

THE GOLDEN RULE OF SOVEREIGN IMMUNITY
THE KING CAN DO NO WRONG
An Overview of Insurance Regulators and Personal Liability

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Introduction

Generally, insurance regulators are immune from tort liability arising from fundamental government policy and decision-making. Insurance regulators are afforded this immunity through the same federal and state statutes that protect all government officials for their legislative, judicial and administrative acts.² Under these statutes, an insurance regulator or any other public officer is protected from liability as long as he “. . . lawfully exercises the judgment and discretion with which he is invested by virtue of his office . . . keeps within his scope of his official authority, and acts without malice or corruption.”³ This language means that a public officer will not be held officially liable for executing the duties of his office or personally liable for the tortious consequences of his actions, providing they are not unlawful or performed out of spite.⁴ Naturally, the question arises as to what extent a regulator may take action before his behavior is beyond his “scope of authority,” “corrupt” or “malicious”?

Legislative Trends

An increasing number of states have enacted statutes that offer additional protection to insurance regulators than the traditional statutes which grant general immunity to government officials. For example, in addition to its statute providing immunity to all state officials,⁵ the North Carolina state legislature enacted a statute in 1993 that specifically grants *complete* official and personal immunity to receivers in the event of an insurer’s rehabilitation.⁶ This immunity exists whether the receiver is the Commissioner of Insurance himself or a person duly appointed by his Office.⁷ Consequently, in North Carolina, an insurance regulator who is acting in a receiver capacity has both official and personal immunity for his actions, providing they are not the result of willful misconduct.

Other states have enacted statutes that offer additional protection to insurance regulators acting as a receiver, including Rhode Island,⁸ Georgia,⁹ and Connecticut.¹⁰ The Rhode Island statute is similar to the North Carolina statute, protecting receivers in both official and personal capacities providing that a regulator’s conduct does not result in intentional tortious harm.¹¹ However, not all state statutes protect a regulator to the same extent as the North Carolina statute. Connecticut, for instance, does not offer an insurance regulator acting as a receiver complete protection, but limits personal immunity to the extent that a regulator’s actions are not based on bad faith.¹² Despite differences such as this, there remains a legislative tendency to protect the actions of insurance regulators in both official and personal capacities.

Judicial Trends

Courts, too, have echoed this willingness to broaden the traditional scope of an insurance regulator’s protection. As best illustrated in *Golden Rule V. James E. Long*, the North Carolina Court of Appeals liberally interpreted the Commissioner’s rule-making authority, holding that the Commissioner was neither officially nor personally liable for taking actions that were not specifically within his statutory authority.¹³

The Facts of Golden Rule

Golden Rule Insurance Co. requested rate increases on two of its health insurance forms in North Carolina. The Commissioner granted Golden Rule’s request for rate increases with the stipulations that there be a one year guarantee of rates and that the rate increases would not become effective until the policyholders’ anniversary dates. Golden Rule was dissatisfied with the Commissioner’s response and proceeded to notify all brokers handling Golden Rule insurance in North Carolina and all North Carolina Golden Rule policyholders that it would be nonrenewing the policies. Consequently, the Commissioner contacted Blue Cross/Blue Shield about continuing coverage for terminated Golden Rule policyholders. Blue Cross/Blue Shield accepted the Commissioner’s proposal. Notice was given to Golden Rule policyholders explaining the change in their coverage. A similar letter was also sent to North Carolina insurance agents

of Golden Rule and a press release was issued announcing Blue Cross/Blue Shield's agreement to substitute comparable coverage.¹⁴

Legal Actions Taken Against the Commissioner

Golden Rule filed a Petition for Judicial Review and a Motion for Stay, asking the court for unconditional approval of its requested rate increases. The court ordered the Commissioner to enter a written order giving full, unconditional approval of the pending rate increase requests, but its decision was overruled by the Court of Appeals.

Golden Rule proceeded to file an amended complaint asserting several claims against the Commissioner in both his individual and official capacities, including defamation, intentional interference with contractual relations, violations of the Unfair Trade Practices Act and violations of 42 U.S.C. § 1983, which covers actions for the deprivation of civil rights. The court granted the Commissioner's motion for summary judgment on all claims in both capacities.

The Court's Response to Claims Against the Commissioner in His Official Capacity

The court determined that the Commissioner was not liable in his official capacity for imposing a one-year guarantee of rates and anniversary date implementation restrictions, despite the fact that these actions had never been taken in North Carolina and despite the fact that the North Carolina legislature did not explicitly give the Commissioner the power to issue such an order.¹⁵ In doing so, the court took a very liberal and broad view of North Carolina law, stating ". . . the Legislature can obviously not anticipate every problem which will rise before an administrative agency in the administration of an act . . . Clearly, then, we must . . . leave to executive officers the authority to accomplish the legislative purpose . . . The modern tendency is to be more liberal in permitting grants of discretion to administrative agencies in order to ease the administration of laws as the complexity of economic and governmental conditions increases."¹⁶ Additionally, North Carolina law provided that the Commissioner may disapprove any accident and health policy in which premiums are unfair, unjust or inequitable. Based on this statute and its lenient view towards administrative officials executing public policy decisions, the court concluded that the Commissioner's actions were within his statutory scope of authority.¹⁵ Therefore, the lower court was correct in issuing summary judgment in favor of the Commissioner in his official capacity.

The Court's Response to Claims Against the Commissioner in His Personal Capacity

As to the claims against the Commissioner in his personal capacity, the court properly cited North Carolina law, stating that a public official ". . . engaged in the performance of governmental duties involving the exercise of discretion, may be held personally liable if it is alleged and proved that his act, or failure to act, was corrupt or malicious, or that he acted outside of and beyond his scope of authority." Because the court had already determined that the Commissioner had not acted out of the scope of his authority, the only remaining issue left for the court to decide was whether the Commissioner's actions were "corrupt" or "malicious."

Golden Rule asserted that the Commissioner acted with malice when he spoke with other Insurance Commissioners at an NAIC meeting in regard to Golden Rule and its actions in North Carolina. However, the court ruled that conversations such as the ones in which the Commissioner had participated are legitimate acts carried out in the performance of official duties and, therefore, not evidence of malice. If such conversation were to be considered malicious, the court pointed out that "public officials would be immobilized at every threat of litigation."¹⁹

Golden Rule also asserted that the Commissioner acted maliciously when he refused to meet any further with Golden Rule to discuss the rate increases and when he told the CEO of Golden Rule that the press would look upon Golden Rule unfavorably if it continued to take this issue to the public.²⁰ Additionally, the Commissioner repeated several times in his deposition his belief that Golden Rule was "holding the citizens of North Carolina hostage."²¹ With respect to these incidents, the North Carolina Appeals Court stated that although acts of hostility and anger may be used as evidence to prove malice, the Commissioner's angry acts were not indicative of malice in this instance. The Court pointed to the strained relationship which had developed between the Commissioner and Golden Rule and concluded that the Commissioner's reactions were a normal response.²² It would be irrational, the Court added, for Golden Rule to assume that the Commissioner would not respond to the press given the fact that Golden Rule had already issued public

statements against the Commissioner and the Department of Insurance.²³

Implications of Golden Rule and Other Cases Against Insurance Regulators

Clearly, *Golden Rule* sets a high threshold in protecting insurance regulators' actions and speech. If such strong actions are considered by courts to be fair play in interactions between regulators and insurance companies, then what kind of action would a court characterize as "malicious"? Except for the most glaringly abusive behavior, courts have yet to define which actions cross the threshold. However, *Golden Rule* is not the only case that clarifies which actions do *not* cross that line. In Louisiana, claims against the Insurance Commissioner alleging defamation and civil rights violations over statements made by the Commissioner in a press release were dismissed because the acts were protected by the Commissioner's absolute immunity.²⁴ Also, a California court has held that an Insurance Commissioner did not act beyond the scope of his authority by issuing a letter to policyholders stating that he was dissatisfied with how an insurer handled its claims.²⁵

Conclusion

Although policies affirming government immunity have been criticized for eliminating sources of redress for injured parties and for creating a privileged class of persons who can inflict injury without fear of punishment, these policies are generally upheld by state governments immunizing insurance regulators to the extent of their official acts. Additionally, an increasing number of judicial and legislative acts are virtually foreclosing the possibility of holding an insurance regulator personally liable for his actions, except for the most egregious misconduct. This combination of statutory and judicial protection has proven to insulate insurance regulators in a number of ways, thus increasing their ability to make decisions and take actions without the fear of liability. Consequently, in the realm of insurance, the regulator is king and his actions, whether official or not, are unlikely to be deemed improper.

Endnotes

1. The author gratefully acknowledges the assistance of Nicole T. Burchett in preparing this article.
2. See 57 Am. Jur. 2d § 129 for a list of state statutes that protect local governments and employees from tort liability.
3. *Golden Rule Ins. Co. v. Long*, 113 N.C. App. 187, 194, 439 S.E.2d 599, 603, appeal dismissed and disc. review denied, 335 N. C. 555, 439 S.E.2d 145-46 (1993).
4. Second Restatement of Torts § 895D.
5. N.C. Gen. Stat. §§ 143-291 to 143-300.1.
6. N.C. Gen. Stat. § 58-30-71.
7. It is interesting to note that once an Insurance Commissioner takes on the role as receiver, he loses his identity as the State, and with it his immunity. N.C. Gen. Stat. § 58-30-71 restores that immunity.
8. R.I. Gen. Laws § 27-14.3-9.
9. GA. Gen. Stat. § 33-37-8.1.
10. C.G.S.A. § 38a-909.
11. See R.I. Gen. Laws § 27-14.3-9.
12. *Id.*
13. See *Golden Rule Ins. Co. v. Long*, 113 N.C. App. 187, 194, 439 S.E.2d 599, 603, appeal dismissed and disc. review

denied, 335 N. C. 555, 439 S.E.2d 145-46 (1993).

14. *Id.*, 113 N.C. App. 190-191, 439 S.E.2d at 601-602.

15. *Id.*, 113 N.C. App. 194, 439 S.E.2d at 603.

16. *See State ex rel. Comm'r of Ins. v. Rate Bureau*, 300 N.C. 381, 402, 269 S.E.2d 547, 563 (1980).

17. *Golden Rule*, 113 N.C. App. 196, 439 S.E.2d at 604.

18. *Id.*, 113 N.C. App. 194, 439 S.E.2d at 603.

19. *Id.*, 113 N.C. App. 198, 439 S.E.2d at 607.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Douglas S. Crucet v. James H. Brown*, No. 1:93-CV-1535-ODE, N.D. Ga., Atlanta Div.

25. *Twentieth Century Ins. Co. v. Quackenbush*, ___ Cal. App.4th___ (1998).