X10 UWYCV 074020455S	:	SUPERIOR COURT
STATE OF CONNECTICUT	:	JUDICIAL DISTRICT OF WATERBURY AT WATERBURY
v.	:	COMPLEX LITIGATION DOCKET
ACORDIA, INC.	:	April 19, 2010

MEMORANDUM OF DECISION

The Plaintiff, State of Connecticut, represented by Richard Blumenthal, Attorney General of the State of Connecticut, originally brought this action pursuant to Conn. Gen. Stat. §42-110m against the Defendant, Acordia, Inc. by a complaint dated 12/19/06 and return date in early January 2007. The State's claims at that time were considerably more expansive than the claims made at the time of trial and in the Plaintiff's post-trial filings. The "Summary of the Case" claimed that as a result of certain actions of the Defendant, which actions constituted unfair trade practices, violative of the Connecticut Unfair Trade Practices Act , Conn. Gen. Stat.§ 42-110a et seq. (hereinafter "CUTPA"), customers and a certain class (non-participating) of insurance companies in the State of Connecticut were harmed.

Defendant, Acordia, Inc. (hereinafter, "Acordia") appeared through counsel on January 17, 2007 and after a mere twenty months of pleading practice, the issues were joined and the matter claimed for trial.

The parties, represented by counsel, tried the matter to the Court commencing on November17, 2009 and continuing on November 19, 20, 23, 24,

25, 30, and December 1, 2009. Twenty witnesses testified during the trial. Deposition testimony of another witness was read into the record. And, nearly two hundred exhibits comprising thousands of pages were submitted to the Court.

Following a full trial, the Court, after considering and weighing the credible, relevant, reliable and legally admissible evidence and the reasonable, rational, logical and lawful inferences to be drawn therefrom, finds, rules, determines and concludes as follows: In 1999, Acordia was headquartered in Chicago, Illinois. The headquarters had fewer than ten officers and managers. Acordia is a decentralized organization with 75 to 100 local sales offices throughout the United States that, in turn, employ roughly 1000 producers. The local offices are structured to be separate corporate entities. Although Acordia does not maintain a local office in the State of Connecticut, it does solicit customers and sell and service insurance products to customers in the State of Connecticut through Acordia, East Inc., located in New Jersey, Acordia of New York, Inc., and Acordia, Northeast, Inc. in Boston, among others. Acordia was a "classic roll up." Its growth was accomplished by it acquisitions of smaller independent agencies or smaller independent brokers. By way of background, there are three main players in the insurance industry: insurance companies, brokers and agents, and consumers either businesses or individuals. Insurance companies sell their products to consumers in one or both of the following ways: directly to the consumer or through a broker or agent. The broker or agent may be independent and offer consumers insurance products from more than one company or may be a "captive" agent of a particular insurance company.

Acordia is an independent insurance agent or broker and offers its clients a choice of products from multiple insurance companies depending upon availability and suitability including, among other factors, price and value. There can be many reasons a Connecticut consumer may wish to use the services of an independent broker rather than a "captive agent", including the variety of insurance product offered. Independent brokers are compensated for their services in two ways: either by a fee charged to the consumer for assisting them with their insurance needs or by a commission, be it fixed and/or contingent, a piece of the premium paid to the insurer for the product.

Contingent commission agreements between insurers and brokers have been part of the industry for decades. They take various forms and serve various purposes, but in general reward brokers for increasing the volume of premium placed with an insurer, reward brokers for more careful underwriting by loss experience contingencies, and/or encourage renewal of expiring policies leading to a reduction in transactional costs. The reward is an additional commission paid to the broker by the insurer. The existence of contingent commissions is well known to state regulators as the regulations and forms utilized by the Insurance Department require their disclosure as part of an insurer's rate filings.

As a result of its growth by acquisitions of smaller brokerages in the late 1990's, Acordia experienced technological difficulties in attempting to integrate different computer systems. At the same time, insurance companies were investing in technology that would allow them to interface their platforms with brokers. Acordia desired to invest in new technology that would allow its local,

regional and corporate offices to utilize a common platform that could also interface with the insurer's technology. The integration of platforms would achieve efficiencies that could ultimately lead to cost savings for all three players in the insurance industry.

In order to fund the development of this technology, a system called AMS Segitta, Acordia sought financial assistance from its markets, the insurers. Acordia approached the twenty insurers with whom it placed the most business with a request that they enter into what eventually would come to be known as the "Millennium Partnership Program" ("MPP"). Under the MPP, Acordia requested that the participating insurance carriers pay an additional 1% of the total value of the premiums that were placed with those companies over a three year period. This "contingent commission" was over and above the commissions that Acordia was being paid by the insurers. At this time, Travelers and The Hartford were building customer service centers designed to service client needs with expanded hours via phone or computer. This not only provided convenience to the consumer, it saved servicing expenses for the insurers and freed up time for the brokers with which to sell more product. As part of the MPP, certain service fees charged by the carriers to the brokers for their clients' utilization of the service centers were to be waived if certain other conditions were met.

Of the carriers approached by Acordia five ultimately agreed to participate in the MPP, including Travelers, The Hartford, Chubb, Atlantic Mutual and Sun Alliance.

The motivation of the insurers was simply to incent Acordia to sell more of their product rather than the product of another insurer. It was on that basis that Charlie Ruoff, who was the chief marketing officer of Acordia at the time and the "author" of the program, sold the insurers on the benefits of the MPP. Representatives of both Travelers and The Hartford testified at trial that they believed that they would have the opportunity under the MPP to quote more business through Acordia to Acordia's clients and sell more insurance. The insurers requested that the MPP be kept confidential as they did not want Acordia's competitors seeking similar additional compensation.

In order for Acordia to maximize the benefits afforded under the MPP, Acordia's producers at the local offices would have to sell products of the five participating companies. Ruoff assured the insurance partners that the producers at the local level, the point of sale, would be made aware of their "priority" status. Indeed, Ruoff informed the Millennium partners that "all of the revenue will be provided to them."(referring to regional and local office colleagues in attendance at a presentation by Ruoff to 100 Acordia personnel at a meeting in Denver in September 1999.) Ruoff informed Acordia's P/C Marketing Committee of and gave regular status reports on the MPP- the committee being made up of regional managers and representatives from various local offices across the country. The committee was instructed to "concentrat(e)... on the plans and initiatives put forward by our priority markets to the exclusivity of all other markets." Regional managers, such as Kevin Conboy, East Regional Director, in turn, communicated down the line informing the East Region's Executive management that "Charlie

Ruoff has negotiated national agreements with several of our key property casualty markets that provide us with an incentive based on total written premium... As you will read, this incentive program affords us the opportunity to realize significant income, over and above, any incentive or profit sharing we receive on a local or regional level. This program should be considered a very important part of your 2000 business plan. Millennium markets should be given preferential consideration on new and renewal placements." The lack of any mention of Segitta might make one question the primacy of the originally stated rationale of the MPP. In any event, the purpose of or even the existence of the MPP is not the central issue in this matter at this point.

Plaintiff offered evidence from four Connecticut consumers and their brokers. Each customer was a client of an Acordia subsidiary during the relevant period and had at least one insurance policy that was placed with an MPP insurer. In each case, the broker/customer relation went back years or even decades. In each case, the broker knew the nature of the customer's business and their insurance needs. In each case, the Connecticut consumer depended on and trusted their broker to provide them with independent and unbiased advice on what insurance to purchase. Although the level of business sophistication varied among the four customers, the brokers had superior knowledge and heightened expertise to that of their customers in each case. The brokers encouraged the customers to trust their judgment, independence and expertise and the customers justifiably relied on that judgment, independence and expertise. The four

producers knew that their customers were expecting them to act in their best interest when procuring insurance on their behalf.

The State of Connecticut did not prove that the four brokers did anything other than act in their clients' best interest. Three of the four producers had never even heard of the MPP while it was in effect and therefore its existence could not possibly have influenced their behavior. The remaining producer may have heard about the MPP but it did not affect his obligations to his client. The brokers' behavior is not surprising in as much as the personal relationship with the client is paramount to a producer.

The Connecticut customers were never informed about the MPP and although each consumer testified that they would have wanted to know about the additional compensation Acordia was receiving pursuant to the MPP, the State of Connecticut did not prove that they suffered any individualized monetary harm. Their premiums were the same as they would have been regardless of whether Acordia received or the insurers were retaining the additional one percent.

The State of Connecticut did not prove that the four producers had steered their customers to MPP insurers because of the MPP and, in fact, in at least one instance a producer's advice to his customer regarding placement "cost" Acordia about $500,000 that it would have received under the MPP.

The decentralized organizational structure of Acordia, the high value producers placed on their long-standing personal relationships with their clients (their meal tickets) and the lack of direct benefit to the producer made steering unlikely.

In this "The Incredibly Shrinking Case", the State of Connecticut essentially argues that Acordia, Inc. engaged in conduct prohibited under CUTPA[1] by failing to disclose the MPP and the hypothetical conflict of interest to its clients. The State of Connecticut argues that the non-disclosure violated the public policy of the State in 1999-2002.

"[A] violation of CUTPA may be established by showing ... a practice amounting to a violation of public policy." Daddonna v. Liberty Mobile Home Sales, Inc., 209 Conn. 243, 254 (1988); see also Normand Josef Enter., Inc. v. Connecticut Nat'l Bank, 230 Conn. 486, 522-23 (1994). To prove "unfairness", the State must show that the challenged practice is (1) "without necessarily having been previously considered unlawful, offends public policy as it has been

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[1] Sec. 42-110b. Unfair trade practices prohibited. Legislative intent.
(a) No person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.
(b) It is the intent of the legislature that in construing subsection (a) of this section, the commissioner and the courts of this state shall be guided by interpretations given by the Federal Trade Commission and the federal courts to Section 5(a)(1) of the Federal Trade Commission Act (15 USC 45(a)(1)), as from time to time amended.
(c) The commissioner may, in accordance with chapter 54, establish by regulation acts, practices or methods which shall be deemed to be unfair or deceptive in violation of subsection (a) of this section. Such regulations shall not be inconsistent with the rules, regulations and decisions of the federal trade commission and the federal courts in interpreting the provisions of the Federal Trade Commission Act. (d) It is the intention of the legislature that this chapter be
remedial and be so construed.
Sec. 42-110m. Restraining orders or injunctions. Relief.
(a) Whenever the commissioner has reason to believe that any person has been engaged or is engaged in an alleged violation of any provision of this chapter said commissioner may proceed as provided in sections 42-110d and 42-110e or may request the Attorney General to apply in the name of the state of Connecticut to the Superior Court for an order temporarily or permanently restraining and enjoining the continuance of such act or acts or for an order directing restitution and the appointment of a receiver in appropriate instances, or both. Proof of public interest or public injury shall not be required in any action brought pursuant to section 42-110d, section 42-110e or this section. The court may award the
relief applied for or so much as it may deem proper including reasonable attorney's fees, accounting and such other relief as may be granted in equity. In such action the commissioner shall be responsible for all necessary investigative support.
(b) Nothing contained in this chapter shall be construed as a limitation upon the power or authority of the state, the attorney general or the commissioner to seek administrative, legal or equitable relief as provided by other statutes or at common law.

established by statutes, the common law, or otherwise — in other words, it is within the penumbra of some common law, statutory or other established concept of unfairness"; or (2) "is immoral, unethical, oppressive, or unscrupulous"; or (3) "causes substantial injury to consumers, [competitors or other businesspersons]." Cheshire Mortgage Serv., Inc. v. Montes, 223 Conn. 80, 105-106 (1992); see also Macomber v. Travelers Property and Cas. Corp., 261 Conn. 620, 644 (2002). All three criteria do not need to be satisfied to support a finding of unfairness because a practice may be unfair because of the degree to which it meets one of the criteria. Cheshire Mortgage at 106. The Connecticut Supreme Court regularly finds CUTPA violations where the plaintiff has proven only one or two of the three prong standard. See e.g., Larsen Chelsey Realty Co. v. Larsen, 232 Conn. 480, 507-08 (1995) (first and second prongs only); Dow & Condon, Inc. v. Anderson, 203 Conn. 475, 484 (1987) (second prong only); Conaway v. Prestia, 191 Conn. 484, 493 (1983) (first prong only); Cheshire Mortgage, 223 Conn. at 112-13 (first and third prongs only).

Acordia is employed by its customers to procure insurance for them and to act on their behalf during that process. The elements required to show the existence of an agency relationship are (1) a manifestation by the principal that the agent will act for him; (2) acceptance by the agent of the undertaking; and (3) an understanding between the parties that the principal will be in control of the undertaking. Thus Acordia is the agent of its customers for the purposes of procuring insurance. The existence of and the nature and the extent of an agency

relationship is a question of fact. (see Wesley v. Schaller Subaru, Inc., 277 Conn. 526, 543 (2006); Albuquerque v. Albuquerque, 42 Conn. App. 284, 287 (1996).) Acordia, acting through its wholly owned subsidiaries and their respective producers, is also a fiduciary to its clients because of the heightened degree of trust and confidence that exists in Acordia's relationship with its clients. For example, Acordia (or to be more accurate, its producers have) has a long standing relationship with many of its customers, in many cases spanning several decades. Connecticut consumers depend on and trust Acordia to provide them with independent and unconflicted advice on what insurance to purchase. Acordia's heightened expertise in the field of insurance is why Connecticut consumers hire Acordia as their insurance agent. Acordia worked to establish a relationship of trust and confidence with its customers. Acordia knew that its customers were expecting it to act in their best interest when procuring insurance on their behalf.

A fiduciary or confidential relationship may also be proven where a plaintiff can demonstrate the following relationship: (1) a unique degree of trust and confidence between the parties; (2) one party of whom has superior knowledge, skill or expertise; and (3) is under a duty to represent the interests of the other. See Konover Dev. Corp. v. Zeller, 228 Conn. 206, 219 (1994) ("We have stated that a 'fiduciary or confidential relationship is characterized by a unique degree of trust and confidence between the parties, one of whom has superior knowledge, skill or expertise and is under a duty to represent the interest of the other. . . . The superior position of the fiduciary or dominant party affords him great

opportunity for abuse of the confidence reposed in him.'"); see also Sherwood v. Danbury Hosp., 278 Conn. 163, 195 (2006); Biller Associates v. Peterken, 269 Conn. 716, 723 (2004); Hi-Ho Tower, Inc. v. Com-Tronics., 255 Conn. 20, 41 (2000); Albuquerque v. Albuquerque, 42 Conn. App. at 287 ("A fiduciary . . . relationship is characterized by a unique degree of trust and confidence between the parties, one of whom has superior knowledge, skill or expertise and is under a duty to represent the interests of the other. . . . The superior position of the fiduciary or dominant party affords him great opportunity for abuse of the confidence reposed in him." (Citation omitted.)).The existence of a fiduciary relationship is a question of fact for which the plaintiff bears the burden of proof and which the plaintiff has met .See Albuquerque v. Albuquerque, 42 Conn. App. 284, 287 (1996); Gandolfo v. Barker, 2008 Conn. Super. LEXIS 552, 29-31 (Mar. 10, 2008, Dubay, J.); US Financial Group, Inc. v. Salazar, Superior Court, Judicial District of Danbury, Docket No. CV 00 0339753, 2002 Conn. Super. LEXIS 1346 (April 23, 2002, Moraghan, J.).

Once a fiduciary relationship is established, the burden of proof shifts to the fiduciary to prove, by clear and convincing evidence, that the actions at issue were the product of fair dealing, good faith and full disclosure. Cadle Co. v. D'Addario, 268 Conn. 441, 455, 457 (2004) ("A fiduciary seeking to profit by a transaction with the one who confided in him has the burden of showing that he has not taken advantage of his influence or knowledge and that the arrangement is fair and conscientious."); Beverly Hills Concepts, Inc. v. Schatz & Schatz, Ribicoff & Kotkin, 247 Conn. 48, 56-57 (1998); Konover Dev. Corp. v. Zeller, 228

Conn. 206, 229-30 (1994); XL Specialty Insurance v. Carvill America, Inc., 2007 Conn. Super. LEXIS 1376, *66 (May 31, 2007), quoting, Dunham v. Dunham, 204 Conn. 303, 322-23 (1987) ("Once a fiduciary relationship is found to exist, the burden of proving fair dealing properly shifts to the fiduciary . . . . [T]he standard of proof for establishing fair dealing is not the ordinary standard of fair preponderance of the evidence, but requires proof either by clear and convincing evidence, clear and satisfactory evidence or clear, convincing and unequivocal evidence."); Sherwood v. Danbury Hosp., 278 Conn. 163, 195-96 (2006).

Despite this fiduciary relationship, Acordia did not disclose the existence of the Millennium Partnership to Acordia's clients. Fiduciaries have an obligation to disclose all conflicts of interest to their principals. The Millennium Partnership constituted a conflict of interest between Acordia and its clients because under the Millennium Partnership Acordia received more money when Millennium insurers' products were sold to Acordia clients and Acordia agreed to present Millennium insurer products more frequently to Acordia clients in return for those increased payments.

The court finds persuasive the reasoning of the Appellate Court of Illinois, First Judicial District which found the failure to disclose contingent commissions paid by an insurer to an insurance broker to be a violation of an insurance broker's fiduciary duty to its customer. Village of Orland Hills v. Gallagher & Co., No. 3260, *24 (Ill. App. Ct. 1st Dist. Sep. 16, 2003) rehearing denied 2003 Ill. App. LEXIS 1430 (Oct. 17, 2003) (reversing trial court's granting of summary judgment and finding that insurance broker was a fiduciary and as such "had a duty to

disclose and remit any profits, including contingent commissions, if it is shown that the contingent commissions existed, defendant received monies in connection with, or because of, services performed on behalf of [the principal], and if the existence of the contingent commission was a material fact.") (relying on United States v. Carter, 217 U.S. 286, 305-06 (1910) ("If [a fiduciary] takes any gift, gratuity, or benefit in violation of his duty, or acquires any interest adverse to his principal, without full disclosure, it is a betrayal of his trust and a breach of confidence, and he must account to his principal for all he has received." and "it is a rule of universal application, that no one having such duties to discharge shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect. So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into.") and the Restatement (Second) of Agency § 388 (1958) ("[t]hus, an agent who, without the knowledge of the principal, receives something in connection with, or because of, a transaction conducted for the principal, has a duty to pay this to the principal even though otherwise he has acted with perfect fairness to the principal and violates no duty of loyalty in receiving the amount."), for the principle that fiduciaries have a duty to disclose contingent payments and remit those payments to the principal.

Connecticut Courts have been guided by the Restatement of Agency in determining the scope of agency law. See Nat'l Publ'g. Co. v. Hartford Fire Ins. Co., 287 Conn. 664, 678 (2008) (relying on Second Restatement of Agency for list

of factors to use in assessing whether relationship of agency exists); Ravetto v. Triton Thalassic Techs., 285 Conn. 716, 737 (2008) (citing to Restatement of Agency for point of authority); Beckenstein v. Potter & Carrier, Inc., 191 Conn. 120 (1983) (adopting the basic principles for determining a relationship of agency as defined by § 1 of 1 Restatement (Second) of Agency (1958)); see also Citibank v. Gifesman, 63 Conn. App. 188, 191 n.3 (2001) (stating it is appropriate to look to the Restatement (Second), of Agency when ascertaining the scope of apparent authority); Lassow v. Jefferson Pilot Fin. Ins. Co., 2003 Conn. Super. LEXIS 2562 (Sept. 8, 2003).

Acordia claims that it has no fiduciary relationship with the four clients or any other Connecticut clients and that the relationships maintained at the producer or subsidiary level may not be attributed to Acordia. Acordia cannot hide behind its corporate form when it directs its wholly owned subsidiaries as its agents to carry out its unfair and deceptive business practices. Acordia entered into the Millennium Partnerships to confidentially, if not secretly, give the Millennium insurers "first shot" at Acordia's customers' insurance business. The insurers' "preferred" or "priority" status was communicated to local offices and producers, local offices and producers were expected to and directed to comply with Acordia, Inc.'s instructions, compliance was tracked, and local offices were "credited" for their compliance. Presumably as a result of these instructions, at least in part, sales of Millennium Partner insurance increased, just as Acordia, Inc. intended. Indeed, Acordia, Inc.'s use of its subsidiaries as its agents to

implement the Millennium Partnership was inherent in the Millennium Partnership because Acordia, Inc. sells insurance only through its local offices and producers.

Moreover, Acordia had a fiduciary relationship with its customers because the insurance producers working on Acordia's behalf had a fiduciary relationship with their customers. Acordia depended on those relationships of trust and confidence to carry out the Millennium Partnership. Acordia intentionally sends its insurance producers into the market place under the Acordia banner to gain and attract customers. Consumers view Acordia as a single entity. Both Acordia and the individual producers benefit from their affiliation because of the resources, expertise, and access to insurance markets that large insurance brokers like Acordia have. Acordia should not now be allowed to claim that it is not liable for the unfair trade practices that it directed its subsidiaries to put in to motion. To accept Acordia's position is to accept that revenue flows up but fiduciary obligations do not.

§381 of Restatement (Second) of Agency provides: Unless otherwise agreed, an agent is subject to a duty to use reasonable efforts to give his principal information which is relevant to affairs entrusted to him and which, as the agent has notice, the principal would desire to have and which can be communicated without violating a superior duty to a third person.

Thus, Acordia's nondisclosure violated Connecticut's public policy of respecting fiduciary obligations as that policy existed in 1999-2002 and engaged in conduct prohibited under CUTPA. A CUTPA violation may be established by showing either an actual deceptive practice or a practice amounting to a violation

of public policy. Daddonna v. Liberty Mobile Home Sales, Inc., 209 Conn. 243, 254 (1988) ("[A] violation of CUTPA may be established by showing either an actual deceptive practice; or a practice amounting to a violation of public policy."); see also Normand Josef Enter., Inc. v. Connecticut Nat'l Bank, 230 Conn. 486, 522-23 (1994) (same).

The defendant argues that even if the breech of fiduciary duty violated the public policy of the State of Connecticut in 1999-2002, the plaintiff cannot prevail in its CUTPA claim as the plaintiff has failed to prove a violation of the Connecticut Unfair Insurance Practices Act Conn. Gen. Stat.§§38a-815 et seq.[2]

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[2] Sec. 38a-815. (Formerly Sec. 38-60). Unfair practice prohibited.
No person shall engage in this state in any trade practice which is defined in section 38a-816 as, or determined pursuant to sections 38a-817 and 38a-818 to be, an unfair method of competition or an unfair or deceptive act or practice in the business of insurance, nor shall any domestic insurance company engage outside of this state in any act or practice defined in subsections (1) to (12), inclusive, of section 38a-816. The commissioner shall have power to examine the affairs of every person engaged in the business of insurance in this state in order to determine whether such person has been or is engaged in any unfair method of competition or in any unfair or deceptive act or practice prohibited by sections 38a-815 to 38a-819, inclusive. When used in said sections, "person" means any individual, corporation, limited liability company, association, partnership, reciprocal exchange, interinsurer, Lloyd's insurer, fraternal benefit society and any other legal entity engaged in the business of insurance, including producers and adjusters. The following are defined as unfair methods of competition and unfair and deceptive acts or practices in the business of insurance:
(1) Misrepresentations and false advertising of insurance policies. Making, issuing or circulating, or causing to be made, issued or
circulated, any estimate, illustration, circular or statement, sales presentation, omission or comparison which: (a) Misrepresents the
benefits, advantages, conditions or terms of any insurance policy; (b) misrepresents the dividends or share of the surplus to be received, on any insurance policy; (c) makes any false or misleading statements as to the dividends or share of surplus previously paid on any insurance policy; (d) is misleading or is a misrepresentation as to the financial condition of any person, or as to the legal reserve system upon which any life insurer operates; (e) uses any name or title of any insurance policy or class of insurance policies misrepresenting the true nature thereof; (f) is a misrepresentation, including, but not limited to, an intentional misquote of a premium rate, for the purpose of inducing or tending to induce to the purchase, lapse, forfeiture, exchange, conversion or surrender of any insurance policy; (g) is a misrepresentation for the purpose of effecting a pledge or assignment of or effecting a loan against
any insurance policy; or (h) misrepresents any insurance policy as being shares of stock.
(2) False information and advertising generally. Making, publishing, disseminating, circulating or placing before the public, or causing, directly or indirectly, to be made, published, disseminated, circulated or placed before the public, in a newspaper, magazine or other publication, or in the form of a notice, circular, pamphlet, letter or poster, or over any radio or television station, or in any other way, an advertisement, announcement or statement containing any assertion, representation or statement with respect to the business

This requirement was first set out by the Connecticut Supreme Court in Mead v. Burns, 199 Conn.651,509 A.2d 11 (1986) and reconfirmed by Lees v. Middlesex Insurance Company, 229 Conn.842,643 A.2d. 1282 (1994). Relying upon this Supreme Court precedent, Connecticut courts have consistently held that for insurance-related conduct to constitute a violation of CUTPA, the conduct must also constitute a violation of CUIPA. Put another way, when a CUTPA claim is based on insurance practices, it is the CUIPA allegation that forms the basis of the claim rather than the more generalized requirements of CUTPA. To the extent the Plaintiff attempts to argue this requirement does not apply to him, Mead v. Burns resolves this issue and requires the State—just as a private plaintiff—to prove that the CUTPA claim is also a CUIPA violation.

In Mead v. Burns, the Connecticut Supreme Court addressed the scope of liability imposed by CUIPA and CUTPA on the insurance industry. Recognizing that under CUIPA enforcement powers are vested in the insurance commissioner, the plaintiff insured, supported by the attorney general as amicus curiae, urged the Court to hold that the insurance commissioner did not have exclusive jurisdiction to regulate the conduct of the insurance industry. They further argued that the insurance commissioner's jurisdiction under CUIPA was "concurrent with that of the commissioner of consumer protection, the attorney general and private litigants under CUTPA," and the Court agreed. The Court disagreed, however, that a CUTPA claim could be based upon conduct that did not constitute a CUIPA violation. Instead, the Mead Court held that CUIPA embodies a public policy as to

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of insurance or with respect to any person in the conduct of his insurance business, which is untrue, deceptive or misleading....

the bounds of acceptable and unacceptable insurance-related conduct and that a CUTPA claim could not be maintained for conduct that did not satisfy CUIPA's requirements. So although Mead allows the Attorney General to pursue a CUTPA claim against Acordia here, he may do so only if he can prove an underlying violation of CUIPA.[3] The Court finds that Acordia's nondisclosure of the existence of the MPP to its customers was "deceptive or misleading" as those terms are used in CUIPA. Conn. Gen. Stat. § 38a-816.

At the conclusion of trial, Acordia made an oral motion to amend its special defenses to conform to the evidence. Acordia reduced its motion to writing and filed it together with a memorandum in support when it filed its post-trial brief and proposed conclusions of fact and law. Acordia wishes to assert three special defenses previously stricken by Judge Shortall as the case as tried by the plaintiff was different than the case originally pled by the plaintiff. Acordia seeks to replead its second special defense - the so-called "filed rate" doctrine. In short, this doctrine may bar any action that questions the amount or reasonableness of premiums charged to consumers if the rates are filed with appropriate regulatory authorities - in this case the Department of Insurance. This doctrine may well be a defense to an action seeking to bar or recoup contingent commissions that were filed, but this is not that case at this point. Plaintiff is not now seeking to bar contingent commissions or reduce or even question the reasonableness of any premium but is rather seeking to compel the disclosure of contingent commissions required of a fiduciary at common law. Acordia seeks to reassert its third special

[3] The court agrees with the plaintiff's argument that an insurance company could engage in conduct which would violate CUTPA and not violate CUIPA and still be liable under CUTPA if the conduct was not, as it

defense based on the equitable doctrine of estoppel and incorporating the allegations contained in its second defense. In the second defense, Acordia claims that "the State may not prosecute this action to bar contingent commissions" because equity requires the state be estopped. The Court notes that there was no evidence of any reliance on the part of Acordia based on action of the State. More important, the State is not seeking to bar contingent commissions, so this defense is immaterial. To the extent that the third defense could be read most broadly to suggest that equitable estoppel bars the entire action the defense is improper because there was no credible trial evidence that Acordia changed its position or was induced to act by any affirmative State conduct.[4] Additionally, there is no credible trial evidence suggesting that it would be highly inequitable or oppressive for the State to enforce its unfair trade practice laws against Acordia. Thus, Acordia's proffered estoppel defense does not conform to the credible evidence elicited at trial.

The Connect Supreme Court has explicitly ruled that estoppel may be asserted against the State "(1) only with great caution, (2) only when the resulting violation has been unjustifiably induced by an agent having authority in such matters, and (3) only when special circumstances make it highly inequitable or oppressive" to enforce the law. Dupuis v. Submarine Base Credit Union, 170 Conn. 344, 354 (1976) (emphasis in original); Fadner v. Commissioner of Revenue Services, 281 Conn. 719, 726 (2006) (same); see also Heckler v.

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is here, related to its insurance business

[4] Judge Shortall's decision striking Acordia's estoppel defense was not based on the Court's understanding of the State's claim, but on Judge's Shortall's conclusion that "the State correctly points out that Acordia fails to allege that it relied on the state's approval of contingent commissions in entering into such

Community Health Services of Crawford County, Inc., 467 U.S. 51, 60-61 (1984) (reserving judgment on issue of whether estoppel may never be asserted against government and stating, "When the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined. It is for this reason that it is well settled that the Government may not be estopped on the same terms as any other litigant." Also noting the "heavy burden" of establishing estoppel against the government.).

Here, Acordia's proffered estoppel defense is improper because there was no credible trial evidence and Acordia does not allege that the State did anything to induce Acordia to act. Indeed, Acordia makes much of the fact that contingent compensation agreements have been endemic in the insurance industry for over 100 years and that for all that time the custom in the insurance industry was not to disclose such arrangements. No Acordia witness testified that, but for some act by the State, Acordia would not have entered into the Millennium Partnership agreements or failed to disclose their terms to Acordia's clients.

Finally, as required when attempting to assert estoppel against the government, there is no credible trial evidence establishing any "special circumstances mak[ing] it highly inequitable or oppressive" for the State to enforce its unfair trade practice laws against Acordia.

Acordia's fourth special defense incorporates its allegations contained in its second special defense and says that the doctrine of waiver precludes the

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arrangements with insurers" and that even "the most liberal reading of pleadings does not permit the court to supply 'essential allegations ....'" Mem. of Dec. at 6-7;

state from barring contingent commissions specifically and if read broadly, bars the prosecution of this action.

The United States Supreme Court has made clear that the waiver of sovereign rights cannot be implied, but must be made in unmistakable terms. Here, there is no trial evidence that the State waived its right to enforce its unfair trade practice laws against Acordia.

Any defense of waiver asserted against the government is disfavored because "generally speaking public officers have no power or authority to waive the enforcement of the law on behalf of the public." U.S. v. Amoco Oil, 580 F. Supp. 1042, 1050 (W.D. Missouri 1984) (holding that EPA's failure to act cannot support defense of waiver); see also U.S. v. Iron Mountain Mines, Inc., 812 F. Supp. 1528, 1546-47 (E.D. Calif. 1992) (stating "waiver ... may not be asserted against sovereigns who act to protect the public welfare."); U.S. v. Kramer, 757 F. Supp. 397, 427 (D. N.J. 1991) (stating that "equitable defenses cannot be asserted against the government when it acts in its sovereign capacity to protect the public health and safety.").

Regardless, even assuming a public officer can waive the government's right to enforce laws that benefit the public[5], the United States Supreme Court has explicitly held that "a waiver of sovereign authority will not be implied, but instead must be 'surrendered in unmistakable terms.'" U.S. v. Cherokee Nation, 480 U.S. 700, 707 (1987) citing Bowen v. Public Agencies Opposed to Social Security Entrapment, 477 U.S. 41, 52 (1986). Indeed, in a case where tobacco companies

[5] The purpose of CUTPA is to protect the public from unfair practices in the conduct of any trade or commerce.

asserted a waiver defense based on the government's longstanding knowledge and regulation of the violative conduct - just as Acordia asserts here - the district court found such a defense was insufficient as a matter of law absent facts "to justify a finding of the Government's unmistakable intent to waive its right to bring a civil RICO case against [the defendants]." U.S. v. Philip Morris, Inc., 300 F. Supp.2d 61, 69 (D.D.C. 2004).

Here, there is no trial evidence and no allegation that Connecticut intended to waive its rights to sue Acordia, see Klewin Northeast, LLC v. Bridgeport, 282 Conn. 54, 87 (2007) (holding waiver is the intentional relinquishing of a known right), and evidenced that intent in unmistakable terms. Silence is not waiver. Thus, Acordia's proffered wavier defense does not conform to the credible trial evidence and is therefore improper as it does not conform to the proof under P.B. 10-62.[6]

The State of Connecticut's prayer for relief seeks an injunction "enjoining Acordia from engaging in any acts that violate the Connecticut Unfair Trade Practices Act, including, but not limited to, the unfair and deceptive acts and practices alleged... [in the complaint]." The nondisclosure which the Court found to be a violation of CUTPA by virtue of being contrary to public policy derived from

[6] Sec. 10-62. — Variance; Amendment
In all cases of any material variance between allegation and proof, an amendment may be permitted at any stage of the trial. If such allegation was made without reasonable excuse, or if the adverse party was actually misled thereby to his or her prejudice in maintaining the action or defense upon the merits, or if such amendment requires postponement of the trial or additional expense to the adverse party and this is shown to the satisfaction of the judicial authority, such amendment shall be made only upon payment of costs or upon such terms as the judicial authority may deem proper; but in any other case, without costs. Immaterial variances shall be wholly disregarded.
Had the court allowed the amendment of the third and forth special defenses, Acordia would bear the burden of proving the special defenses. The court's finding that the defenses have no basis in credible trial evidence demonstrates how far off the defendant is from meeting that burden.

common law in 1999-2002 does not violate public policy in 2010. In 2005, the General Assembly of the State of Connecticut clearly set forth the State's public policy by enacting Conn. Gen.Stat.§ 38a-707a[7] which requires only that a broker paid both by the insured and an insurer disclose the amount of compensation he will derive from the insurer. Accordingly, the Court declines to issue an injunction.

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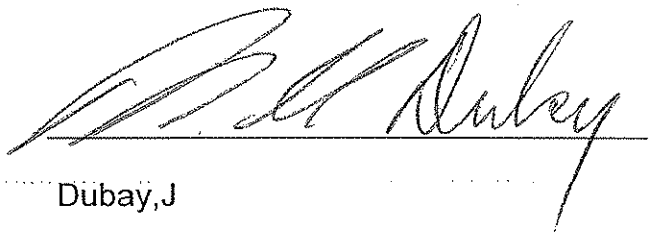
[7] Sec. 38a-707a. Producer compensation. Disclosure and customer acknowledgment.
(a) As used in this section:
(1) "Affiliate" means a person who (A) controls, is controlled by, or is under common control with a producer, and (B) is permitted to receive compensation pursuant to this chapter;
(2) "Compensation from an insurer or other third party" means payments, commissions, fees, awards, overrides, bonuses, contingent commissions, loans, stock options, gifts, prizes or other forms of valuable consideration, whether or not payable pursuant to a written agreement;
(3) "Compensation directly from the customer" does not include any fee or amount allowed under section 38a-707 and regulations adopted pursuant to said section or any fee or amount collected by or paid to the producer that does not exceed an amount established by the commissioner pursuant to section 38a-707;
(4) "Customer" does not include a person whose only relationship to the producer or affiliate with respect to the placement of insurance is as (A) a participant or beneficiary of an employee benefit plan, or (B) a person covered under a group or blanket insurance policy or group annuity contract;
(5) "Documented acknowledgment" means the customer's written consent, except that in the case of a purchase over the telephone or by electronic means for which written consent cannot reasonably be obtained, "documented acknowledgment" includes consent documented by the producer; and
(6) "Insurance producer" or "producer" means an insurance producer, as defined in section 38a-702a, except that "insurance producer" or "producer" does not include (A) a person such as a managing general agent, sales manager or wholesale broker who is licensed as an insurance producer and who acts only as an intermediary between an insurer and the customer's producer, or (B) a reinsurance intermediary.
(b) If an insurance producer or affiliate of such producer receives any compensation directly from a customer for the initial placement of insurance, neither the producer nor the affiliate shall accept or receive any compensation from an insurer or other third party for that placement of insurance unless the producer has, prior to the time the policy is delivered to the customer:
(1) Obtained the customer's documented acknowledgment that such compensation will be received by the producer or affiliate; and
(2) Disclosed the amount of compensation that the producer or affiliate will receive from the insurer or other third party for the placement, except that if the amount of compensation is not known at the time of disclosure, the producer shall disclose the specific method for calculating such compensation and, if possible, a reasonable estimate of the amount.
(c) Subsection (b) of this section shall not apply to:
(1) An insurance producer who (A) does not receive compensation directly from the customer for the placement of insurance, and (B) discloses to the customer prior to the time the policy is delivered to the customer:
(i) That the producer will receive compensation from an insurer in connection with that placement; or
(ii) That, in connection with that placement of insurance, the insurance producer represents the insurer and that the producer may provide services to the customer for the insurer;

(2) The placement of insurance in surplus lines or residual markets; or
(3) A producer whose sole compensation is derived from commissions or other remuneration from the insurer.

The State's prayer for relief seeks an accounting to determine how much, if any, of Acordia's increased revenues are derived from conduct which was violative of CUTPA. Plaintiff introduced exhibits evidencing that Acordia wrote more insurance with the MPP companies during the life of the MPP than it did before. That evidence is insufficient for the Court to determine the amount of money Acordia realized in connection with its CUTPA violations. Pursuant to Conn. Gen. Stat.§ 42-110m, Acordia is ordered to account for non-disclosed MPP based commissions for products purchased by consumers in the State of Connecticut.



Dubay,J

APPEAL - CIVIL

JD-SC-28 Rev. 12-09
P.B. §§ 3-8, 62-8, 63-3, 63-4, 63-10
C.G.S. §§ 31-301b, 51-197f, 52-470

State of Connecticut
Date: 05/10/2010
Payfile: 1012748-1

Docket: CV084020455S
Receipt Nbr: 0492853
Amount: $250.00

List Total: 605.425.00

☐ To Supreme Court ☒ To Appellate Court

See Instructions on Back/page 2

Name of case *(State full name of case as it appears in the judgment file)*
State of Connecticut v. Acordia, Inc.

Classification
☒ Appeal ☐ Cross appeal ☐ Joint appeal ☐ Amended appeal ☐ Stipulation for reservation ☐ Corrected/amended appeal form ☐ Other *(Specify)*

Trial Court History

Tried to: ☒ Court ☐ Jury
Trial court location: **Waterbury**
Trial court judges being appealed: **Hon. Kevin Dubay**
All other trial court judge(s) who were involved with the case: **Hon. Joseph Shortall**
List all trial court docket numbers, including all location prefixes: **HHD-CV-07-4027314-S (X09); UWY-CV07-4020455-S (X10)**
Judgment for *(Where there are multiple parties, specify any individual party or parties for whom judgment may have been entered.)*
☐ Plaintiff ☐ Defendant ☒ Other: **Order for an accounting (Conn. Gen. Stat. 52-405)**
Judgment date of decision being appealed: **4/19/2010**
Date of issuance of notice on any order on any motion which would render judgment ineffective:
Date for filing appeal extended to:
Case type
☐ Juvenile — Termination of Parental Rights ☐ Juvenile — Order of Temporary Custody ☐ Juvenile — Other
☒ Civil/Family: Major/Minor code **M90** ☐ Habeas Corpus ☐ Workers compensation ☐ Other
For habeas corpus or zoning appeals indicate the date certification was granted:

Appeal

Appeal filed by *(Where there are multiple parties, specify the name of the individual party or parties filing this appeal.)*
☐ Plaintiff(s) ☒ Defendant(s) ☐ Other
From *(the action which constitutes the appealable judgment or decision)*: **The Trial Court's Memorandum of Decision ordering an accounting, dated April 19, 2010 (Conn. Gen. Stat. 52-405)**
If to the Supreme Court, the statutory basis for the appeal *(Connecticut General Statutes section 51-199)*

Appearance

By *(Signature of attorney or self-represented party)* ▶
Telephone number: **(860) 275-0100**
Fax number: **(860) 275-0343**
Juris number *(If applicable)*: **014229**
Type name and address of person signing above *(This is your appearance; see Practice Book section 62-8)*: **Mitchell Harris, Day Pitney LLP, 242 Trumbull Street, Hartford, CT 06103**
E-mail address: **mharris@daypitney.com**
"X" one if applicable
☐ Counsel or self-represented party who files this appeal will be deemed to have appeared **in addition to** counsel of record who appeared in the trial court under Practice Book section 62-8.
☐ Under Practice Book section § 3-8, counsel or self-represented party who files this appeal is appearing **in place of:**
Name of counsel or self-represented party:
Juris number *(If applicable)*:

Certification (Practice Book section 63-3)

I certify that a copy of this appeal was mailed or delivered to all counsel and self-represented parties of record as required by Practice Book section 62-7 on:* **5/10/10**
Signed *(Individual counsel/self-represented party)* ▶
** Attach a list with the name, telephone number and fax number of each counsel and self-represented party and the address where the copy was mailed or delivered.*

To Be Completed By Trial Court Clerk

☒ Entry Fee Paid ☐ No Fees Required ☐ Fees, Costs, and Security waived by Judge *(enter judge's name below)*

Judge:
Date waived:
Signed *(Clerk of trial court)*: Ann Marie Griffin
Date: 5/10/10
The clerk of the original trial court, if different from this court, was notified on _____ that this appeal was filed.
In habeas matters, a copy of this endorsed appeal was provided to the Office of the Chief State's Attorney, Appellate Bureau, on _____.

Court Use Only
Date and time filed
SUPERIOR COURT
JUDICIAL DISTRICT OF WATERBURY
FILED
MAY 10 P 12:20

Documents to be given to the Appellate Clerk with the endorsed Appeal form

The following documents must be filed with the Appellate Clerk when filing the endorsed appeal form; Practice Book sections 63-3 and 63-4.
1. Preliminary Statement of the Issues
2. Preliminary Designation of Pleadings
3. Court Reporter's Acknowledgment/Certification re transcript
4. Docketing Statement
5. Statement for Preargument Conference (form JD-SC-28A)
6. Draft Judgment File
7. Constitutionality Notice (if applicable)
8. Sealing Order form, if any
9. List of counsel of record in trial court (DS1 received from clerk)
10. Proof of receipt of the copy of the endorsed appeal form by the original trial court clerk or the clerk of the court or courts where the case was transferred, if the case was in more than one trial court

Certification

I certify that a copy of the endorsed appeal and all documents to be given to the Appellate Clerk with the endorsed Appeal form were mailed or delivered to all counsel and self-represented parties of record* as required by Practice Book section 63-3 on:
Signed *(Individual counsel or self-represented party)* ▶
** Attach a list with the name, telephone number and fax number of each counsel and self-represented party and the address at which the copy was mailed or delivered.*

CERTIFICATION

THIS IS TO CERTIFY that on May 10, 2010 a copy of the foregoing was mailed to:

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Attorney George William O'Connell
Attorney Kirsten Rigney
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Mitchell R. Harris