

WHAT CONSTITUTES A WILLFUL¹ VIOLATION OF AN INSURANCE CODE?

Phillip E. Allen, Esq.
(502) 254-1213

Insurance codes require commissioners to suspend or revoke certificates of authority for certain violations of the codes, including failure to file or timely file required reports, failure to pay premium taxes, failure to pay judgments within specified time periods, refusal to be examined, and in the event of receivership, conservatorship, rehabilitation and other delinquency proceedings.

Insurance codes also give commissioners discretion to suspend or revoke and /or impose civil penalties for willful violations of the codes for which suspension of certificates of authority are not mandated. However, only five insurance codes define willful.

The Florida,² Idaho,³ and North Carolina⁴ Insurance Codes define willful or willfully as meaning an act or omission committed with actual knowledge that such act or omission constitutes a violation of their codes, and which is made with specific intent nevertheless to commit such act or omission.

The California Insurance Code⁵ provides that willful or willfully, when applied to the intent with which an act is done or omitted, means simply a purpose or willingness to commit the act or to make the omission even though there is no intent to violate the code.

The Arizona Insurance Code⁶ provides that willful means with respect to conduct or a circumstance described by statute defining an offense, that a person is aware or believes that the person's conduct is of that nature or that the circumstances exists.

The Colorado Insurance Code does not define willful, but Subsection (i) of Colorado Insurance Bulletin 1-98 defines willful as meaning an act or omission that the person knew or reasonably should have known was a violation of the code, a general business practice, or a violation committed with such frequency that indicates a tendency to engage in acts substantially similar to a prior violation.

Several states have issued regulations or bulletins providing that specified violations of their insurance laws are considered to be willful violations regardless of the circumstances surrounding the violations.

Section 6 of Alabama Insurance Regulation 102 provides, "Failure to comply with a material provision of this or any regulation is considered a willful violation of a regulation, which, pursuant to Section 27-2-17, Code of Alabama 1975, shall be considered a willful violation of a material provision of the Insurance Code, which, pursuant to Section 17-3-21, may subject the insurer to the suspension or revocation of the insurer's Certificate of Authority.

Kentucky Insurance Bulletin 88-14 states that insurance companies and agents use of lead cards which violate advertising regulations and trade practices will be considered to be willful violations of the Kentucky Insurance Code; and the Virginia Insurance Department, in a series of 26 insurance bulletins dated from 1978 though 1999, ruled that all of the violations of the Virginia Insurance Code specified in the bulletins are considered to be willful violations.

Only a few cases involving insurance laws have addressed the issue of what constitutes a willful violation.

In a 1962 case, the New York Court of Appeals said that the term willful as used in the insurance code means intentionally doing an act and knowing that the act has been done.⁷ And in two 1990 cases, the New York Court of Appeals said that the term willful when used in regard to insurance law violations means no more than intentional and deliberate.⁸

In a 1965 Maryland case, the Maryland Court of Appeals said, “The term ‘willful’ violation of insurance laws as used in the Md. Ann. Code art. 48A, Sec. 111 (1957) clearly means an intentional act of omission or commission. ‘Willfulness’ and ‘negligence’ are not synonymous terms.”⁹

The Supreme Court of the United States has addressed the issue of what constitutes a willful act several times, but never in the context of a willful violation of an insurance code.

In *United States v. Illinois Central R. Co.*,¹⁰ following its opinion in *United States v. Murdock*,¹¹ the Court said that the word willful often denotes that which is intentional, knowing or voluntary, as distinguished from accidental, and characterizes conduct marked by careless disregard, whether or not one has the right to so act.

In *Screws et al v. United States*¹² the Court said. “We recently pointed out that ‘willful’ is a word of many meanings, its construction often being influenced by its context...At times...the word denotes an act which is intentional rather than accidental...”

Other cases not involving insurance laws have also construed the term willful when used in the context of a violation of a civil statute. In a 1986 case,¹³ the Supreme Court of Rhode Island, after examining the definitions that other courts have employed, stated that “...to act either ‘knowingly’ or ‘willfully’ is to act voluntarily and intentionally, and not because of mistake or accident or other innocent reason.”

The common thread running through the case law is that for an act to constitute a willful violation of a civil statute it must be voluntary, intentional, deliberate, knowing, or characterized by a reckless disregard of the statute as distinguished from a mistaken or an accidental act.

Market conduct examinations often result in civil penalties being imposed against the company examined. The NAIC Examiners Handbook provides that examiners should either use a random or systematic method of reviewing files, and suggests that error tolerance levels employed by the states should be not less than 7% for claim procedures and 10% for all other procedures.

Market Conduct Examination Reports report the mathematical error levels of the procedures examined without alleging whether the errors constitute willful violations of the codes, and insurance departments impose civil penalties against insurers when the error rates exceed the tolerance levels.

Such treatment implies that error rates which exceed tolerance levels are deemed to be willful violations because their frequency indicates conscious, deliberate or knowing acts characterized by reckless disregard of the statutes while error rates below the tolerance levels may be deemed to be the result of mistakes or accidents.

¹ Willful is sometimes spelled as wilful.

² *Fla. Stat. 672.041(7)*.

³ *Idaho Code 41-1436 (5)*.

⁴ *N.C. Gen. Stat. 58-40-5 (7)*.

⁵ *10 C.C.R. 2695.2(y)*.

⁶ *A.R.S. 1-215.42*.

⁷ *In the Matter of Old Republic Life Insurance Company, Respondent, v. Thomas Thacher, as Superintendent of Insurance of the State of New York, Appellant*, 186 N.E. 2d 554 (1962).

⁸ *In the Matter of Insurance Company of the State of Pennsylvania, Petitioner, v. James P. Corcoran, as Superintendent of Insurance of the State of New York, Respondent*, 160 A.D. 2d 304 (1990) . *In the Matter of American Transit Insurance Company, Appellant, v. James P. Corcoran, as Superintendent of Insurance of the State of New York, Respondent*, 565 N.E. 2d 485 (1990).

⁹ *Nuger, et al. v. State Insurance Commissioner*, 207 A.2d 619 (1965)

¹⁰ 303 U. S. 239 (1938).

¹¹ 290 U.S. 389 (1933).

¹² 325 U.S. 91 (1945).

¹³ *Carmody v. Rhode Island Conflict of Interest Commission; Carol P. Luby v. Rhode Island Conflict of Interest Commission*, 509 A. 2d 453 (1986).