

# Willful Acts Coverage Update

March 1, 2023

## Willful Acts – Ninth Circuit (California Law)

### *County of Sacramento v. Everest Nat'l Ins. Co.*

No. 22-15250, 2023 WL 1960675 (9th Cir. Feb. 13, 2023)

The U.S. Court of Appeals for the Ninth Circuit affirmed the decision of the U.S. District Court for the Eastern District of California, finding that an insured was barred by a California statute from seeking indemnity from an insurer for liability arising from willful acts of discrimination.

The sheriff's department of Sacramento County was named in a lawsuit by police officers in November 2010, which alleged that the department retaliated against them after they had made complaints about discrimination, in violation of California's Fair Employment and Housing Act (FEHA).

Sacramento County (county) stepped in as the ultimate employer of individual defendants named in the case. The county sought coverage from Everest National Insurance Company (Everest). Everest defended the county in the lawsuit under a reservation of rights. Following a verdict in the plaintiff police officers' favor, Everest withdrew its defense of the county on the basis of California Insurance Code Section 533, which provides that "[a]n insurer is not liable for a loss caused by the willful act of the insured; but he is not exonerated by the negligence of the insured, or of the insured's agents or others."

The county commenced a lawsuit against Everest alleging breach of contract and bad faith. Everest moved for summary judgment on the basis that coverage was barred under Section 533, which motion the trial court granted.

The appellate court affirmed summary judgment to Everest, finding that Section 533 was a legislatively created exclusion prohibiting coverage for willful acts that is read into all liability policies. Because the county was found directly liable for discrimination under FEHA, which imposes direct liability on employers, there was no duty to indemnify the county for the verdict in the underlying case.

The appellate court rejected the county's argument that Section 533 did not apply because the county was vicariously liable for its employees' conduct. There was no evidence that the county's liability was based on vicarious liability for its employees' conduct in either the jury instructions or the verdict form; rather, the county was found directly liable for violations of FEHA. The appellate court concluded, "the district court properly granted summary judgment in favor of Everest because California Insurance Code § 533 barred indemnity of the retaliation claims." The appellate court also rejected the county's request to certify the question to the California Supreme Court.