

Insurer Sues Department of Insurance Over Multi-Million Dollar Penalty

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In suing the California Insurance Commissioner on July 10, 2014, PacifiCare Life Insurance Company sought a writ of mandamus ordering the Commissioner to set aside his Decision and Order imposing a record \$173 million penalty on PacifiCare (the Order). The Commissioner's Order followed a three-year evidentiary hearing after which the administrative law judge recommended that PacifiCare be assessed a substantially smaller penalty of \$11 million.

The Order stemmed from a targeted market conduct examination of PacifiCare's claims handling practices that was allegedly initiated in response to the increase in complaints received by the Department following the 2005 merger of PacifiCare and UnitedHealth. The California Department of Insurance (CDI) contended that PacifiCare's push for savings following the merger resulted in a total breakdown in customer service and claims administration.

PacifiCare's suit asserted that the Commissioner and the CDI misinterpreted the Unfair Insurance Practices Act and the Fair Claims Settlement Practice Regulations. PacifiCare contested the Commissioner's assertions that:

- Under California Insurance Code section 790.03(h), "there can be no ambiguity that the Legislature intends to punish single acts knowingly committed or acts performed with such frequency that they demonstrated a general business practice."
- Knowingly committed includes constructive knowledge, not just actual knowledge.
- "[C]ommitting the same violation over and over again indicates a 'general business practice'" and frequency is not established by reference to tolerance thresholds in the National Association of Insurance Commissioners' Market Regulation Handbook.
- A "willful act is one committed or omitted with a purpose or willingness to commit the act, or make the omission ... It 'does not require any intent to violate the law, or to injure another, or acquire any advantage.'"
- Section 790.035's exception for "inadvertent" issuance, amendment, or servicing of a policy – under which multiple acts are viewed as a single act for purposes of assessing penalties – does not apply if the violation is repeated after notice, either constructive or actual.
- A licensee would need to adopt "remedial measures to correct its noncompliance, both retrospectively and prospectively," before remedial measures would be a mitigating factor.
- Good faith attempt to comply requires "that the actor have an actual and reasonable belief that it was complying with the law."

The interpretations in the Commissioner's Order set forth the means by which the CDI may assess greater penalties for violations found in market conduct exams for any insurer in California.