

FILED

2014 MAY 12 A 9:51

BEFORE THE WASHINGTON STATE
OFFICE OF THE INSURANCE COMMISSIONER

CLERK
KIMBERLY R. PETERSEN
INSURANCE OFFICER

In the Matter of:

**PREFERRED CHIROPRACTIC
DOCTOR, INC.,**

Respondent.

Docket No. 13-0134

**OIC REPLY TO PREFERRED
CHIROPRACTIC DOCTOR'S
RESPONSE TO ORDER ON
RECONSIDERATION OF
FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
FINAL ORDER**

BACKGROUND AND BASIS

The Office of the Insurance Commissioner ("OIC") submits this reply to Preferred Chiropractic Doctor, Inc.'s ("PCD") response to OIC's Motion for Reconsideration.

PCD "willfully" operated a discount plan without a license in Washington, even after it became aware of the need for licensure. PCD's continued theory is that since no one specifically told it to stop violating the law, it was fine to continue the violation. This is like saying, as a defense to running a red light, that since no one specifically told me to stop at the light, I had every right to keep on driving. This argument is ludicrous on its face, particularly coming from an attorney, who should know better. The OIC presumed that the words of RCW 48.155.020(1) would be taken as written. The OIC does not condone violations of law as they are occurring while such violator is considering obtaining a license. To do so would be a dereliction of duty, since the public could be at risk during the period of time the license application process is ongoing. Shouldn't PCD have queried the OIC about continuing to operate illegally if it thought it could? PCD did not do so since it was clear what the answer would be. No license, no discount plan sales, period.

Contrary to PCD's response, the "willful" act PCD committed was not failing to obtain a license, but operating a discount plan in Washington without a license. That this is so is clearly stated in RCW 48.155.130(2), to wit,

A person that willfully operates as or aids and abets another operating as a discount plan organization in violation of RCW 48.155.020(1) commits insurance fraud and is subject to RCW 48.15.020 and 48.15.023, as if the unlicensed discount plan organization were an unauthorized insurer, and the fees, dues, charges, or other consideration collected from the members by the unlicensed discount plan organization or marketer were insurance premiums.

Furthermore, this is not a criminal matter, so PCD's legal citation requiring "a bad purpose" is inapposite. Mens rea is crucial in criminal law, but not relevant in regulatory law unless specifically required by statute or rule. As pointed out in the OIC Hearing Brief, PCD did knowingly and willfully continue to sell discount plan memberships for months after it became aware of the need for a license. It also appears that PCD never terminated active discount cards, if at all, until April 25, 2013 at the earliest. However, PCD is also responsible for all illegal sales made after the act became law in 2009. PCD intentionally ran a discount plan organization in Washington and intentionally sold memberships. The PCD organization was not acting in Washington State by accident or mistake. PCD's recurrent claim in its Motion that PCD was "acting inadvertently" as a discount plan organization is patently false on its face. In Washington alone, PCD sold 1,524 discount cards grossing \$58,680.00 in premium.

The definition of "willfully" has always depended on context, and is frequently conflated with the term "knowingly." The Supreme Court has taken pains to observe that the word "willful" is a word of many meanings, and that its construction is often influenced by its context." *Ratzlaf v. United States*, 510 U.S. 135, 141, 126 L. Ed. 2d 615, 114 S. Ct. 655 (1994). The Ninth Circuit underwent a detailed analysis of the difference between

“knowingly” and “willfully” in *U.S. v. Tarallo*, 380 F.3d 1174; 2005 U.S. 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 “willfull” 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 willfullness provision of § 78ff(a). In *English*, the Court rejected the defendant’s argument that § 77x’s willfullness 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 evil intent. If a license is needed before selling discount cards, and one does not have one, there has been a “willfull” violation unless the circumstances indicate accident or mistake. This is not the case here.

PCD’s counsel urges sanctions against the undersigned for alleged bad faith. While that is a crude tactic, let it be known that counsel’s sworn declaration contains two blatant lies. At no time did I ever agree with PCD that PCD had not willfully violated any law. Nor did I state that “higher ups” were pushing for the fine amount. The fine referenced in the pleadings is the minimum amount under the state, so there was no need for pressure from so-called higher ups. Even if I had felt this way, which I did not, I most certainly would not have shared this opinion with Mr. Clabaugh. This unethical conduct by Mr. Clabaugh has gone on the entire time before, during, and after the hearing. At some point before the hearing, I finally declined to engage Mr. Clabaugh over the phone because he continually mischaracterized our conversations and the OIC’s actions. He continues to do so now, and if sanctions are appropriate, sanctions should be placed on him. His declaration was made under oath, so he perjures himself, as well.

CONCLUSION

RCW 48.155.130 incorporates the sanctions available under RCW 48.15 for unauthorized insurers. These were sanctions available to the Chief Hearings Officer and were pled in the OIC’s pleadings and Hearing Brief. The OIC continues to plead them now. The evidence demonstrated that PCD did willfully operate its discount plan without a license, and so was eligible for a fine under RCW 48.15.020 and RCW 48.15.023. PCD was well aware that such a fine was an option, and argued as much in its Motion for Summary Judgment. It is appropriate to include the fines available under RCW 48.15 as an avenue available to the Chief Hearings Officer in this matter. Contrary to PCDs assertion, the OIC simply wants the big picture viewed. The OIC is not “bullying” PCD, nor does it have any interest in grinding a “small company into the ground.” Apparently, PCD feels

that it should get special treatment because it is has inadequate resources. The OIC simply seeks to enforce the law against any and all violators, big or small. The OIC has no animus against PCD. Acts and failures to act simply have consequences. To let PCD avoid sanctions altogether is contrary to the letter and spirit of RCW 48.155 and RCW 48.15, and should be reversed. An appropriate fine under RCW 48.15.020 and RCW 48.15.023, under the auspices of RCW 48.155.130, should be levied on PCD.

DATED this th12 day of May, 2014.


Marcia G. Stickler
OIC Staff Attorney

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 REPLY TO PREFERRED CHIROPRACTIC DOCTOR'S RESPONSE TO ORDER ON MOTION FOR RECONSIDERATION OF FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER on the following individuals in the manner indicated:

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

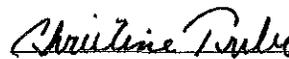
(XXX) Via Hand Delivery

For Respondents:

Edward I. Clabaugh, Esq.
10217 SW Burton Drive, Suite 100
Vashon Island, Washington 98070

(XXX) Via U.S. Regular Mail

SIGNED this 12th day of May, 2014, at Tumwater, Washington.


Christine Tribe

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