Case No. 17-4125

United States Court Of Appeals
FOR THE SIXTH CIRCUIT

WALID JAMMAL, ET AL,

Plaintiffs-Appellees

v.

AMERICAN FAMILY INSURANCE COMPANY, ET AL.,

Defendants-Appellants

On Appeal from the United States District Court for the Northern District of Ohio, No. 1:13-cv-00437-DCN

BRIEF OF *AMICUS CURIAE* OF THE AMERICAN COUNCIL OF LIFE INSURERS IN SUPPORT OF AMERICAN FAMILY INSURANCE COMPANY AND REVERSAL OF THE DISTRICT COURT'S CERTIFIED OPINION

Paulo B. McKeeby
Ronald E. Manthey
Morgan, Lewis & Bockius LLP
1717 Main Street
Suite 3200
Dallas, Texas 75201
Telephone: 214.466.4000
Fax: 214.466.4001
Paulo.Mckeeby@morganlewis.com
Ron.Manthey@morganlewis.com

Attorneys for American Council of Life Insurers

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and 6 Cir. R. 26.1.1, non-party *amicus curiae* American Council of Life Insurers ("ACLI") discloses that it is a nonprofit corporation, has no parent corporation, does not issue shares of stock, and, therefore, no publicly held corporation owns 10% or more of its stock. ACLI is a national organization representing member companies.[1]

Dated: January 24, 2018

/s/ Paulo B. McKeeby
Counsel for Amicus Curiae
American Council of Life Insurers

[1] Pursuant to FED. R. APP. P. 29(a)(4)(E), ACLI further states that no party's counsel authored this brief in whole or in part, and no party, its counsel, or other person contributed money intended to fund the brief's preparation or submission other than ACLI on behalf of its collective membership.

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STATEMENT OF PARTY CONSENT

ACLI files this brief as *amicus curiae* with the consent of all parties.

IDENTITY, INTEREST, AND AUTHORITY TO FILE

This brief is filed by ACLI, which supports the defendant-appellant, American Family Insurance Company ("Appellant"), in seeking the reversal of the district court's decision below.

ACLI is a trade association with approximately 290 member companies operating in the United States and abroad. ACLI advocates in state, federal, and international forums for public policy that supports the industry marketplace and the policyholders that rely on life insurers' products for financial and retirement security. ACLI often files *amicus* briefs in cases, like this one, that involve issues of great importance to its members and their policyholders.

ACLI member companies are the leading providers of financial and retirement security products covering individual and group markets. They provide life insurance, disability income, long-term care insurance, annuities, pension products, and reinsurance. In the United States, these members represent more than 95% of industry assets, 93% of life insurance premiums, and 98% of annuity considerations of the life insurance and annuity industry.

STATEMENT OF THE CASE AND INTEREST OF *AMICUS CURIAE*

ACLI adopts the Statement of the Case set forth in the Brief of Appellant.

ACLI submits this brief to inform the Court of the negative and far-reaching industry and policy implications of the district court's determination that insurance agents who contract with Appellant are employees as a matter of law. Given the record evidence in the case, the result is contrary to precedent in this and other circuits that have addressed the question of the proper classification of insurance agents who sell insurance products.

The district court's decision overlooks, or at least attaches insufficient significance to, fundamental factors on which other courts have relied in determining the proper classification of insurance sales agents. By discounting these factors, the district court's decision deprives insurance companies of the predictability of reliance on precedent and will dramatically undermine one of the lawful business models used for decades to sell insurance.

If the district court's decision is permitted to stand, insurance companies with independent distribution models essentially would have to start from scratch in assessing whether or not individuals who sell insurance and related products are properly classified. Moreover, by placing undue emphasis on tangential indicia of control which other courts have either ignored or regarded as insignificant, the district court's decision creates an atmosphere of uncertainty that almost certainly will yield increased litigation in an area which, until this point, seemed settled by precedent. Even worse, the decision could lead to grossly disparate results from

circuit to circuit by creating an outlier result that places outcome-determinative reliance on factors which courts to date have traditionally afforded little or no emphasis. The significant unpredictability for business operations, coupled with the cost of new class-based challenges to exemption status, will hurt both the policyholders and shareholders of many ACLI members. For these reasons, and as more fully discussed below, ACLI respectfully submits that the district court's opinion should be reversed.

ARGUMENT

The district court's decision is against the overwhelming weight of authority. Nearly every case involving insurance agents has held that agents are properly classified as independent contractors. Most significantly, in finding proper independent contractor classification, the courts in those cases, across numerous circuits, have relied on factors that also exist in this case. In reaching the conclusion that the agents in this case are employees as a matter of law, the court wrongly discounted those factors and clear, cohesive precedent.

Specifically, much of the indicia of control on which the district court improperly relied relates not to the "manner and means" by which a product is sold or a service is provided, as emphasized under the Supreme Court's *Darden* test or other similar tests. Rather, the district court's factual analysis focuses on factors

more (if not only) relevant to the *results* or *outcome* of the service provided, not the details regarding how that outcome was or could be achieved.

But control over "results" is *not* dispositive control under *Darden*. Without jeopardizing independent contractor status, a company can tell an independent contractor agent that, unless he or she sells a certain amount of product, the company will choose not to continue to contract with him or her. It is black-letter law that such a goal is not control when, as here, the company does *not* dictate to whom a policy or product should be sold, which of a company's many insurance offerings should be sold, or how the sales should be accomplished. The district court's decision, which purports to apply *Darden*, deviates from the focus on indicia of control over manner and means described therein as well as in similar "right to control" and "actual control" tests. As such, the decision of the district court is at odds with other circuit opinions interpreting and applying *Darden* and against the weight of national authority on the subject. The district court's decision should, therefore, be overturned.

I. THE DISTRICT COURT'S DECISION WILL RESULT IN A LACK OF PREDICTABILITY AND WILL RESTRICT OR ELIMINATE THE OPPORTUNITY FOR INDIVIDUALS TO OPERATE AND PROFIT FROM THEIR OWN BUSINESSES

Any multifactor test—including the test set forth by the Supreme Court in *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992) to determine whether a hired party is an employee or independent contractor—is by definition fact-

intensive. Nonetheless, prior to the district court's opinion, parties in the insurance industry could proceed with some degree of confidence that their contractual preferences would be honored by courts if their relationship met certain fundamental principles. The district court's opinion, by overemphasizing certain factors and discounting the key indicia of independence on which other courts have previously relied, erodes that confidence and increases the likelihood of unpredictable outcomes. It represents an invitation for courts to make purely case-by-case determinations in this area and would decrease the predictability of outcomes in insurance agent classification cases.

Such a result is detrimental not just for the insurance companies but also for the independent agents with whom they contract. Many of those agents, and likely the more successful ones, enjoy the freedom to make the expenditures that they see fit, the potential for increased compensation, and the tax benefits associated with independent status. Affirming the district court's opinion will require agent reassessment of previous tax filings and will have potentially other tax and related consequences, most of them presumably unwanted. Reassessment of agent classification by other insurance companies might result in similar undesired consequences.

This lack of predictability is precisely what the *Darden* and related tests were designed to reduce. Indeed, the Supreme Court in the context of independent

contractor classification has encouraged "predictability through advanced planning," by encouraging parties to agree on the relevant contractual terms that will govern their relationship. *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 750 (1989).

Whereas a challenge to contractual independent contractor status generally could be assessed under existing case law by examination of a few factors, such as form of payment, right to control schedule, and payment for equipment and staffing, the district court's approach improperly makes the analysis much more complicated. Insurance companies would have to reassess their independent contractor relationships and would have limited (or no) certainty that their contractually agreed-upon terms will be honored. The result is not only day-to-day uncertainty as to proper classification, but also the virtual certainty of additional litigation in an area of law that heretofore has been relatively settled. To avoid this outcome, the district court's decision should be reversed.

II. THE DISTRICT COURT'S DECISION IS AGAINST THE OVERWHELMING WEIGHT OF AUTHORITY AND DISCOUNTS CRITICAL FACTORS ON WHICH COURTS HAVE RELIED IN REACHING CLASSIFICATION DETERMINATIONS

Nearly every court to have considered the classification of insurance agents has determined that they properly are treated as independent contractors rather than employees. *See, e.g., Weary v. Cochran*, 377 F.3d 522, 524 (6th Cir. 2004) ("As a general matter, this Court has repeatedly held that insurance agents are independent

contractors, rather than employees, in a variety of contexts.") (citations omitted); *Schwieger v. Farm Bureau Ins. Co. of Neb.*, 207 F.3d 480 (8th Cir. 2000); *Murray v. Principal Fin. Group, Inc.*, 613 F.3d 943 (9th Cir. 2010); *Nationwide Mut. Ins. Co. v. Mortensen*, 606 F.3d 22 (2d Cir. 2010); *Oestman v. Nat'l Farmers Union Ins. Co.*, 958 F.2d 303 (10th Cir. 1992); *Butts v. C.I.R.*, 66 T.C.M. (CCH) 1041 (1993), *aff'd*, 49 F.3d 713 (11th Cir. 1995).

In doing so, courts applying the Supreme Court's test in *Darden*, or other similar control tests, have focused on a set of common criteria in determining whether or not the hiring party retains the right to control the manner and means by which the particular service is accomplished. No single factor is dispositive. As one court observed, application of a right of control test, under *Darden* or otherwise, "requires more than simply tallying factors on each side and selecting the winner on the basis of a point score." *Schwieger*, 207 F.3d at 487; *see also Ware v. U.S.*, 67 F.3d 574, 579 (6th Cir. 1995) ("In weighing the factors, the court's conclusion that they cumulatively favored independent contractor status was not based simply on the number of factors favoring each party. Rather, the court reconsidered all the facts as they bore upon the degree of control exercised or retained by each party.").

Moreover, in making classification determinations in the insurance agent context, courts have not focused on theoretical control, but on whether *actual* control or an *actual* "right to control" exists. When that standard is applied, the district

court's opinion makes it clear that nearly all of the commonly applied core criteria, as more fully discussed below, cut in favor of a finding that the agents selling American Family products were properly classified as independent contractors. That the district court nonetheless, and contrary to its own analysis and to the plaintiffs' burden of proof, ruled otherwise warrants a reversal of that decision.

A. Payment by Commissions

As here, in nearly all of the cases in which courts have determined that insurance agents were properly classified as independent contractors, the agents were paid solely, or at least mostly, by commissions based on the sales of applicable insurance products. Courts have noted this as a key factor weighing in favor of independence, and for good reason. *See, e.g.*, *Weary*, 377 F.3d at 527. ("Fifth, the fact that Weary was paid solely upon a commission basis and did not earn a salary lends further support to the conclusion that he was an independent contractor.").[2]

Agents in most cases, and in the underlying decision, are paid at a contractually agreed-upon commission rate only if they make sales. As such, their compensation, in large part, is based—in combination with their skill—on the type and amount of sales calls they choose to make, the time they choose to invest in

[2] *See also Murray*, 613 F.3d at 946; *Barnhart v. N.Y. Life Ins. Co.*, 141 F.3d 1310, 1313 (9th Cir. 1998); *Birchem v. Knights of Columbus*, 116 F.3d 310, 313 (8th Cir. 1997); *Ware*, 67 F.3d at 579; *Oestman*, 958 F.2d at 304; *Knight v. United Farm Bureau Mut. Ins. Co.*, 950 F.2d 377, 379 (7th Cir. 1991).

making each of those calls, and the method and means they choose to use in identifying particular sales prospects. That an agent him or herself controls all of those factors, and is paid based on his or her efforts as opposed to the number of hours worked, cuts significantly in favor of independent status. *Knight*, 950 F.2d at 380 ("Pay by commission implicitly depends on the agents' ability to sell which, in turn, depends on the methods used by [the agent]. It was the lack of control over the manner and means by which she sold insurance, which was not controlled by [the insurance company], that determined her income."). When an agent is paid by commissions, all control over manner and means rests with the agent.

B. Ability to Control Schedule and Work Unsupervised

Another common factor in cases affirming independent contractor status is the agent's right to control his or her schedule and to work without supervision. As with the district court's description of agents contracted to sell American Family products, agents who control their own work hours and perform services without daily supervision have repeatedly been held to be properly classified as independent contractors.[3]

Combined with a commission-based pay system, the ability to determine work hours drives significantly the potential for, and control over, profit or loss by an

[3] *See., e.g.*, *Murray*, 613 F.3d at 946; *Weary*, 377 F.3d at 526; *Schwieger*, 207 F.3d at 484; *Knight*, 950 F.2d at 379; *Oestman*, 958 F.2d at 304.

agent. For example, an agent who is paid by commission but who spends very little time in the field making sales (or who chooses poor prospects or markets) would not be expected to earn significant commissions. Conversely, an agent who is paid by commissions and who devotes the majority of working time to successful markets and selling a varied and successful product mix would likely earn higher commissions.

The district court in its opinion determined that the agents selling American Family products worked largely with limited, if any, daily or other supervision and, with the exception of occasional training-related meetings, were able to set their own work schedules on a day-to-day basis. Memorandum Opinion, R. 320, Page ID # 20966, 20977. The court nonetheless held that these agents were employees as a matter of law. In so doing, the district court deviated from the clear precedent cited herein holding agents with similar autonomy to be independent contractors.

C. Investment in Equipment and Other Instrumentalities

Another factor critical to an assessment of control is the degree of autonomy for purchases of, and minimal reimbursement for, business expenditures, including office equipment and rent. Where a contractor is permitted wide leeway to make overhead decisions, and spends his or her own funds on equipment and other expenditures to increase the potential for profit, courts generally have found

independent status.[4] The district court's opinion confirms that agents selling American Family products paid for the majority of their own office-related expenditures and, while Appellant may have had some approval of office space decisions, agents primarily were charged with personally identifying office locations and funding the rent for those spaces. Memorandum Opinion, R. 320, Page ID # 20974–75. As such, this core factor also cuts against the district court's decision and weighs in favor of independent status.

D. Ability to Hire Staff

As with capital expenditures, another significant indicator of independent status is the ability to hire, and the responsibility for payment to, one's own assistants and other office staff. Specifically, discretionary hiring authority is a commonly cited factor in judicial determinations holding that insurance agents are independent contractors. Such hiring authority, combined with the requirement here that such staff be paid by the agent him or herself, is further proof both that the worker controls the manner and means by which the service is accomplished and bears the risk of profit or loss associated with the independent business.[5]

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[4] *See, e.g., Wortham v. Am. Family Ins. Group*, 385 F.3d 1139,1140–41 (8th Cir. 2004); *Weary*, 377 F.3d at 526; *Schwieger*, 207 F.3d at 485; *Oestman*, 958 F.2d at 306.

[5] *See, e.g., Wortham*, 385 F.3d at 1140; *Weary*, 377 F.3d at 526; *Oestman*, 958 F.2d at 304.

For example, in *Butts*, the court emphasized the agent's right to hire and retain clerical staff. 66 T.C.M. (CCH) 1041, at *1. In particular, the court noted that the agent "fixed the terms and conditions of [the staff employees'] services, maintained day-to-day authority over them, and established and paid their compensation." *Id*. The court made clear that such authority went directly to the assessment of how to make the business more profitable and that such decisions regarding personnel were "an exercise of professional judgment made in connection with [the agent's] responsibility to operate his own office." *Id*. at *2. More specifically, decisions to retain personnel were made "only because [the agent] believed his office would operate more efficiently and profitably." *Id*.

While Appellant apparently had some oversight responsibility for staffing decisions (which flow, at least in part, from external regulatory agency compliance standards), the district court's opinion at a minimum suggests that the determination of whether to hire additional staff, and how to compensate them, was within the discretion of the independent agent. Memorandum Opinion, R. 320, Page ID # 20978. However, in reaching its conclusion of employment status, the district court gave insufficient weight to this factor in contravention of the precedent in this and other circuits.

III. THE DISTRICT COURT'S DECISION RELIED ON FACTORS THAT ARE NOT RELEVANT TO CONTROL

The district court ultimately concluded that application of the *Darden* "right of control" factors was inconclusive, a result at odds with its own analysis and the plaintiffs' burden of proof. *See id.* at Page ID # 20981. Moreover, the district court was able to reach that conclusion only by giving insufficient weight to the factors noted above. Because it reached that conclusion, however, the court turned to and placed undue weight on other factors, which numerous agencies and courts have found to be irrelevant or, at best, neutral in the independent contractor analysis. In addition, the district court substituted other criteria that it viewed as more relevant than those in *Darden*, including as to the "job performance and the employment opportunities of the aggrieved individual . . . ." *Id.* at Page ID # 20982. These other criteria, however, do not bear upon, much less control in any way, the manner and means by which the insurance sales were provided. To the contrary, the "other factors" relied on by the court largely address bargained-for contractual terms that are not relevant to the day-to-day activities of the agents. For that reason, the additional factors relied upon by the district court have been found in other cases involving independent insurance agents, but those courts nonetheless found the agents to be independent contractors and not employees.

A. Ownership of Customer Information and Restrictions on Competition

Among the other alleged indicia of control substituted by the district court are the ownership of the insurance "book of business" and the customer's insurance policies. *Id.* However, the district court's decision does not define "book of business" other than through citation to generalized testimony that Appellant exerted "total control" over insurance policies. *Id.* at Page ID # 20954. In addition, the district court does not explain how any such "ownership," if there is any by anyone other than the policyholder, relates to the ultimate question of how—i.e., the manner and means through which—the agent sold those policies. The fact that customers have "contracts" or "policies" directly with the insurance provider—as opposed to the agent—is common given an agent's role as a sales intermediary. All policies are created by insurance companies. It is not the fact that such policies exist, but *how* they are sold that governs employment or independent contractor status. If not, as all agents sell one or more companies' insurance policies, an agent could never be independent. For that reason, the fact that a policy is that of an insurer does not in any way relate to control of the manner and means of service and generally has been rejected by courts as a factor that weighs in favor of employee status. *See, e.g.*, *Nationwide Mut. Ins. Co. v. Mortensen*, 606 F.3d 22, 31 (2d Cir. 2010) (holding agents to be independent contractors notwithstanding that agents claimed that the insurance company "asserts ownership over the customer information"); *Butts v.*

C.I.R., 66 T.C.M. (CCH) 1041, at *9 (1993), *aff'd*, 49 F.3d 713 (11th Cir. 1995) (holding agent to be independent contractor despite agent's "lack of vested benefit in his book of business").

Further negating the idea that "control" of a "policy" or "book of business" has any applicability here, the fact that the parties may be required by insurance department regulatory standards or by contract to vest certain rights in customer information in the insurance provider is unremarkable and does not show control of the manner and means by which any sale is made. For example, in *Butts*, the plaintiff argued in favor of employee status based on contractual provisions whereby the insurance provider claimed a property interest in policyholders, had the right to reject insurance applications and/or refuse to renew policies, and precluded any vested interest by the agent in any "book of business." 66 T.C.M. (CCH) 1041, at *3–4. The court, in addressing the restrictions on an agent's rights as to policyholders and policyholder information, concluded that: "[W]e have previously addressed whether the types of restrictions respondent points to in this case bear on an insurance company's control of an insurance agent's professional behavior, and we have squarely concluded that they have no bearing on such inquiry." *Id.* at *4.

Other courts have reached similar conclusions in connection with contractual, regulatory or other rights that grant the insurance carrier, as opposed to the agent, control over information related to a policy, policyholder or other "book of business"

related information. *See., e.g., Mortensen*, 606 F.3d at 31 (affirming decision that agents were independent contractors even though agents asserted that insurance company owned customer information); *Ware v. U.S.*, 67 F.3d 574, 576 (6th Cir. 1995) (holding agent to be independent contractor, notwithstanding the fact that agent agreed that his book of business was the property of the insurance company). Consequently, the fact that the insurance provider may have a contractual or regulatory requirement to retain or maintain customer or policy information (including a copy of any policy) is insignificant and should not have been afforded any weight by the district court.

Courts similarly have attached little significance to restrictions on independent agents' rights to sell other insurance products. *See, e.g., Ware*, 67 F.3d at 579 ("[Agent] could sell only AAA insurance, with minor exceptions."); *Mortensen*, 606 F.3d at 25 ("As Nationwide agents, the defendants were not permitted to sell or solicit insurance for any Nationwide competitor . . . ."); *Knight v. United Farm Bureau Mut. Ins. Co.*, 950 F.2d 377, 378 (7th Cir. 1991) ("[T]he agents are not allowed to sell insurance for any other company."). The district court's reliance on competitive restrictions regarding policyholders thus was misplaced and inconsistent with other decisions. These restrictions—again the majority of which are not well-defined by the district court's decision—relate to, if anything, control of the end-product (i.e., the number of products sold), and not the

manner and means by which sale of that product is accomplished. Moreover, it ignores that agents controlled which of American Family's various products they would recommend to a customer, based on the individualized needs of the customers the agents themselves sourced, solicited and chose to meet with. As such, the district court attached undue significance to restrictions on competition in applying the *Darden* test.

B. Sales Goals, Minimum Production Requirements and the Existence of Managerial "Chains of Command"

Similarly misplaced is the district court's reliance on production quotas, sales goals and a managerial chain of command to motivate and encourage sales. *See* Memorandum Opinion, R. 320, Page ID # 20961. Particularly with regard to quotas and production goals, it is black-letter law, particularly as applied to insurance agents, that these minimum sales criteria to maintain an independent contract do not relate to the manner and means by which the products are sold. Without jeopardizing independent contractor status, a company can ask that a minimum amount of sales be conducted, provided it does not dictate day-to-day how those sales should occur, what products should be sold, to whom, etc. As such, the relevance of these factors under *Darden* is remote, as other courts have concluded. *See, e.g., Murray v. Principal Fin. Grp., Inc.*, 613 F.3d 943, 946 (9th Cir. 2010) (imposition of minimum standards imposed by the hiring party insufficient to overcome strong indications that agent was an independent contractor); *Schwieger v. Farm Bureau Ins. Co. of*

Neb., 207 F.3d 480, 484 (8th Cir. 2000) (requirement of submission of weekly and monthly production reports to keep track of sales goals and quotas insufficient to overcome other indicia of independent status); *Barnhart v. N.Y. Life Ins. Co.*, 141 F.3d 1310, 1313 (9th Cir. 1998) (indicating that "unilateral imposition of minimum standards" suggests control but is insufficient to overcome other indicia of independent contractor status).

The district court's decision also devotes considerable attention to Appellant's "Agency Sales Managers" and their efforts to motivate agents to increase sales. Memorandum Opinion, R. 320, Page ID # 20972–73. Once again, the activities of these Agency Sales Managers appear to relate more to the mutual contractual objective of selling insurance, and not to the manner and means through which such sales were made. That the insurance provider might establish goals, or even terminate agents who do not meet those goals, does not mean that it, or the Agency Sales Managers, controlled the manner and means of how the service is provided. *See Knight*, 950 F.2d at 378 (rejecting the plaintiff's contention that "the existence of a chain of command inferentially establishes an employer/employee relationship.").

In short, the district court simply attached undue significance to production goals and requirements that have little, if anything, to do with *how* the particular service of insurance sales is performed, and particularly on a day-to-day basis. There

is no indication in the district court's opinion that agents were required to use any particular techniques or sales methods to accomplish sales or that their contracts would be terminated for failing to do so. As such, the district court's reliance on these factors to support its determination of a right of control under *Darden* was mistaken.

C. Control of Advertising and Marketing Materials

A final factor noted by the district court, that also merits attention, is the alleged control of advertising and marketing materials. Memorandum Opinion, R. 320, Page ID # 20959. Putting aside that simply *approving* materials does not diminish the control the agents had over whether to use any materials and what those materials would be, including their content, the fact that insurance companies have to approve such materials is not a choice of the carriers and so cannot be attributed to them as an exercise of control. For example, existing securities laws (as related to variable insurance products, state insurance law, and other externally regulatory standards) require that advertising and marketing materials not be misleading. That limited basis for review cannot and does not indicate any control over the manner or means through which sales are made or services are provided. *Schwieger*, 207 F.3d at 485 (holding that the requirement of authorization for advertisement and business cards is a "contractual concept of 'aids and services' provided to independent contractors in order to help them improve their own businesses" and is insufficient

to show employee status); *Oestman v. Nat'l Farmers Union Ins. Co.*, 958 F.2d 303, 306 (10th Cir. 1992) (holding that the requirement of written permission before advertising "is not the type of control that establishes an employer/employee relationship" where the insurance carrier has a substantial interest in controlling advertising based on potential liability for misstatements or misrepresentations). Accordingly, the right to approve advertising by Appellant is not an indicator of control under the *Darden* test or any other test for independent contractor status as applied to insurance agents.

IV. THE DISTRICT COURT'S DECISION IS INCONSISTENT WITH THE APPLICABLE BURDENS OF PROOF UNDER *DARDEN*

The district court acknowledged that the plaintiffs bear the proof under *Darden* to show by a preponderance of the evidence that they were common law employees rather than independent contractors. Memorandum Opinion, R. 320, Page ID # 20971; *see also Lilley v. BTM Corp.*, 958 F.2d 746, 751 (6th Cir. 1992). It was thus the plaintiffs' burden to show that the *Darden* factors mitigated in favor of finding employee status.

The district court found that the application of the *Darden* factors was inconclusive and yet went beyond those factors in a results-oriented approach to conclude that plaintiffs are employees as a matter of law. This conclusion was not only erroneous, but also essentially relieved plaintiffs of their burden of proof. Once the district court determined that the application of the *Darden* factors was

inconclusive, it should have ended the analysis there, as the plaintiffs had not met their burden of proof. By failing to do so, and by introducing "other factors," the court abrogated the requirement that a party claiming employee status bear the burden of showing that the *Darden* factors demonstrate the insurance company's right to control the manner and means as to how the particular service is provided. For this additional reason the district court's decision should be reversed.

V. CONCLUSION

For the foregoing reasons, the Court should reverse the order of the district court and remand for entry of judgment in favor of American Family Insurance Company.

Respectfully submitted,

/s/ Paulo B. McKeeby
Paulo B. McKeeby
Ronald E. Manthey
Morgan, Lewis & Bockius LLP
1717 Main Street
Suite 3200
Dallas, Texas 75201
Telephone: 214.466.4000
Email: paulo.mckeeby@morganlewis.com
Email: ron.manthey@morganlewis.com

Attorneys for American Council of Life Insurers

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure and 6 Cir. R. 32, I hereby certify that the foregoing Brief of American Counsel of Life Insurers as *Amicus Curiae* in Support of Defendant-Appellant American Family Insurance Company and Reversal of the District Court's Certified Opinion contains 4,653 words, including headings, footnotes, quotations, and citations, as counted by the word processing system for Microsoft Word 2016, and therefore is within the word limit set by this Court. The brief complies with the typeface requirements of Rule 32(a)(5) and (6) of the Federal Rules of Appellate Procedure because it was prepared using Microsoft Word 2016 processing program in 14-oint Times Roman font.

/s/ Paulo B. McKeeby
Paulo B. McKeeby
Counsel for *Amicus Curiae* American Counsel of Life Insurers

CERTIFICATE OF SERVICE

It is hereby certified that on January 24, 2018, the foregoing was electronically filed with the Clerk of the Court via the Court's ECF system. All counsel will be served by the ECF system.

/s/ Paulo B. McKeeby
Paulo B. McKeeby
Counsel for *Amicus Curiae* American Counsel of Life Insurers