IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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WAUKESHA COUNTY, WISCONSIN,

OPINION AND ORDER

Plaintiff,

06-C-0656-C

v.

NATIONWIDE LIFE INSURANCE COMPANY and NATIONWIDE RETIREMENT SOLUTIONS, INC.,

Defendants.

- -

This is a civil suit for money damages. Its genesis is a fixed annuity contract that defendants Nationwide Life Insurance Company and Nationwide Retirement Solutions, Inc. issued to plaintiff Waukesha County, Wisconsin, as a deferred compensation plan for the benefit of plaintiff's employees. In February 2006, plaintiff selected another deferred compensation plan to replace the Nationwide contract and asked defendants for a lump sum withdrawal. Defendants complied, but assessed a deduction of 4.9% ($542,480.37) as a "market value adjustment." Plaintiff contends that defendants acted illegally in determining the adjustment.

Initially, plaintiff named both defendants but alleged no wrongdoing on the part of

defendant Retirement Solutions. After defendants brought this omission to plaintiff's attention, plaintiff filed an amended complaint in which it stated that all allegations referring to "Nationwide" included both defendants. Defendants made no reference in its reply brief to its motion to dismiss Retirement Solutions, leading me to assume that it has dropped the motion.

Plaintiff has alleged breach of contract, breach of the covenant of good faith, negligent misrepresentation, strict liability misrepresentation, intentional misrepresentation and unfair trade practices under Wis. Stat. § 100.18. Defendants have moved to transfer venue to the United States District Court for the Eastern District of Wisconsin and for dismissal of the breach of contract claims in count 1 and the state law claim of unfair trade practice in count 6 for plaintiff's failure to state a claim upon which relief may be granted.

The motion to transfer venue will be denied. Plaintiff chose this venue. Defendants are subject to jurisdiction in this district and were so at the time the suit was commenced, making venue proper here under 28 U.S.C. § 1391(c). Not altogether altruistically, defendants argue that it would be more convenient for plaintiff to prosecute its case in the district in which it is located. The argument is not persuasive. Plaintiff is in a better position than defendants to decide where it wants to sue.

Defendants have shown no reason why the Eastern District of Wisconsin would be a substantially more convenient forum. They make the broad assertion that none of the

likely witnesses reside here and that none of the evidence is based here but they do not say where the likely witnesses do reside. If they are in or near Wisconsin, they are subject to this court's subpoena power; if they reside out of state, they are equally unavailable to both sides unless they are employees of a party. The evidence is likely to be on paper or computer and can be produced in this court as easily as in Milwaukee.

With the venue question out of the way, I turn to defendants' motion to dismiss. I conclude that the motion to dismiss count 1 (breach of contract) should be denied. Although it is unlikely that plaintiff will be able to show that defendants breached the contract between the parties, at this early stage of the litigation, I cannot say that it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. However, it is clear that count 6 (unfair trade practices under state law) must be denied because plaintiff's ongoing relationship with defendants means that plaintiff is not a member of the public entitled to the protections of the statute and even if it is, it was not induced to enter into a contract with defendants but rather chose to terminate its ongoing contractual relationship with defendants.

For the purpose of deciding the motion to dismiss, I find that the following facts are fairly alleged in the complaint and attached exhibits.

ALLEGATIONS OF FACT

Plaintiff Waukesha County is a body corporate of the state of Wisconsin with its principal place of business in Waukesha, Wisconsin. Defendants Nationwide Life Insurance Company and Nationwide Retirement Solutions are both Ohio corporations with their principal places of business in Columbus, Ohio. The amount in controversy exceeds $75,000.

Defendant Nationwide Life sells non-insurance investment vehicles in the state of Wisconsin. Defendant Nationwide Retirement acts as an agent of defendant Nationwide Life in connection with non-insurance investment vehicles.

Until recently, plaintiff offered its employees two deferred compensation plan options under section 457 of the Internal Revenue Code. One was a plan issued and administered by defendants; the other was a plan administered by the International City/County Management Association's ICMA Retirement Corporation. (Documents attached to the complaint indicate that plaintiff's contract with defendants dates back at least as far as 1986.). Section 5.02 of the contract provided that if plaintiff terminated the contract and sought a lump sum withdrawal, defendants could deduct a "market value adjustment" from the payout. The market value adjustment was to be the amount that defendants determined "in accordance with its then current procedures applicable to all Contracts of this type and class, would be the net capital loss, if any resulting to [defendants] if investments were liquidated to make the lump sum withdrawal."

In 2005, plaintiff conducted a competitive evaluation of its two deferred compensation plan options. In September 2005, defendants advised plaintiff of their estimate that the deduction for market value adjustment would be 0.33% if plaintiff terminated the fixed annuity contract. At the conclusion of the evaluation process, plaintiff selected ICMA as the sole deferred compensation plan for its employees. It notified defendants of its choice and asked for an updated calculation of the present value of the fixed annuity contract. On February 14, 2006, defendants advised plaintiff that the market value adjustment deduction had increased from 0.33% to 2.36%.

When plaintiff began its competitive evaluation, it sent requests for information to its two plan providers, defendants and ICMA. In response, defendants sent plaintiff a copy of its "Fixed Account for USCM/NACo Cases Fact Sheet" for the period ending March 31, 2005. Under the heading "Portfolio Statistics," the fact sheet states that the "average quality" of the investments in plaintiff's fixed account was "A," a rating that indicates high quality and relatively low investment risk. Under the heading "Portfolio Statistics," the fact sheet stated that the "duration" of the investments in the account was 4.2. (Duration is a rough measure of the sensitivity of bond prices to rising interest rates; a duration of 4.2 indicated that the risk to the investments from rising interest rates was relatively low.)

In or about November 2005, plaintiff obtained a copy of defendants' fact sheet for the period ending September 30, 2005. Plaintiff read the information on this sheet as

indicating that the March 2005 estimate of market value adjustment was unlikely to fluctuate significantly, given the high credit quality and relatively low duration of defendants' investments. In reliance on this information, plaintiff chose to delay the termination of its group contract with defendants until after it had completed the competitive evaluation of the deferred compensation plan options.

Apparently after February 14, 2006, when plaintiff learned that defendants would be applying a much higher market value adjustment rate to the payout, plaintiff scheduled a telephone conference call with defendants' sale manager and staff actuary. In preparation for the call, plaintiff asked for an accurate and up-to-date fact sheet, which defendants provided for the period ending December 31, 2005. This fact sheet contained two changes from earlier versions. First, it omitted any reference to duration. Second, it stated that the "A" rating applied to only a part of the portfolio; in the earlier fact sheets, it had said that the "A"rating applied to all assets. When plaintiff asked for a fact sheet with an accurate duration number for the fixed account, defendants refused to supply one.

Plaintiff believes that the changes in the December 2005 fact sheet were necessary to correct earlier misstatements about credit quality and duration, that they were issued to correct such misstatements and that they constitute an acknowledgment by defendants that the previous statements were false, inaccurate and misleading. In a telephone conference call, defendants told plaintiff that the market value adjustment defendants were using was

not based on the actual liquidation of capital assets, but was simply a charge based on a formula devised by defendants that did not reflect the actual cost to defendants of plaintiff's termination of the fixed annuity contract.

In response to questions put to them by plaintiff, defendants told plaintiff that the "A" rating shown on the March and September 2005 fact sheets was false because approximately 30% of the portfolio was not rated. Defendants admitted that the rating was closer to "Baa" or medium risk. Defendants admitted that the durations of 4.2 and 4.3 set out in the March 2005 and September 2005 fact sheets were false and that the true duration was 5.73. They admitted also that the number for the duration given previously was for a different set of investments.

When plaintiff's group contract was terminated, defendants assessed a market value adjustment of $542,480.37, or 4.09% of the $13.25 million in wrapped fixed assets in the plan.

OPINION

A. Breach of Contract Claim

As I understand plaintiff's breach of contract claim, it is based on plaintiff's reading of § 5.02 of the contract. Plaintiff contends that reading this provision in its entirety makes it plain that the apparently free rein given defendants to determine the market value

adjustment any way they choose, so long as the method is "in accordance with their then current procedures applicable to all Contracts of this type and class" is modified by the requirement that the outcome of the determination must be the "net capital loss, if any, resulting to defendants if investments were liquidated to make the lump sum withdrawal." It seems that plaintiff believes that "net capital loss" has a set meaning, so that if defendants did not "net gains (income received and principal appreciation) and losses (lower asset prices), to arrive at the [market value adjustment]"; if they failed "to tie the adjustment to actual capital losses," Amended Cpt., dkt. #11, at ¶ 46; and if they did not create "a formula for calculating a market value adjustment that counts only losses and not gains," id. at ¶ 50, they are in breach of the contract.

Defendants deny that the contract terms required them to follow any particular procedure other than their "then current procedures" in calculating the market value adjustment. Defendants do not deny that the provision must be read in its entirety, but they point out that the provision specifies that the determination of the net capital loss is to be made in accordance with defendants' then current procedures and that it does not require defendants to determine the net capital loss in the manner that plaintiff suggests.

Although it appears likely, and almost inevitable, that defendants are correct in arguing that plaintiff cannot show that defendants breached the contract by calculating the market value adjustment according to the procedures in place at the time plaintiff

terminated the contract, I am reluctant to dismiss plaintiff's claim at this early stage of the litigation. It is true, as defendants point out, that plaintiff has not alleged that defendants did not follow their then current procedures when they determined the net capital loss on plaintiff's account and it has not alleged that defendants promised anywhere in their contract with plaintiff that they would compute "net capital loss" in the way that plaintiff wishes they had. However, without knowing exactly how defendants computed the net capital loss in this case, I cannot say that plaintiff has no chance of success on its breach of contract claim. It may be that expert testimony will establish that the results of defendants' calculation bore no relation to a "net capital loss" under any objective view of the term. And, although a jump in the applicable rate from 0.33% to 4.09% may have a reasonable explanation, the increase and the admitted inaccuracies of the duration rates raise questions about the adjustment calculation. Until these matters have been developed more completely, it would be premature to dismiss this claim. Therefore, I will deny defendants' motion to dismiss count 1 of the amended complaint.

B. State Law Unfair Trade Practices Claim

For the reasons stated in the opinion issued on February 21, 2007, in Uniek, Inc. v. Dollar General Corp., 06-C-0311, a copy of which is attached, I am prepared to find as a matter of law that plaintiff has failed to state a claim under Wis. Stat. § 100.18. Section

100.18 is intended to protect members of the public from entering into contracts based on advertisements, announcements, statements or representations that contain "any assertion, representation or statement of fact which is untrue, deceptive or misleading." The Wisconsin courts has read "the public" as not including those who have a "particular relationship" with the entity making the representations of fact. Kailin v. Armstrong, 2002 WI App 70, ¶ 42, 252 Wis. 2d 676, 643 N.W.2d 132. When defendants made the allegedly untrue statements to which plaintiff objects, they had had a contractual relationship with plaintiff for about 20 years. According to Kailin, this fact takes the case out of the protections offered by § 100.18. Id. at ¶ 44 ("We see no indiction in the language of § 100.18(1) that the legislature intended to address untrue, deceptive, or misleading assertions, representations, or statements of fact made by one party to another after they have entered into a contract."). Even if, despite the holding in Kailin, defendants' statements could be said to have been made to "the public," those statements did not have the effect of inducing plaintiff to enter into a contract with defendants; in fact, as plaintiff alleges in its complaint, it chose a plan administrator other than defendants for its deferred compensation plan.

ORDER

IT IS ORDERED that the motion to dismiss filed by defendants Nationwide Life

Insurance Company and Nationwide Retirement Solutions, Inc. is GRANTED with respect to count 6 (unfair trade practices under state law) of plaintiff Waukesha County's complaint and DENIED with respect to count 1 (breach of contract); defendants' motion to dismiss the complaint with respect to defendant Nationwide Retirement Solutions, Inc. is DENIED as moot; and defendants' motion for a transfer of venue is DENIED.

Entered this 21st day of March, 2007.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNIEK, INC.,

OPINION AND ORDER

Plaintiff,

06-C-311-C

v.

DOLLAR GENERAL CORPORATION,

Defendant.

- -

From 1993 to 2005, plaintiff Uniek, Inc. distributed picture frames to defendant Dollar General Corporation, reaching $12 million in sales in 2005. After defendant chose another picture frame manufacturer as its primary supplier in 2006, plaintiff brought this action for damages, asserting claims for breach of contract, promissory estoppel, quantum meruit and a violation of Wis. Stat. § 100.18. The parties are of diverse citizenship and the amount in controversy is more than $75,000, providing a basis for jurisdiction under 28 U.S.C. § 1332.

Defendant has moved for summary judgment on plaintiff's claim under Wis. Stat. § 100.18, which prohibits fraudulent representations in certain business transactions. Defendant asserts three grounds for its motion: (1) its statements to plaintiff were not made

to "the public," as required by § 100.18; (2) the statute protects only buyers rather than sellers like plaintiff; and (3) plaintiff has not adduced any evidence that defendant made any representations that were false when made. I agree with defendant that plaintiff's relationship with defendant sufficiently distinguishes plaintiff from "the public" as that term is currently understood by the Wisconsin courts in the context of Wis. Stat. § 100.18(1). Accordingly, I will grant defendant's motion for summary judgment.

From the facts proposed by the parties and the record, I find that the following are undisputed.

UNDISPUTED FACTS

Plaintiff Uniek, Inc. manufactures and supplies picture frames and other home decor products to retailers. Defendant Dollar General Corporation operates more than 8,000 convenience stores across the country. Plaintiff's state of incorporation and location of its principal place of business are Wisconsin; defendant's are Tennessee.

In 1993, plaintiff began distributing picture frames to defendant for sale in defendant's stores. From 1993 to 2004, defendant purchased picture frames from six or seven other vendors. Its purchases from plaintiff consisted of "closeout, end runs and discounted merchandise." There were as many as two years when plaintiff did not sell any merchandise to defendant; in other years, plaintiff's sales to defendant reached as high as

$6,000,000.

Beginning in 1995, plaintiff designated an employee to manage its account with defendant. Representatives from plaintiff and defendant met every several months to discuss the account. In addition, plaintiff and defendant communicated in writing and over the telephone about issues such as the selection of picture frames that defendant should carry and discounts and promotional merchandise available to defendant.

In November 2004, defendant asked plaintiff to "present its vision for supplying a complete frame assortment to [defendant] as the core supplier." Plaintiff complied and became defendant's core supplier of picture frames for 2005. The parties signed a document called "Uniek/Dollar General 2005 Planogram Agreement Letter of Understanding." Under a section titled "Overview," the letter states:

> Uniek, Inc. will supply Dollar General an 8 ft planogram to roll out at the end of April 2005 to approximately 7,430 stores and all seven DC's. The program will begin as a domestic program distributed from Uniek's warehouses in Waunakee, WI. The change to a direct import program will be determined by Uniek and Dollar General following setting all stores with the 2005 planogram.

The remainder of the letter sets out the terms of the new relationship. Plaintiff agreed to pay for additional fixtures that would be needed to display its frames "upon receiving complete exclusivity to the line planogram for 12 months based on service performance and product satisfaction." With respect to inventory, plaintiff was "to only carry 30 days of merchandise on hand to supply [defendant] at all times." If an item was discontinued,

plaintiff and defendant would "work together to liquidate the merchandise on store leve[l] to avoid excess inventory."

After signing the letter of understanding, plaintiff and defendant began working together more closely. Plaintiff's employees began making frequent visits to defendant's headquarters and employees of both companies traveled together to Hong Kong to meet picture frame manufacturers. Plaintiff's sales to defendant in 2005 exceeded $12 million.

Plaintiff believed that its relationship with defendant in 2006 would be an extension of the 2005 relationship. On January 30, 2006, defendant's buyer emailed plaintiff, informing it that it had been "awarded" certain "items" for the "Home Decor 2006 Planogram Year." On February 1, defendant's buyer sent another email to plaintiff, "congratulat[ing]" it "on all the new business" and asking plaintiff to have items shipped to defendant by May 15 and to "have ready a 30 day supply on hand." Because many of the items were manufactured in China, plaintiff began immediately manufacturing, shipping and warehousing the items listed in the January 30 email. (Neither party proposes facts identifying those items.) In February 2006, representatives of defendant told plaintiff several times that defendant would sign a 2006 "letter of agreement" similar to the 2005 letter.

On March 13, 2006, defendant told plaintiff that it was "re-reviewing" the 2006 planogram. However, defendant did not tell plaintiff to stop producing, shipping or

warehousing any items. Approximately three weeks later, defendant told plaintiff that it would be "revisiting suppliers to be used for the 2006 Planogram."

On April 18, defendant told plaintiff that in two weeks it would decide who would be its "core" picture frame supplier for 2006. On May 15, defendant told plaintiff that it had selected a new picture frame supplier.

OPINION

At issue is the first provision in Wis. Stat. § 100.18. It consists of one sentence only, but its length would put even Dickens to shame. It reads:

> No person, firm, corporation or association, or agent or employee thereof, with intent to sell, distribute, increase the consumption of or in any wise dispose of any real estate, merchandise, securities, employment, service, or anything offered by such person, firm, corporation or association, or agent or employee thereof, directly or indirectly, to the public for sale, hire, use or other distribution, or with intent to induce the public in any manner to enter into any contract or obligation relating to the purchase, sale, hire, use or lease of any real estate, merchandise, securities, employment or service, shall make, publish, disseminate, circulate, or place before the public, or cause, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in this state, in a newspaper, magazine or other publication, or in the form of a book, notice, handbill, poster, bill, circular, pamphlet, letter, sign, placard, card, label, or over any radio or television station, or in any other way similar or dissimilar to the foregoing, an advertisement, announcement, statement or representation of any kind to the public relating to such purchase, sale, hire, use or lease of such real estate, merchandise, securities, service or employment or to the terms or conditions thereof, which advertisement, announcement, statement or representation contains any assertion, representation or statement of fact which is untrue, deceptive or misleading.

Wis. Stat. § 100.18(1).

Although the wording is cumbersome, the gist of the provision is simple, at least for the purpose of this case: it prohibits the making of false or misleading representations to "the public" in the context of certain business transactions. The question presented by defendant's motion for summary judgment is whether defendant's 2006 statements on which plaintiff says it relied were made to "the public" within the meaning of Wis. Stat. § 100.18. (Defendant does not suggest that the economic loss doctrine would bar reliance on Wis. Stat. § 100.18, so I need not consider that question. Compare Kailin v. Armstrong, 2002 WI App 70,¶ 42, 252 Wis.2d 676, 643 N.W.2d 132 (Ct. App. 2002) (economic loss doctrine does not apply to claims brought under Wis. Stat. § 100.18) with MBI Acquisition Partners, L.P. v. Chronicle Publishing Co., 301 F. Supp. 2d 873, 886 (W.D. Wis. 2002) (dismissing claims brought under Wis. Stat. § 100.18 as barred by economic loss doctrine).)

On its face, a statement made to "the public" suggests an attempt to communicate with a large audience rather than a private message directed at one party. Webster's New World Dictionary 1087 (3d College ed. 1988) (defining "public" as "the people as a whole"). It is likely that this was the meaning the legislature intended to give the term when it passed the precursor to § 100.18 in 1925. At that time, the statute was limited to fraudulent *advertising* and could be enforced by the state only (presumably for the public good rather than for an individual's private interests). Wis. Stat. § 343.413 (1925). Thus, like the

Federal Trade Commission Act of 1914, it appears that the Wisconsin law was enacted primarily to protect "the vast multitude" from buying products as the result of advertisements likely to mislead "the ignorant, the unthinking and the credulous" consumer. Aronberg v. Federal Trade Commission, 132 F.2d 165, 167 (7th Cir. 1942).

In the following decades, many if not all of the other states adopted similar statutes patterned on a number of model laws such as the Unfair Trade Practices and Consumer Protection Law, the Uniform Deceptive Trade Practices Act and the Uniform Consumer Sales Practices Act. Like the Federal Trade Commission Act and the original version of the Wis. Stat. § 100.18, these laws focused on stopping large scale *consumer* fraud and were usually enforceable by the state attorney general only, at least in the early years. Sheila B. Scheuerman, The Consumer Fraud Class Action, 43 Harv. J. on Legis. 1, 14-20 (2006). Contract law was insufficient to protect consumers from fraud "because a business could make false claims about its product or advertise lower-than-actual prices without entering into a contract." Victor E. Schwartz and Cary Silverman, Common Sense Construction of Consumer Protection Acts, 54 U. Kan. L. Rev. 1, 7 (2005).

During this time period, Wisconsin's law was anything but static. Over the years, the statute has been amended numerous times to expand its protections. The current version of the statute is no longer limited to advertising or even to sales. It now extends to a false or misleading "representation of any kind" and to inducements to enter into "any contract or

obligation relating to the purchase, sale, hire, use or lease of any real estate, merchandise securities, employment or service." And of course, as is demonstrated by this case, § 100.18 is not limited to enforcement by the state for the public good, but may be used as well by individuals seeking to protect their own interests. Wis. Stat. § 100.18(11)(b)2.

Thus, it should come as no surprise that the Wisconsin courts have rejected a number of efforts to restrict the meaning of "the public" to what was intended originally. The first judicial construction of the term came in 1974, when the Wisconsin Supreme Court concluded that "use of the term 'the public' does not mean that the statements be made to a large audience. As has been noted, in some situations one person can constitute the public." State v. Automatic Merchandisers of America, Inc., 64 Wis. 2d 659, 664, 221 N.W.2d 683, 686 (1974). The court concluded that "the public" included persons who had purchased a vending machine after the defendant had made misrepresentations both orally and in printed promotional materials. Id. In Bonn v. Haubrich, 123 Wis. 2d 168, 173, 366 N.W.2d 503, 505 (Ct. App.1985), the court rejected an argument that §100.18(1) did not cover a transaction unless it involved advertising or printed materials. Finally, in K & S Tool & Die Corp. v. Perfection Machinery Sales, Inc., 2006 WI App 148, ¶¶23-27, – Wis. 2d –, 720 N.W.2d 507, the court held that a plaintiff was not excluded from the protections of the statute simply because it had had some dealings with the defendant in the past. Id. at ¶27 (concluding that statute could apply to plaintiff that "received catalogs and brochures

from [the defendant], previously made inquiries about products and prices, and purchased one product from [the defendant] four years earlier"). Along these same lines, I concluded in Stoughton Trailers, Inc. v. Henkel Corp., 965 F. Supp. 1227, 1236-37 (W.D. Wis. 1997), that Wis. Stat. § 100.18(1) applied equally to individual consumers and commercial entities.

Given these decisions and all the changes in the law since Wis. Stat. § 100.18(1) was first passed, one could argue plausibly that it is anachronistic to interpret "the public" as having *any* limitation on the parties that can seek the law's protections. Potentially, any person or entity is a member of the public. Because the statute now covers so many situations that the legislature in 1925 did not anticipate, perhaps it is a mistake to continue viewing the term as reflecting the legislature's intent to limit the law's scope to a particular group of people.

Regardless of the merit of such an approach, it has not yet been embraced by the Wisconsin courts. Although they have stressed that "the public" has "a broad meaning" in the context of Wis. Stat. § 100.18(1), e.g., K&S Tool & Die, 2006 WI App 148, ¶ 20, they have declined to conclude that the term means everyone. Thus far, Automated Merchandisers is the only case in which the Wisconsin Supreme Court has considered whether a particular party falls within the meaning of "the public" under the statute. Although the court did not set forth an explicit test for making that determination, in rejecting the argument that the plaintiff did not fall within the statute's purview, the court

stated, "there is no peculiar relation between the defendants and the prospective purchasers which would distinguish the prospective purchasers from 'the public' which the legislature intended to protect." Automated Merchandisers, 64 Wis. 2d at 663, 221 N.W.2d at 686. In subsequent cases, the court of appeals has derived a test from this statement: whether the plaintiff had a "particular relationship" with the defendant of a type the legislature did not intend to protect. Kailin, 2002 WI App 70, ¶44; K&S Tool & Die, 2006 WI App 148, ¶¶20-23.

It is not immediately apparent how this test should be applied. As discussed above, discerning the legislature's intent for a statute that has been amended numerous times is less than straightforward. *Which* legislature's intent should control? It was the 1925 legislature that inserted the term into the statute, but the current version bears little resemblance to its original form. In Automated Merchandisers, 64 Wis. 2d at 662-63, 221 N.W.2d at 685, the court acknowledged that the meaning of the term had changed since the law's inception. Id. (rejecting attorney general's 1925 interpretation of the statute because of amendments made to statute). But there is little indication in the statute or the case law how the amending legislatures intended their changes to affect the meaning of "the public."

Some guidance is provided in Kailin, 2002 WI App 70, the only published case in which a Wisconsin court has concluded that a plaintiff did not qualify as a member of "the public." In that case, the court held that a misrepresentation was not made to "the public"

within the meaning of Wis. Stat. § 100.18(1) if the statement was made to a party with whom the defendant had a contract. The court stated: "Once the contract was made, the Kailins were no longer 'the public' under the statute because they had a particular relationship with Armstrong—that of a contracting party to buy the real estate that is the subject of his post-contractual representation." Id. at ¶44.

Although plaintiff does not say so explicitly, it would limit Kailin to its facts. It suggests that any relationship short of a contract is not a "particular relationship" depriving a party of the protections of Wis. Stat. § 100.18(1). Of course, the precise nature of plaintiff's relationship with defendant at the beginning of 2006 is the central dispute in this case. However, I need not determine for the purpose of defendant's motion for summary judgment whether this relationship constituted a contract.

If the Wisconsin courts had intended to exclude from the law only contracting parties, it could have stated the rule as whether the parties had a "contracting relationship," but they have employed the more general language, "particular relationship." The standard suggested in Automated Merchandisers, 64 Wis. 2d at 664, 221 N.W.2d at 686, is whether the plaintiff had a relationship that would somehow "distinguish" it from any other party. By adopting this standard, it appears that the Wisconsin courts have attempted to preserve some aspect of the statute's original purpose in protecting the "vast multitude," who cannot be expected to be educated enough about the other party to protect their own interests.

Although the courts have never clearly articulated the rationale for the "particular relationship" standard, presumably it is that those who have long-term, established relationships are in a better position than most to protect themselves in the context of that relationship. Given the statute's current application to the sophisticated business entity as well as the ignorant consumer and to statements that never reach the "vast multitude," one could question whether this attempt to meld the old with the new leads to the most logical distinctions between those plaintiffs that fall within the statute and those that are excluded.

However, to the extent the "particular relationship" test should be reexamined, that is a task for the Wisconsin Supreme Court; the duty of this court is to apply the standard provided by the state courts. Allstate Ins. Co. v. Menards, Inc., 285 F.3d 630, 637 (7th Cir. 2002). In doing so, it is not difficult to conclude that plaintiff cannot maintain its claim under Wis. Stat. § 100.18(1). Plaintiff attempts to compare its relationship to defendant with the one at issue in K&S Tool & Die, but this comparison borders on the ridiculous. In K&S Tool & Die, 2006 WI App 148, ¶27, the plaintiff had made one purchase from the defendant, four years earlier. In contrast, before this dispute arose, plaintiff had had an ongoing relationship with defendant for thirteen years, selling as much as $12 million of merchandise in a single year. If there were any doubt whether plaintiff had a "particular relationship" with defendant from 1993 though 2004, this doubt is dissipated with respect to the relationship established in 2005. It was then that the parties signed the "letter of

understanding," under which plaintiff became defendant's core picture frame supplier. The dispute in 2006 that led to this lawsuit involves the same relationship that was covered by the 2005 letter.

If this relationship does not "distinguish" plaintiff from "the public," then virtually nothing would. In other words, if "the public" has any limiting scope on Wis. Stat. § 100.18(1), plaintiff's claim is one that must be excluded. Because current Wisconsin case law adheres to the view that "the public" does restrict the beneficiaries of Wis. Stat. § 100.18(1), I must grant defendant's motion for summary judgment. This conclusion makes it unnecessary to consider defendant's alternative arguments that Wis. Stat. § 100.18(1) does not protect sellers and that plaintiff has failed to adduce sufficient evidence that defendant made any representations that were false when made.

ORDER

IT IS ORDERED that defendant Dollar General Corporation's motion for summary judgment on Count II of plaintiff' Uniek, Inc.'s complaint is GRANTED. Plaintiff's claim

under Wis. Stat. § 100.18 is DISMISSED.

Entered this 21st day of February, 2007.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge