policies equal to their cost. Nationwide asserted that this practice made Charts eligible for awards from Nationwide for which he would not otherwise have been eligible and inflated his yearly total sales.

Based on the facts stipulated to by Nationwide and the Act's definition of a franchise, it is not surprising that the jury ruled in Charts' favor on the question of the applicability of the Act. The jury found that Charts' relationship with Nationwide was a "franchise relationship" within the meaning of the Connecticut Franchise Act and that Nationwide did not have good cause, as required by the Act, to terminate the relationship.

Post-trial motions, e.g., a motion for judgment as a matter of law, were pending as of this writing.

Some industry watchers have predicted broad consequences from this jury verdict. See, e.g., *Jury Backs \$2.3 Million Award to Terminated Independent Agent; Nationwide to Challenge Verdict*, Insurance Journal (visited Feb. 27, 2005) <<http://www.insurancejournal.com/>

[news/east/2004/12/16/48728.htm](http://www.insurancejournal.com/news/east/2004/12/16/48728.htm); Business Wire, *Jury Awards \$2.3 Million to Wrongfully Terminated Independent Insurance Agent* (Dec. 16, 2004) (visited Feb. 27, 2005) <http://www.nmlcompliance.com/lawsuits/Agent_Jury_Award.htm>. But we think the *Charts* decision likely is to be of limited application, for the following reasons:

First, the definition of a franchise under the Connecticut Franchise Act differs from the definition under most state franchise laws and federal law, in that it does not include as an element the payment of a required fee. Based on the reported facts in this case, it is unclear whether Charts made any "required payments" to Nationwide of the type that would satisfy the franchise fee element found in most other state franchise laws.

Second, even if Nationwide's form of agreement contained a choice of law provision specifying Connecticut as the choice of law, the Act by its own terms is only applicable to agreements "which contemplate or require the franchisee to establish or maintain a place of business in Connecticut." Accordingly, agents outside of Connecticut may not be able to take advantage of the Act's broad definition of a franchise.

Third, the relationship between Charts and Nationwide is not representative of most relationships between insurers and their agents. Many independent insurance agents represent multiple insurance companies and are not contract agents like Nationwide agents who sell solely for Nationwide. If an agent represents multiple insurers, it is unlikely that the operation of the agent's business would be "substantially associated" with a single insurer's trademark. Further, it is unlikely that the degree of dependence placed on any one insurer by the agent would be significant enough to satisfy the "significant assistance" or "substantial control" element required for finding of a franchise under federal law.

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Bridging the Divide – The 28th Annual Forum on Franchising (continued from page 6)

refreshments, we have arranged for a special show, limited to Forum attendees and guests, of the world-famous killer whale, Shamu.

Aside from the many theme parks and other activities available to your families, we also have scheduled some exceptional spouse events. On Thursday, we have arranged an excursion to Cape Canaveral to tour the Space Center, along with lunch with an astronaut. On Friday, spouses can attend a cooking class with chefs from Wolfgang Puck's restaurants.

Friday evening will feature dinner and music at the Jazz Club at Universal Citywalk. On Saturday, a golf tournament will be offered at a

nearby top-flight course. In addition, the Corporate Counsel Division and the Women's Caucus are sponsoring a community service event on Saturday which will give attendees an opportunity to give back to the community.

Some have asked why we call this program "Bridging the Divide." As co-chairs of the program, the title has some personal significance. We come from opposing sectors of the franchise legal world but have been able to work together to create what we hope will be a successful program. We also expect that, as all of us learn more about franchise law from this and other programs, we can have a better understanding and knowledge about our respective views.

We can vigorously represent our clients in adversarial matters but remain collegial and respectful, attributes which are particularly important in the relatively limited universe of the franchise bar. We also hope to offer activities and events which provide a welcoming "bridge" to our spouses, our families and friends.

Both of us look forward to seeing all of you (and your guests) in Orlando.

Ron Gardner and Dennis Wieczorek are Co-chairs of the 2005 Forum on Franchising. Ron is a partner with Dady & Garner in Minneapolis. Dennis is a partner with DLA Piper Rudnick Gray Cary U.S. LLP in Chicago.

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Though *Charts* may be of limited application, it is an excellent illustration of the unintended consequences to licensors, manufacturers – and

now, insurers – of failing to accurately characterize the relationship at its outset, or at the very least, at the time of termination.

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