

App. LEXIS 12903 (9th Cir. Cal., June 29, 2005). The Court ruled that a defendant can commit securities fraud "willfully" in violation of law even if the defendant did not know at the time of the acts that the conduct violated the law. "Knowing" is not a required element of "willful" conduct. The Court elaborated:

The question is whether the securities fraud statutes' use of the term "willfully" means that a defendant can be convicted of securities fraud only if he or she knows that the charged conduct is unlawful, or whether "willfully" simply means what the district court instructed it means: "knowingly" in the sense that the defendant intends those actions and that they are not the product of accident or mistake."

In rejecting the defendant's position, the Court cited numerous previous rejections of such a position by itself and other courts. In *United States v. Charnay*, 537 F.2d 341, 351-52 (9th Cir. 1976), the Court cited with approval the Second Circuit's interpretation of a securities rule in *United States v. Peltz*, 433 F.2d 48, 54 (2d Cir. 1970). The Second Circuit explained there that "the language makes one point entirely clear. A person can willfully violate an SEC rule even if he does not know of its existence. This conclusion follows from the difference between the standard for violation of the statute or a rule or regulation, to wit, 'willfully,' and that for false or misleading statements, namely 'willfully and knowingly.'" *Id.* at 54. The Ninth Circuit also addressed an argument very similar to Tarallo's in *United States v. English*, 92 F.3d 909 (9th Cir. 1996). In *English*, the defendant was convicted of securities fraud under 15 U.S.C. §§ 77q(a) and 77x. "Section 77q(a) makes it illegal to use instruments of interstate commerce to defraud or deceive purchasers of securities. Section 77x, a general penalty provision covering § 77q(a) and other 15 U.S.C. § 77 offenses, provides that 'any person who willfully violates' § 77q(a) is subject to fines and incarceration. 15 U.S.C. § 77x (emphasis added)." *Id.* at 914. Section 77x is therefore substantively similar to the willfulness provision of § 78ff(a). In *English*, the Court rejected the defendant's argument that § 77x's willfulness requirement required that the government prove that the defendant knew that his conduct was illegal.

It is beyond dispute that in regulatory enforcement, there is no *mens rea* or requirement of civil intent. If a license is needed and one does not have one, there has been a "willful" violation unless the circumstances indicate accident or mistake.

Issue: Does the Commissioner have the authority to fine PCD for selling discount plan memberships without a license?

Under RCW 48.155.130(2), as cited in both the OIC's Notice of Request for Hearing for Imposition of Fines and its Hearing Brief, any person who willfully operates a discount plan organization in violation of RCW 48.155.020(1) is subject to RCW 48.15.020 and RCW 48.15.023, as if they were unauthorized insurers. RCW 48.15.023 can subject a violator to a fine

of up to \$25,000 for each violation of transacting insurance, as defined in RCW 48.01.060, in Washington without authorization. There is no mention of "any license" in subsection (2). The "any license" language of subparagraph (1)(b) might be substituted by "a license, if any." PCD's position would make it riskier to get a license, let it lapse, and continue to sell discount plan memberships than to avoid licensure altogether. This makes no sense and would result in unlikely, absurd, or strained "consequences. *In re Parentage of J.M.K.*, 155 Wn.2d 374, 387, 119 P.3d 840 (2005); *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2005). RCW 48.155.130(1)(b) clearly permits the Commissioner to impose a fine in lieu of any other actions, for violation of any provision of the chapter, including the section requiring licensure.

Issue: Is each sale a violation of the act, or is failure to obtain a license just one violation?

Both RCW 48.155.130 (1)(b) and RCW 48.15.023 permit the Commissioner to impose a fine "for each violation." Both apply to PCD. PCD's position that failure to obtain a license is one and only one violation of RCW 48.155.020, regardless of how many memberships it sells, makes no sense. If it were so, how conceivably could there be more than one violation? The words "for each violation" would be superfluous, a violation of the rule that all the language in a statute shall be given effect; no portion shall be rendered meaningless. *Judd v. American Tel and Tel. Co.*, 152 Wn.2d 195, 202, 95 P.3d 337 (2004). An "insurance transaction" is defined in the insurance code, to wit:

Insurance transaction" includes *any*: [emphasis added] (1) solicitation. (2) negotiations preliminary to execution.(3) execution of an insurance contract (4) transaction of matters subsequent to execution of the contract and arising out of it (5) insuring. RCW 48.01.060

Thus, given RCW 48.15.020 and RCW 48.15.023, any time a PCD discount plan membership was solicited, negotiated, sold, or used to obtain a discount at a chiropractor's office pursuant to the membership, an unauthorized insurance transaction took place. Each time an unlicensed discount plan membership was sold, like any insurance transaction performed by an unauthorized insurer, a violation occurred. This is just common sense. By counting each illegal transaction rather than the one-time failure to get a license, enforcement penalties are proportional to the unlicensed activity that has occurred. To do otherwise would upset the entire scheme of the insurance code. Again, this would put an unlicensed entity in a better position vis-à-vis potential enforcement, than a licensed entity. This would be bad public policy as well as undercut the purpose of the insurance code as a consumer protection vehicle.

Pursuant to the foregoing, the Chief Hearings Examiner should deny PCD's motion in its entirety.

Respectfully Submitted this 12th day of September, 2013.



Marcia G. Stickler,
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CERTIFICATE OF MAILING

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the foregoing OIC RESPONSE TO PCD MOTION FOR SUMMARY JUDGMENT on the following individuals in the manner indicated:

Patricia Peterson, Chief Hearing Officer
P O Box 40255
Olympia, WA 98504-0255

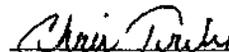
(XXX) Via Hand Delivery

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SIGNED this 12th day of September, 2013, at Tumwater, Washington.



Christine Tribe