

# WILFUL MISCONDUCT VICE OF CONSENT ACCORDING TO THE NEW CIVIL CODE

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## **Abstract:**

*The wilful misconduct represents the misleading of a person by another person by using evil means to cause him/her to clinch a legal act to which he/she would not have consented otherwise.*

*Similarly to error, the wilful misconduct falsifies reality, but this false reality is caused by evil means by the other contracting party. Some authors define wilful misconduct as “an error caused” by the other contacting party.*

*The party whose consent was vitiated by wilful misconduct may request cancellation of the contract, even if the error which he/she was involved in was not essential. The penalty is relative nullity of the legal act concluded, because the rule of law protects a private interest with the right of the wilful misconduct’s victim to claim damages, that is to say damages compensation to cover the loss suffered.*

*Being a relative nullity, it can only be invoked by the party whose consent was vitiated, the heirs having no active procedural standing to invoke the relative nullity because it is a personal action; they may continue the lawsuit if after initiating the action the victim of the wilful misconduct died.*

**Keywords:** *wilful misconduct; vice of consent; fraudulent acts; obtaining by insidious means; suggestion; fraud; relative nullity.*

## **General considerations**

Wilful misconduct - cunningness. The wilful misconduct is that vice of consent that represents the misleading of a person by cunning means in order to induce him/her to conclude a legal act.

The wilful misconduct is a vice only to the extent to which it results in causing an error in the will of the document’s author. If the author discovers the error induced before signing the legal document, it is not signed under the spur of the error caused by the wilful misconduct and if the legal document is signed, it is valid.<sup>2</sup>

The wilful misconduct represents the misleading of a person by another person by using cunning means to cause him/her to clinch a legal act to which he/she would not have consented otherwise.

Similarly to error, the wilful misconduct falsifies reality, but this false reality is *caused by evil means* by the other contracting party. Some authors define wilful misconduct as “*an error caused*” by the other contacting party.

According to the stipulations of article 1214 of the Civil Code, the consent is vitiated by wilful misconduct when the party was involved in an error caused by the fraudulent manoeuvres of the other party or when the latter failed, fraudulently, to inform the contractor of certain circumstances that ought to have been disclosed to him/her.

The party whose consent was vitiated by wilful misconduct may request cancellation of the contract, even if the error in which he/she was involved in not was essential.

### *The structure of the wilful misconduct*

The wilful misconduct vice of consent has two components:

- the material element (objective), represented by the fraudulent manoeuvres, that is to say machinations, artifices, deceitfulness, falsification of documents, to distort reality and to conceal the truth, which is called positive wilful misconduct, for example, changing the odometer in a car before selling it to hide how long it has been used, and the negative wilful misconduct (by reticence) consists of concealing or failing to inform the other party about certain critical circumstances which, if the other party had known, he/she would not have

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<sup>2</sup> C.Hamangiu, I.Rosetti-Bălănescu, al.Băicoianu – *Tratat de Drept civil român* (Romanian Civil Law Treaty), All Beck Publishing House, 2002. p. 83.

signed the legal document, such as the concealing by the seller of a house the fact that it was built of adobe and failing to inform the buyer about this reality because if he/she had known the reality, he/she would not have contracted.

- the subjective element, that is to say the intention to deceive the other contracting party in order to persuade him/her to sign the legal document. We meet the intention to deceive also in the case of the liberalities where the wilful misconduct has the form of obtaining by insidious means and suggestion<sup>1</sup>. Thus, a part, in the case of *obtaining by insidious means*, uses its influence over the testator and directs the liberality that he/she will perform. That means the use of evil means in order to win the holder's affection and thus determine him/her to make a liberality (a donation, a legacy) for the author of these cunning means, which otherwise he/she would not have done.

Obtaining by insidious means consists of fraudulent means to gain the holder's confidence and to deceive his/her good faith to determine him/her to donate a good to be gratified by will, and the suggestion is exercised by concealed and tendentious means in order the plant in the holder's mind the idea of making the liberality which he/she would not have made on his/her own initiative

*Suggestion* is the act through which the testator is suggested the idea of making a liberality to an individual to whom he/she would not have made such gratification.

Suggestion is exercised by concealed and tendentious means in order to plant in the holder's mind the idea of making a donation or of establishing a legacy that he/she would not have done on his/her own initiative.

The obtaining by insidious means and the suggestion represent the cause for revocation of liberality only if the means used are indeed deceptive, fraudulent. The insidious means cannot invalidate the liberality if they are not characterised by wilful misconduct. Therefore, liberality may be cancelled only if the fraudulent manoeuvres had as result the alteration of the holder's will, in the sense that without their exercise, the holder would not have made the act of liberality.<sup>2</sup>

In case we have an intention to mislead and the party is still deceived, the legal document will be cancelled for error and not for wilful misconduct.

#### *Terms*

To be considered wilful misconduct, two conditions must be fulfilled:

- the error caused by the wilful misconduct to be decisive, that is to say that without it, the respective party would not have signed the act, although the Civil Code no longer provides the crucial character of fraudulent (evil) manoeuvres. The wilful misconduct is defined as having two assumptions, namely:

a) *the party was involved in an error caused by a fraudulent manoeuvres of the other party;*

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<sup>1</sup> Decision no.1160/16.06.1992 of the Supreme Court

The provision documents available as a gift are subject to the rules of the common law regarding vices of the consent. The wilful misconduct is a cause of nullity of the legal act when the evil means employed by one of the parties are such that it is obvious that without these manoeuvres the other party would not have contracted.

In terms of liberalities, the wilful misconduct manifests itself as obtaining by insidious means and suggestion.

Obtaining by insidious means consists of fraudulent manoeuvres and fraudulent means to gain the holder's confidence and to deceive his/her good faith to determine him/her to donate a good or to be gratified by will, and the suggestion is exercised by concealed and tendentious means in order the plant in the holder's mind the idea of making the liberality which he/she would not have made on his/her own initiative.

Obtaining by insidious and suggestion represent the grounds for nullity of liberality only if the means used were deceptive, fraudulent and resulted in the alteration of the holder's will, meaning that without their exercise he/she would not have made the act of liberality.

<sup>2</sup> Decision no. 953/08.06.1978 of the Supreme Court. Civil Division

Decision no. 1917/27.08.1974 of the Supreme Court. Civil Division

Repertoire of civil judicial practice of the Supreme Court and of other courts for the years 1969 to 1975.

b) the *wilful misconduct by reticence when the party failed, fraudulently, to inform the contractor of the circumstances which ought to have been reveal to him/her.*

- the wilful misconduct comes from the other contracting party (there are also situations where the wilful misconduct comes from a third party, but aiding and abetting of the party using the error caused).

This condition concerns the contracts for pecuniary interest, the wilful misconduct coming from the other party. This condition is not met in the unilateral acts, such as the case of the will when we talk about obtaining by insidious means or suggestion and not by the other contracting party.

The contract can be annulled and when the wilful misconduct comes from the representative, the official in charge or the managing director of the other party's business.

*The wilful misconduct committed by a third party*

The party who is the victim of a third party's wilful misconduct may not request the cancellation of the legal act concluded except if the other party knew or, according to the case, should have known the wilful misconduct upon signing the contract.

Independent of the cancellation of the contract, the author of the wilful misconduct is liable for damage that would result.

*Classification of the wilful misconduct*

Originating in Roman private law – which distinguishes between Dolus malus (serious wilful misconduct) and Dolus bonus (minor wilful misconduct), the new regulations do not make this distinction anymore, the old civil code distinguished according to the consequences it had on the validity of the legal act, distinguishing between *the primary wilful misconduct* and *the incident wilful misconduct.*

The primary wilful misconduct covers the main elements of the contract and has the effect of cancellation.

The incident wilful misconduct refers to the secondary elements, accessories and which do not entail the nullity of the contract.

*Direct and indirect wilful misconduct*

*The direct wilful misconduct* is crucial for the very completion of the legal act; it is a ground for nullity.

*The indirect wilful misconduct* does not lead to the cancellation of the act, but only justifies the introduction of an claim for damages.

*Wilful misconduct by committing and wilful misconduct by omitting*

The Civil Code distinguishes between the wilful misconduct by committing and omitting which are also called positive wilful misconduct, respectively negative wilful misconduct or by reticence.

The positive wilful misconduct (by committing) – the consent is vitiated by wilful misconduct when the party was involved in an error caused by the fraudulent manoeuvres of the other party, it is materialised in fraudulent manoeuvres, machinations, artifices, deception, falsification of documents.

For example, the transaction which covers all the disputes between the parties remains valid even if subsequent to the clinching of the transaction there were discovered documents unknown to the parties, except when they had been concealed by the deed of one of the contracting parties or by either party knowingly, by a third party, in which case the transaction is cancellable by invoking the wilful misconduct (article 2276 paragraph 1 of the Civil Code) "*The subsequent discovery of documents unknown to the parties and which could have influence the content of the transaction does not represent a ground for its invalidity, except the situation in which the documents were concealed by one of the parties or, knowingly, by a third party.*"

The negative wilful misconduct (by omitting or by reticence) – the other party has fraudulently omitted to inform the contractor of the circumstances which ought to have been

revealed to him/her, is materialised in the failure to inform the other party about the conditions of closing the legal act or about the hidden defects of the property that is the subject of the contract, although he/she had this obligation.<sup>1</sup>

According to article 298 of the Civil Code, marriage can be annulled at the request of the spouse whose consent was vitiated by error, wilful misconduct or violence.

A marriage may be annulled because of the error caused by wilful misconduct if the person whose consent has been vitiated in this way had a false representation of his/her future spouse's qualities which if he/she had known in reality, would not have consented to the marriage.

It is noteworthy that the wilful misconduct can be considered a vice of consent also in the case when the cunning manoeuvres were manifested by reluctance.

An example of wilful misconduct by reticence is met when one of the future spouses did not communicate his/her health condition to the other future spouse and has knowingly concealed a certain disease, its extent and manifestations, although he/she had this obligation; thus article 278 of the Civil Code provides that marriage does not happen unless the spouses declare that they have notified each other of their health.<sup>2</sup>

The most common cases of wilful misconduct by reluctance is the concealment of a serious chronic disease state upon entering marriage, but not the concealment of: some minor ailments curable even if they have a sexual nature (they may be invoked as a ground for divorce, but not as nullity of marriage), the poor material status, the spouse's age or the existence of a child out of wedlock. It is considered wilful misconduct when concealing a serious chronic disease such as inability to conceive<sup>3</sup>, except the state of insanity or mental debility which entails the absolute nullity of the marriage according to article 293 of the Civil Code or in the case of the wilful misconduct the sanction is relative nullity.<sup>4</sup>

The marriage annulment for wilful misconduct by reticence was ruled by the court of justice when, in case the wife hid in marriage the pregnancy condition as a result of her

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<sup>1</sup> Law no. 363 of 21.12.2007 on fighting unfair practices of professionals in their relationship with the customers and harmonisation of regulations with the European legislation on consumer protection, published in the Official Gazette, Part I no. 899 of 28.12.2007, as amended by Law no.130/2010 published in the Official Gazette no. 453/02.07.2010. Article 7

A commercial practice shall be regarded as misleading omission if, under the present facts, taking into account all its features and circumstances, as well as the limits of the media used to transmit the information, omits essential information necessary to the average consumer, given the context for making a trading decision knowingly and therefore causes or is likely to cause the consumer's making a transaction decision that otherwise he/she would not have taken.

A commercial practice shall also be regarded as misleading omission when, taking into account the matters referred to in paragraph (1), a trader conceals or provides in an unclear, unintelligible, ambiguous or out-of-time manner essential information or does not indicate the commercial intent of the practice, unless it is already apparent from the context, and when, in any of the cases, the average consumer is caused or is likely to be determined to make a trading decision that he/she would not have taken otherwise.

<sup>2</sup> Decision no.324/1990 of the Supreme Court. Civil Division

Decision no.658/1971 of the Supreme Court. Civil Division. R.R.D. no.7/1972, p.115-117.

<sup>3</sup> Decision no.5267/2005 of HCCJ. Civil and Intellectual Property Section.

<sup>4</sup> Decision no.1206/2003 of the Supreme Court

Absolute nullity occurs without distinguishing if the insane or the feeble-minded are or are not banned or if they marry during moments of transient lucidity or during moments when they do not have such lucidity. It is essential to determine whether, because of the mental illness one suffers from, a person is classified as someone who cannot enter into marriage, even if the conclusion date would be in a moment of lucidity. Therefore, the insane or the feeble-minded cannot marry, not only because their condition is exclusive of free consent expression, but also because of the biological considerations. In order to establish the nullity of marriage in the case of insanity or mental debility, these situations must exist on the date of marriage and may be proved by any means, not only at the time of the marriage, but also later. The circumstance in which the spouse had known or not, prior to the marriage, the existence of a state of insanity or of mental debility in the other spouse is irrelevant and therefore absolute nullity sanctioning the marriage cannot be ruled out, being justified by a social interest. The acknowledgement of the spouse's poor health status at the time of entering into marriage does not lead to its validation.

relationship with another man, although the wife was not required to notify this state to her husband, because according to article 278 of the Civil Code, marriage does not happen if the future spouses do not declare that they have notified each other of their health, yet her conduct is fraudulent affecting the trust between the spouses on which marriage is based.<sup>1</sup>

The wilful misconduct by reticence is characterised by that the material element of its structure consists of a fact by omission (inaction) materialised in the concealment by one of the contract partners, or by the fraudulent non-communication with the other party of an essential circumstance that had to be known by him/her in order to have a correct representation of the real facts of concluding the civil act (the contract), a circumstance that ought to have been revealed.<sup>2</sup>

*The evidence of the wilful misconduct*

The wilful misconduct is not assumed, it must be demonstrated so that the party invoking the nullity of a legal act based on the fact that vitiation of consent has occurred through wilful misconduct must prove by any evidence, written documentary evidence, assumptions, including witnesses<sup>3</sup> and according to the rules applicable to the probation of the legal fact.<sup>4</sup>

According article 1214 paragraph 4 of the Civil Code the wilful misconduct is not assumed.

The wilful misconduct involves, in addition to the intention of misleading, an actual activity.

In the case of the wilful misconduct by reticence when the party has fraudulently failed to inform the other, such as concealing a defect of the item sold, the proof will be done with the defect of the item and which if the party had known, would not have signed the contract.

*Fraud and wilful misconduct*

The Civil Code regulates in article 14 the bona fide, so that any natural or legal person must exercise their rights and perform their civic obligations in bona fide, in accordance with the public order and the good morals.

According to article 723 of the Code of Civil Procedure, “Procedural rights must be exercised in good faith and in accordance with the purpose for which they were acknowledged by law. The party using these rights abusively is responsible for the damages caused.”<sup>5</sup>

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<sup>1</sup> Decision no.1049/10.06.1976 of the Supreme Court. Civil Division

<sup>2</sup> Sache Neculaescu, Livia Mocanu, Gheorghe Ghiorghiu, Ilioara Genoiu, Adrian Țuțuianu – Instituții de drept civil (Institutions of civil law). Universul Juridic Publishing House. Bucharest 2012. pp.57-60.

<sup>3</sup> Law no.134/2010 Civil Procedure Code, published in the Official Gazette no.485/15.07.2010 amended by Law no.76/2012 published in the official Gazette no.365/30.05.2012, republished in the Official Gazette no.545/03.08.2012. Article 309 paragraph 4

(4) The testimony with witnesses is also inadmissible if in order to prove a legal document the law requires the written form, except the cases in which:

1. the party was in material or moral impossibility to produce a document to prove the legal act;
2. there is a beginning of written proof, according to the stipulations of article 310;
3. the party lost the evidencing document because of unforeseeable circumstances or force majeure;
4. the parties agree, even tacitly, to use this proof, but only regarding the rights that they may have;
5. the legal act is attacked for fraud, error, wilful misconduct, violence or is null and void for illegality or immorality, according to the case;
6. it is required to clarify the terms of the legal act;

<sup>4</sup> Decision no. 2330/2001 of the Court of Appeal Bucharest. 3<sup>rd</sup> civil section

The wilful misconduct is a ground for nullity of the agreement when one of the parties has used evil means (machinations, artifices, cunningness, fraudulent manoeuvres) to mislead.

The wilful misconduct is not assumed, so that the claimant must prove by relevant evidence the nature of the evil means used by the defendant to cause the signing of a different act than the agreed one.

<sup>5</sup> Law no.134/2010 Civil Procedure Code, published in the Official Gazette no.485/15.07.2010 amended by Law no.76/2012 published in the Official Gazette no.365/30.05.2012, republished in the Official Gazette no.545/03.08.2012

Article 12 Good faith

(1) Procedural rights must be exercised in bona fide, according to the purpose for which they were acknowledged by law without infringing the procedural rights of another party.

The enforcement of the law, in its letter and spirit, is a public interest necessity and therefore the legal acts committed fraudulently shall be penalised with absolute nullity.

Fraud differs from wilful misconduct, although it has a common element: the bad-faith of its author.

While the wilful misconduct is exerted on one of the parties of the legal act, whose consent it vitiates, fraud is committed by the parties at the expense of the third parties, leaving unaltered the consent of the parties in order to achieve an unfair advantage for those who commit fraud.

Fraud to law represents a fraudulent manoeuvre used by the parties to make, by means of the legal act, a finality prohibited by the regulations in force, by the occult and indirect circumvention of a prohibitive rule. Unlike the wilful misconduct practiced by one party over the other, thus vitiating his/her consent, fraud to the law is an act committed by collusion by the contractors at the expense of the third parties.

Absolute nullity, as civil penalty, occurs in case of infringement upon the conclusion of a legal act of certain mandatory rules and which protect the general public interest and has the effect of abolishing the legal act and of restoring the parties to the previous situation.<sup>1</sup>

The interest of the distinction between fraud and wilful misconduct is that the former is sanctioned by the absolute nullity of the legal act and the latter draws the relative nullity.

According to article 45 of the Civil Code, the fraud committed by the incapable is the simple statement that he/she is able to contract, made by the one lacking the exercise or with limited exercise capacity, and does not remove the cancellability of the act. *But if he/she used fraudulent manoeuvres, the court, at the request of the party misled, may keep the contract when it considers that this would be an appropriate civil penalty.*

According to article 1237 of the Civil Code, fraud by law is also when the cause is illicit and when the contract is only the means to circumvent the application of mandatory legal rules.

#### *The sanction of the wilful misconduct*

According to article 1214 paragraph 2 of the Civil Code, the party whose consent was vitiated by wilful misconduct may request the cancellation of the contract, even if the error in which he/she was involved in was not essential.

The penalty is the relative nullity of the legal act concluded, because the rule of law protects a private interest, with the right of the victim of the wilful misconduct to claim damages as well, that is to say damages covering the loss suffered.

Being a relative nullity, it can only be invoked by the party whose consent was vitiated, the heirs have no active procedural standing to invoke the relative nullity because it is a personal action, they may continue the lawsuit if after starting the legal action the victim of the wilful misconduct died.<sup>2</sup>

According to article 1214 paragraph 3 of the Civil Code, the contract is also cancellable when the wilful misconduct comes from the representative, official in charge or the managing director of the other party's business.

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(2) The party exercising his/her procedural rights in an abusive way is liable for the material and moral damages caused. It may be required, according to the law, to pay a judicial fine.

(3) The party who fails to fulfil in good faith his/her procedural obligations is liable according to paragraph (2).

<sup>1</sup> Decision no.32/2010 of Craiova Court of Appeal. Commercial section.

By the fraudulent manoeuvre of the two defendant companies it was aimed that SC S. J. SRL created a state of forced, artificial insolvency and which cannot be enforced for those earlier claims because the amount from the sale price obtained from selling the two estates by N. to SC E. COM SRL was not reflected in the heritage of SC S. J. SRL at the onset of the judicial liquidation procedure.

Also the aim of the sale was that in case of restoring the previous situation, the applicant is unable to repossess the properties, just by raising the status of bona fide purchaser of SC E. COM SRL, in reality he/she was a screen interposed by SC S. J. SRL.

This makes the legal object of the contract, the aim set by the parties to be an illicit one.

<sup>2</sup> Gabriel Boroi, Liviu Stănciulescu – Instituții de drept civil (Institutions of civil law). Hamangiu publishing House. Bucharest 2012. pp. 105-109.

In all cases, the act ended as a result of the wilful misconduct is not null and it entitles the victim only to an action for annulment. The act of a person of using cunning means in relation to another person may represent, in criminal law, the offense of fraud.<sup>1</sup>

According to article 1249 paragraph 2 of the Civil Code, relative nullity may be invoked by means of action only in the prescription term established by law. However, the party asked to perform the contract can always oppose the relative nullity of the contract at any time, even after reaching the prescription term of the right to action for annulment.

According to article 2529 of the Civil Code, the prescription term of the right to an action for annulment of a legal act begins:

- a) in the case of violence, since the day it ended;
- b) in the case of the wilful misconduct, since the day when it was discovered;
- c) in case of error or in the other cases of cancellation, since the day when the righteous, his/her legal representative or the one called by the law to approve them or to authorise their acts, has known the cause of the cancellation, but no later than 18 months from the completion of the legal document.

In the cases in which the relative nullity may be invoked by a third person, the prescription begins to run, if it is not otherwise provided by law, since the date when the third party knew about the existence of invalidity cause.

According to article 298 of the Civil Code, marriage can be annulled at the request of the spouse whose consent was vitiated by error, by wilful misconduct or by violence.

The error represents a vice of consent only when it concerns the physical identity of the future spouse.

According to article 301 of the Civil Code, marriage annulment may be claimed within 6 months.<sup>2</sup>

In the case of the nullity for vices of consent or for lack of discernment, the term begins to run from the date of cessation of violence or, where applicable, since the date on which the person concerned has undergone the wilful misconduct, the error or the temporary lack of discernment.

According to article 479 of the Civil Code, adoption may be cancelled at the request of any person called upon to consent to its conclusion and whose consent was vitiated by error related to the adoptee's identity, wilful misconduct or violence.

The action may be brought within 6 months from the discovery of the error or wilful misconduct or from the cessation of the violence, but not later than 2 years since the end of the adoption.

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<sup>1</sup> Article 215 of the Criminal Code in force  
Fraud.

Paragraph 3 Misleading or maintenance in error of a person on the occasion of entering into or performance of a contract, committed so that, without this error, the wronged would not have concluded or executed the contract under the terms stipulated, shall be sanctioned by the penalty provided in the preceding paragraphs according to the stipulations shown there.

Article 244 of the Criminal Code – Law no.286/2009 published in the Official Gazette no.510/24.07.2009.

Fraud

1) The misleading of a person by presenting as true a deceitful deed or as deceitful a true deed in order to obtain for oneself or for another person an unjust patrimonial good and if there has been done any damage it shall be punished by imprisonment from 6 months to 3 years.

2) Deception committed by using false names or deceitful qualities or other fraudulent means shall be punished with imprisonment of one to five years. If the fraudulent means are in themselves an offense, the rules on offenses are applied.

3) Reconciliation removes the criminal liability.

<sup>2</sup> Decision no.3746/2003 of the Supreme Court

In the action for annulment of marriage, the plaintiff has the obligation to prove that his/her claim was brought within 6 months after the discovery of the deception ascribed to the defendant.

According to article 1215 paragraph 2 of the Civil Code, independently from the cancellation of the contract, the author of the wilful misconduct is liable for the damage that would result. Thus, if through the wilful misconduct produced the author caused damage by his/her unlawful conduct, there arises the right of the victim to request, together with the request for annulment of the contract or separately, the repair of the damage caused by the wilful misconduct according to article 1357 of the Civil Code.<sup>1</sup>

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<sup>1</sup> Article 1357 of the Civil Code

He who causes injury to another by an unlawful act committed with guilt, is forced to fix it. The author of the damage is liable for the slightest fault.