

Exclusion in Professional Liability Policy for Willful Violation of Penal Statute Does Not Require Conviction

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The Kentucky Supreme Court has held that an exclusion in a cemetery professional liability insurance policy barring coverage for willful violation of a penal statute applied despite the policyholder's lack of a criminal conviction for the offense where the insured admitted that it had violated the statute. *Employers Ins. of Wausau v. Martinez, et al.*, No. 1999-SC-1008-D, 2001 Ky. LEXIS 95 (Ky. May 24, 2001).

A cemetery company and its officers were found civilly liable for willful misconduct stemming from practices of burying multiple bodies in the same graves. Criminal charges against the company and its officers were dropped after they agreed to participate in a diversion program to move the bodies to appropriate locations. The company sought coverage for legal costs arising out of its misconduct from its professional liability insurer, which denied coverage on the basis of an exclusion barring coverage for "willful violation of a penal statute or ordinance committed by or with the knowledge of an insured or of a manager employed by the named insured." The insurer then sought a declaration that no coverage was provided under the policy.

The Kentucky high court held that the exclusion barred coverage. In so holding, the court rejected the policyholder's argument that application of the exclusion was dependent on a criminal conviction. The court reasoned that nothing in the language of the exclusion required criminal conviction. It required only the knowing and willful violation of a penal statute. Here, the court determined that the cemetery company had acknowledged adopting practices of overburying, reusing grave sites, removing remains and memorials from graves, digging in occupied graves, and selling already occupied grave sites, and that these activities violated penal law. The court noted that "it is inappropriate to find coverage in a policy that is meant to cover professional errors or mistakes, when the claims made arise from deliberate and systematic wrongful acts."