SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

SAN BERNARDINO COUNTY, Plaintiff, v. EVEREST NATIONAL INSURANCE COMPANY, et al., Defendants. AND RELATED CROSS-ACTIONS.	Case No.: 23STCV02336 ORDER RE: DEFENDANTS' DEFENSE UNDER INSURANCE CODE SECTION 533 Hearing Date: July 22, 2025 Hearing Time: 1:45 p.m. Dept.: 7

By stipulation, plaintiff San Bernardino County ("County") and five defendants, Everest National Insurance Company, Allied World Assurance Company (U.S.), Inc., Great American Insurance Company of New York, Starr Indemnity & Liability Company,

and Ironshore Specialty Insurance Company (collectively, the "Insurers") bring cross motions for summary adjudication of the following issue:

> Whether Insurance Code section 533 excludes indemnity under the Insurers' policies for some or all of the *Colonies II* Litigation settlements.

County argues the answer is No whereas the Insurers argue the answer is Yes.

For the reasons discussed below, the Court agrees with the Insurers and answers the issue in the affirmative: Yes, Insurance Code section 533 excludes indemnity under the Insurers' policies for some or all of the *Colonies II* Litigation settlements.

I. Introduction

Beginning in 1997, County had a dispute with Colonies Partners, L.P. ("Colonies"), a landowner in the city of Upland, over the responsibility for paying to construct flood-control improvements. (Second Amended Complaint (Apr. 11, 2024) ¶ 13.) Colonies sued County — the *Colonies I* case — a case that, in November 2006, the County Board of Supervisors voted to settle, 3 to 2. (*Id.* at ¶ 15).

Soon afterward, the County's District Attorney's office started to investigate potential corruption in the County's vote to settle *Colonies I*. (Second Amended Complaint, ¶ 16.) In February 2010, then-District Attorney Michael Ramos filed criminal complaints against James Erwin and John Difazio, the founders of two different PACs that had received contributions from Colonies. (*Id.* at ¶ 17.) In May 2011, a grand jury indicted Jeffrey Burum, co-managing partner of Colonies; Paul Biane, a County Supervisor who had voted in favor of the settlement; and Mark Kirk, chief of staff of another supervisor who had voted in favor of the settlement. (*Id.* at ¶ 18.) The indictment alleged Burum, Biane, and Kirk had conspired to settle *Colonies I* on terms favorable to Colonies in exchange for contributions to PACs controlled by the three supervisors who had voted to settle. (*Id.* at ¶ 19.)

In 2017, a jury acquitted Burum. (Second Amended Complaint, ¶ 20.) DA Ramos then dropped the charges against Biane, Kirk, Erwin, and DiFazio. (*Ibid*.)

The following year, the five accused individuals and Colonies then sued County in federal court. (Second Amended Complaint, ¶¶ 21-22.) They also sued then-former DA

Ramos, two deputy DAs, two investigators in the DA's office, a County Supervisor, and an attorney in the County Counsel's office. (*Id.* at ¶ 22.) The cases were consolidated under the lead case, *Colonies Partners L.P. v. County of San Bernardino* (C.D. Cal.) no. 5:18-cv-19-00420 (*Colonies II*). (*Id.* at ¶ 23.)

Following defense motions for summary judgment, the remaining plaintiffs in *Colonies II* were Colonies, Burum, Biane, and Kirk. (Second Amended Complaint, ¶ 27.) County ultimately settled their four cases for a total of $69 million. (*Id.* at ¶ 30.)

In this case, County alleges the Insurers promised to, but did not, indemnify County for its payment to settle the *Colonies II* litigation. It asserts claims against them for breach of contract and breach of the implied covenant of good faith and fair dealing.

II. Legal Standard: Motion for Summary Judgment or Adjudication

The purpose of summary judgment or adjudication is to "cut through the parties' pleadings" to determine whether, "despite their allegations, trial is in fact necessary to resolve their dispute." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 854.)

"A party may move for summary adjudication as to … one or more affirmative defenses … if the party contends … that there is no merit to [the] affirmative defense…." (Code Civ. Proc., § 437c, subd. (f)(1).) Alternatively, "a party may move for summary adjudication of a legal issue or a claim for damages other than punitive damages that does not completely dispose of a cause of action, affirmative defense, or issue of duty" based on "[a] joint stipulation stating the issue or issues to be adjudicated." (§ 437c, subd. (t)(1)(A)(i).)

Per section 437c, subdivision (t), the parties have stipulated to the filing of cross-motions for summary adjudication of the following issue:

> Whether Insurance Code section 533 excludes indemnity under the Insurers' policies for some or all of the *Colonies II* Litigation settlements.

(Declaration of Anthony S. Newman (Plaintiff's Counsel) in Support of Plaintiff's Motion (Mar. 7, 2025) ¶ 12, Exh. L, p. 4.)

III. Analysis

Under section 533, "[a]n insurer is not liable for a loss caused by the wilful act of the insured; but he is not exonerated by the negligence of the insured, or of the insured's agents or others." The purpose of the statute is to discourage willful torts, reflecting a "fundamental policy to deny insurance coverage for wilful wrongs." (*Downey Venture v. LMI Insurance Co.* (1998) 66 Cal.App.4th 478, 499 (*Downey*).) It functions as an exclusionary clause read by law into every insurance policy; it thus overrides any policy language to the contrary. (*Id.* at pp. 499-500.)

The application of section 533 often centers on the meaning of the term "wilful act." Whether an act was or was not willful is a line that is admittedly "difficult to draw." (*California Amplifier, Inc. v. RLI Ins. Co.* (2001) 94 Cal.App.4th 102, 116.) Caselaw has established two general definitions, the first of which defines a willful act in terms of the actor's intent. Under this definition, a willful act is "deliberately done for the express purpose of causing damage" or "intentionally performed with knowledge that damage is highly probable or substantially certain to result." (*Downey*, *supra*, 66 Cal.App.4th at p. 500.) The second defines a willful act in terms of the act itself, not necessarily the actor's intent or purpose. Some acts, such as child molestation, are necessarily "*always* wrongful" and "*always* harmful" and are therefore "willful" acts within the meaning of section 533, even though the actor might not have intended to cause damage or known damage was likely to result from his acts. (*J.C. Penney Casualty Ins. Co. v. M.K.* (1991) 52 Cal.3d 1009, 1025.)

A. Facts

The facts are largely undisputed, and there are really only two key pieces of evidence: the complaints in *Colonies II*, which contain the allegations against County, and the district court's order on the parties' cross-motions for summary judgment, which contains the court's evaluation of the parties' evidence. County requests the Court take judicial notice of these documents, all of which are court records. (County's Requests for Judicial Notice in Support (Mar. 7, 2025) Exhs. A-E.) The Court grants County's requests and takes judicial notice of the contents of the documents and their legal effect, if any, but not the truth of any factual matters contained therein. (Evid. Code, § 452, subd. (d).)

The plaintiffs in *Colonies II* each filed separate cases, although their pleadings were quite similar. Colonies, the partnership, and Burum, the managing partner, filed their cases in March and April 2018, respectively. (RJN, Exh. E, pp. 2-3.) They alleged "an illegal campaign of retaliation, intimidation, and harassment by the County and the State of California through their employees." (RJN, Exh. A, ¶ 2.) "This unlawful campaign was undertaken in retaliation for Colonies' exercise of its First and Fifth Amendment constitutional rights." (*Ibid.*) The alleged "campaign" developed and manifested in several ways, but no more so than in an effort jointly coordinated by the offices of the San Bernardino County District Attorney and the California Attorney General to target Colonies through an unfounded criminal investigation of Colonies and its partners without justification or probable cause." (*Id.* at ¶ 4.) The alleged "motivating and ultimate goal" of the investigation was to "punish Colonies and its management, not to conduct a legitimate and fair examination of the facts…." (*Id.* at ¶ 5.)

Paul Biane, one of the three County Supervisors who had voted to settle *Colonies I*, filed his case in October 2018. (RJN, Exh. E, p. 4.) He alleged he was the target of a "politically motivated and unfounded criminal investigation" that resulted in him being charged with multiple felonies, including bribery. (*Id.* at ¶ 7.) He was arrested with "great media fanfare" in May 2011 and "forced to endure years of persecution" that finally ended in 2017, "when he was subjected to a 10-month jury trial and acquitted." (*Id.* at ¶¶ 7, 9.) Throughout the investigation, litigation, and trial, Mr. Biane was the subject of constant media coverage — encouraged by Defendants — that identified him as a "corrupt" politician who had accepted "bribes" — ruining his reputation. However, once the case arrived at trial, it became clear that Mr. Biane was innocent of all of these accusations." (*Id.* at ¶ 9.) He "did not need to call a single defense witness on his behalf when the prosecution had rested its case." (*Id.* at ¶ 10.)

Lastly, plaintiff Mark Kirk, former Chief of Staff to Gary Ovitt, another County Supervisor who had voted in favor of the *Colonies I* settlement, filed his case in July 2018. (RJN, Exh. E, p. 4.) He alleged he had founded a political committee that received contributions from Colonies. (RJN, Exh. D, ¶ 10.) He alleged he was arrested around the

same time as Biane and also charged with multiple felonies. (*Id.* at ¶¶ 3-5, 12.) He too, was acquitted by a jury, following an alleged six-year investigation and ten-month trial. (*Id.* at ¶ 14.)

The four cases were consolidated. Defendants County, Ramos, Hackleman, Randles, and Schreiber, among others, then moved for summary judgment. In its 61-page order on the motions, the District Court evaluated the parties' evidence. "A key question in this case," the court wrote, "is exactly when and why the investigation began." (Order, p. 8.) The court found evidence that the investigation had been handled by the Public Integrity Unit (PIU) within the DA's Office, and the "PIU began investigating conduct relating to the 2006 Settlement [of *Colonies I*] no later than November 1, 2008." (*Id.* at pp. 8-9.) Ramos was the DA, Hackleman was "a supervising prosecutor in charge of the PIU and was assistant DA," and Randles and Schreiber were "investigators." (*Id.* at p. 14.) The investigation resulted in the indictment of Burum, Biane, and Kirk in May 2011. (*Id.* at 14.)

The court characterized *Colonies II* as a "whirl of mutually implicative claims and doctrines," issuing "like spokes … from [a] central hub" of "First Amendment retaliation." (Order, p. 18.) The court thus "focuse[d] on whether a reasonable jury could conclude Defendants subjected each Plaintiff to a retaliatory investigation" and "work[ed] out[ward] from there." (*Ibid.*) The court denied the motions — meaning the court found evidence sufficient to create triable issues of fact — as follows:

- Colonies and Burum's claims of retaliatory investigation — the "heart of the case," in the court's view — against DA Ramos and deputy-DA Hackleman (Order, pp. 19, 35, 37),
- Colonies and Burum's claims that Ramos and Hackleman conspired to retaliate (Order, p. 51),
- Burum's claim against Ramos and Hackleman of malicious prosecution (Order, p. 55),

- Colonies, Burum, Biane, and Kirk's claims against Ramos and Hackleman of supervisory liability, based on Ramos and Hackleman's oversight of the PIU (Order, p. 60),
- Burum, Biane, and Kirk's claims that the two investigators, Randles and Schreiber, fabricated evidence (Order, p. 52), and
- Colonies and Burum's claims against County under *Monell v. Department of Social Services of City of New York* (1978) 436 U.S. 658, 690 (*Monell*) (Order, p. 48).

These claims, the claims that survived summary judgment, are the claims that County paid to settle. According to Charles E. Slyngstad, who represented County in the litigation, County entered into three settlement agreements with the remaining plaintiffs to resolve *Colonies II* in October, November, and December of 2020. (Declaration of Charles E. Slyngstad in Support (Mar. 3, 2025) ¶ 7.) County has paid the settlement payments required by the settlement agreements. (*Ibid.*)

B. County's Motion

The parties stipulated to summary adjudication of following issue:

Whether Insurance Code section 533 excludes indemnity under the Insurers' policies for some or all of the *Colonies II* Litigation settlements.

County argues the answer to the issue is No. It first argues that most of the liability it faced in *Colonies II* was vicarious liability for the acts of its officials and employees, not direct liability for its own willful acts. And second, to the extent County faced direct liability in *Colonies II*, its liability "could have been established" by proof it had been reckless, but not necessarily willful within the meaning of section 533.

(1) Vicarious Liability

County first argues that it was only vicariously liable for the acts of the four individual defendants — the former DA, a deputy DA, and two investigators.

"An insurer is not liable for a loss caused by the wilful act of the insured…." (Ins. Code, § 533.) Because the statute speaks of the *insured*'s wilful act, it does not bar indemnification of an insured who is liable for the willful act of someone else though not

"personally at fault." (*Downey*, *supra*, 66 Cal.App.4th at p. 512.) "The public policy underlying section 533 — to deny coverage for and thereby discourage commission of wilful wrongs — is not implicated when an insurer indemnifies an 'innocent' insured held liable for the willful wrong of another person." (*Id.* at p. 514.) The classic example is the case of a minor who intentionally started a fire at his school. (*Arenson v. National Automobile Casualty Insurance Co.* (1955) 45 Cal.2d 81, 83.) Section 533 did not bar indemnification of the father for the judgment in the school's favor. Section 533 has "no application to a situation where the plaintiff is not personally at fault." (*Id.* at p. 84.)

Similarly, section 533 does not bar indemnification of an employer held vicariously liable for the willful acts of its employee. (*Lisa. M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal.4th 291, 305, fn. 9.) Vicarious liability is based not on a party's culpability, but on her status in a relationship with another party. (*Schreiber v. Lee* (2020) 47 Cal.App.5th 745, 754.) For policy reasons, the law imputes the act or omission of one person to another person, typically an employer. (*Ibid*.)

County argues its liability for the claims against Ramos, Hackleman, Randles, and Schreiber was only vicarious, citing Government Code section 825, subdivision (a):

> Except as otherwise provided in this section, if an employee or former employee of a public entity requests the public entity to defend him or her against any claim or action against him or her for an injury arising out of an act or omission occurring within the scope of his or her employment as an employee of the public entity and the request is made in writing not less than 10 days before the day of trial, and the employee or former employee reasonably cooperates in good faith in the defense of the claim or action, the public entity shall pay any judgment based thereon or any compromise or settlement of the claim or action to which the public entity has agreed.

The Supreme Court has described section 825 as an "indemnification provision" that effectively "allows a plaintiff to recover from the county for injuries inflicted by an employee of the county." (*Williams v. Horvath* (1976) 16 Cal.3d 834, 842, 844.) A principal purpose of the statute is to encourage the "zealous execution of official duties by public

employees" by limiting their risk of personal liability. (*Pacific Indemnity Company v. American Mutual Insurance Company* (1972) 28 Cal.App.3d 983, 991.)

The Insurers argue that County's statutory duty to indemnify employees under section 825 is not the same as its vicarious liability to plaintiffs injured by its employees. They point out that County's vicarious liability for the acts or omissions of its employees is codified at Government Code section 815.2, rather than section 825.

The Insurers are technically right. But section 825 and the doctrine of vicarious liability have the same effect — the "innocent" insured is held liable for the acts of others, even the willful acts of others, not because of the insured's culpability but for other policy reasons. This scenario does not implicate the policy behind section 533; the policy against indemnification of a willful actor is not implicated by the indemnification of an "innocent" insured.

The Court agrees with County thus far. Had County paid to only settle the claims against Ramos, Hackleman, Randles, and Schreiber, then section 533 would not bar indemnification of County for its payments to settle these claims, given that County only paid because of its duty to indemnify under Government Code section 825. However, as discussed below, County itself faced direct liability in *Colonies II* under section 1983, as interpreted by the Supreme Court in *Monell*.

(2) Reckless Versus Willful

At the time it settled *Colonies II*, County itself faced two *Monell* claims for violation of federal civil rights under section 1983, one by Colonies and one by Burum. Section 533 does not bar indemnification for the portion of the settlement attributable to the *Monell* claims, County argues, because Colonies and Burum could have prevailed on their claims with proof that County had been merely reckless, short of willful.

Section 1983 makes liable any "person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws…."

Although a municipality qualifies as a "person" for purposes of liability under section 1983, there are limits on a municipality's section 1983 liability. (*Monell*, *supra*, 436 U.S. at p. 690.) A municipality cannot be held liable under section 1983 merely because it employed the individual who violated the plaintiff's federal rights, that is, solely on a theory of vicarious liability. (*Id.* at p. 691.) "Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." (*Id.* at p. 694.) "The plaintiff must also demonstrate that, through its *deliberate* conduct, the municipality," because of its policy or custom, was the "moving force" behind the injury alleged. (*Board of County Commissioners of Bryan County, Oklahoma v. Brown* (1997) 520 U.S. 397, 404 (*Brown*).)

Alternatively, even if a municipality's policies and customs are constitutionally valid, it can still be liable under section 1983 for the acts of its employees if it did not adequately train them. (*City of Canton, Ohio v. Harris* (1989) 489 U.S. 378, 387 (*City of Canton*).) Even so, the inadequate training must have resulted from the municipality's "deliberate indifference" to the rights of persons with whom its employees "come into contact," a deliberate indifference that itself essentially constitutes a municipal policy or custom. (*Id.* at p. 388.) "Only where a municipality's failure to train its employees in a relevant respect evidences a 'deliberate indifference' to the rights of its inhabitants can such a shortcoming be properly thought of as a city 'policy or custom' that is actionable under § 1983." (*Id.* at p. 389.) "[I]t may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." (*Id.* at p. 390.)

County argues that in *Colonies II*, the district court found evidence that County might have been liable under section 1983 for its deliberate indifference. Specifically, in ruling on County's motion for summary judgment, the district court found evidence that former-DA Ramos and Deputy-DA Hackleman "may have been deliberately indifferent"

to the "investigative actions" of the Public Integrity Unit within the County DA's office. (Order, pp. 8, 48.) County reasons that deliberate indifference does not qualify as a "willful" act within the meaning of section 533.

Underlying County's position is the assumption that if any element of a claim asserted against an insured can be proven with evidence of something less than a "willful" act, then section 533 does not bar indemnification of the insured for his liability on the claim. To support this assumption, County cites, among other authorities, *City of Whittier v. Everest National Insurance Company* (2023) 97 Cal.App.5th 895 (*City of Whittier*), a case in which the City of Whitter, the insured, had settled claims by police officers who objected to the city's quota system for citations and arrests. The officers claimed the city had retaliated against them in violation of Labor Code section 1102.5, which prohibits retaliation against employees for reporting activity they believe to be unlawful. (*Id.* at p. 903) At a mediation, the city settled the officers' claims for $3 million. It then requested indemnification from its insurers, who denied city's request, citing Insurance Code section 533. (*Id.* at p. 905.) The insurers then successfully sought from the trial court a declaration that because of section 533, they did not have a duty to indemnify the city. City appealed.

To resolve the question, the Court of Appeal carefully parsed the statute, Labor Code section 1102.5, under which the officers had sued the city. Based on its reading of the statute, the court concluded that a plaintiff might be able to prove retaliation under section 1102.5 without proof her employer retaliated willfully, if the employer mistakenly believed the activity the employee reported was lawful. (*City of Whittier*, *supra*, 97 Cal.App.5th at p. 915.) "Liability is proper in this scenario — the employee, having opposed the employer's unlawful directives, should not bear the burden of the employer's mistake in believing those directives were lawful." (*Id.* at p. 915.) In that scenario, the "employer's conduct … is closer to negligence than intentional misconduct." (*Id.* at p. 916.)

The Court of Appeal then turned to the officers' allegations against the city, finding the alleged quota system was not so "clearly illegal" that city "could not have believed otherwise." (*City of Whittier*, *supra*, 97 Cal.App.5th at p. 918.) "Conceivably … a [police]

department reasonably could believe it could impose an arrest count benchmark based on shift averages if that benchmark was but one of several factors considered in evaluating performance. A court, however, might disagree. Consistent with our conclusion … the police department in that circumstance would be liable under Labor Code section 1102.5, subdivision (c), but would not have acted willfully." (*Id.* at pp. 918-919, page number omitted.)

The Court does not read *City of Whittier* as holding that section 533 does not apply so long as the claims against the insured can theoretically be proven without evidence of willful acts. For one, the City of Whitter's liability was never adjudicated in the underlying action, and its potential liability was based only on the allegations in the third party's complaint. Furthermore, the Court of Appeal "express[ed] no opinion whether the insurers may defeat or reduce the City's coverage claim by showing, for example, that the City's conduct was in fact willful, and/or that some or all of the settlement is in fact allocable to willful conduct." (*City of Whittier*, *supra*, 97 Cal.App.5th at p. 919.) The court wrote that "[t]he trial court may address such issues on remand should the parties wish to raise them." (*Ibid.*) While section 533 did not bar the City of Whittier's indemnification based on the record presented, the Court of Appeal did not conclude the city had been merely negligent.

Although here, as in *City of Whittier*, County's liability was never adjudicated in the underlying *Colonies II* litigation, the district court did evaluate the evidence against County by ruling on, and ultimately denying, County's motion for summary judgment. A similar judicial evaluation of the evidence against the insured was apparently not available in *City of Whitter*. County might be correct that theoretically, allegations of "deliberate indifference" under *City of Canton* do not automatically mean the municipality acted willfully within the meaning of section 533 — although deliberate indifference, the Supreme Court has made clear, if not technically willful, must be awfully close to willful, as deliberate indifference is the municipality's "deliberate" or "conscious" choice to not adequately train its employees. (*City of Canton*, *supra*, 489 U.S. at p. 389.) But the theoretical conclusion does not end the analysis. Here, the Court must consider the

district court's evaluation of the evidence against County in its order denying County's motion for summary judgment.

As discussed, a municipality can only be liable under section 1983 if the alleged violation of a federal right resulted from a municipal policy, a municipal practice, or, a municipality's deliberate indifference to the rights of persons with whom municipal employees come into contact. In *Colonies II*, the district court analyzed only the first potential ground for County's *Monell* liability — the theory the alleged retaliation against plaintiffs resulted from a County "policy." The district court found there was enough evidence to support this theory, concluding Colonies and Burum submitted "enough evidence to sustain a claim of a longstanding municipal policy 'so persistent and widespread that it constitute[d] a permanent and well settled [] policy.'" (Order, p. 45 [citing *Trevino v. Gates* (9th Cir. 1996) 99 F.3d 911, 918 (*Trevino*)].)

"A jury could also conclude on this record," the court continued, "that a 'final policymaker' of the County — Ramos — took or ratified retaliatory action," citing *Pembaur v. City of Cincinnati* (1986) 475 U.S. 469. (Order, p. 47.) *Pembaur* establishes another legal basis for a municipal policy. A single action can qualify as a municipal policy if the action is a decision by a municipal official who has "final authority to establish municipal policy with respect to the action ordered." (*Pembaur*, at p. 481.) The record in *Colonies II* "support[ed] an inference," the district court concluded, "that in his capacity as a County actor, Ramos directed the PIU to investigate Burum or Colonies and to file a criminal complaint prior to the 2010 political season." (Order, p. 48.) The district court thus found evidence to support a second basis for a County policy within the meaning of *Monell*.

Finally, the court concluded that Plaintiffs "point[ed] to several investigative actions by the PIU that may have been ratified by Ramos or Hackleman, or to which they may have been deliberately indifferent," citing *Christie v. Iopa* (9th Cir. 1999) 176 F.3d 1231, 1238-1239. (Order, p. 48.) *Christie* addressed another situation in which one single act can qualify as a municipal policy: the actor was a subordinate of a final policymaker, and the policymaker "ratified" the subordinate's act. (*Christie*, at p. 1238.) In *Colonies II* the court found evidence that the role of deputy-DA Hackleman "appears to have been an

admixture of prosecutorial and purely investigative, detective-like functions, and he seems to have regularly apprised Ramos of the PIU team's actions, a fact which muddies the water enough to preclude summary judgment for the County on the *Monell* claims." (Order, p. 48.) The court thus found evidence that Ramos, a final policymaker, had ratified the acts of Hackleman, a subordinate, providing a third and final legal basis for a County policy under *Monell*.

County focuses on the district court's comment that Ramos or Hackleman "may have been deliberately indifferent" to several investigative actions by the PIU. (Order, p. 48.) But of the three bases for *Monell* liability, "deliberate indifference" relates to the third basis, a municipality's failure to train per *City of Canton*, not the first basis, an established municipal policy. The district court's reference to deliberate indifference was offhand, was not a basis for the court's ruling, not a theory advanced the plaintiffs — that is, they did not advance a failure-to-train theory — and not mentioned again in the Order.

Therefore, the district court's offhand reference to deliberate indifference does not mean there was evidence County's acts were not "willful" acts within the meaning of Insurance Code 533. On the contrary, the court found evidence that County was directly liable under section 1983 per *Monell* — evidence that County had a permanent and well-settled policy (*Trevino*), evidence of a decision by a County official who had final authority to establish County policy with respect to the action ordered (*Pembaur*), and evidence that a final County policymaker ratified the acts of a subordinate that had caused the alleged violations of plaintiffs' constitutional rights (*Christie*).

(3) Larger-Settlement Rule

Assuming section 533 does indeed bar indemnification of the *Monell* claims, County argues for application of what it calls the larger-settlement rule: "an insured is entitled to reimbursement for the entirety of a settlement payment made to resolve both covered and uncovered losses, where the liability for the uncovered claims or parties is purely derivative of the liability for the covered claims." (Memorandum, 27:4-7.) Based on the authorities cited by County, the larger-settlement rule is typically applied in cases involving directors and officers (D&O) insurance, which insures a corporation for loss

caused by the wrongful acts of its directors and officers but not for loss caused by the corporation itself. (*Nordstrom, Inc. v. Chubb & Son, Inc.* (9th Cir. 1995) 54 F.3d 1424, 1427 (*Nordstrom*).) The rule applies if the corporation has paid to settle uncovered claims asserted against it together with covered claims asserted against its directors and officers. Under the rule, the corporation is still entitled to full indemnification for the entire settlement amount; the amount is reduced "only if the acts of the uninsured party [i.e., the corporation] are determined to have increased the settlement." (*Id.* at p. 1432, emphasis removed.) "This would only be true if the corporate entity alone were liable for a particular claim, or if its liability would exceed that of the directors and officers on any claim for which the corporation was independently but jointly liable." (*Ibid.*)

The rule applies here, County argues, because the *Colonies II* settlement payments were for both covered and uncovered claims — the covered claims against County's employees (to whom County had a duty of indemnification under Government Code section 825) and the uncovered *Monell* claims against County directly. "[L]ike each of the 'mixed' settlements in the cases that have applied the larger settlement rule," County argues, "the County's liability under the two *Monell* claims is entirely derivative of the Individual Defendants' liability for the remaining claims that are the subject of the settlements." (Memorandum, 29:14-16.)

County's argument makes some sense, and if nothing else, reflects its counsel's mastery of several areas of insurance law. But the Court is not persuaded the larger-settlement rule applies here. The rule applies if an insured has paid to settle claims covered and not covered under the terms of the insured's policy, whereas here, County paid some claims for which it cannot be indemnified by its insurers as a matter of public policy. The typical scenario to which the larger-settlement rule applies thus involves starkly different policy considerations than the settlement of *Colonies II*. In *Nordstrom*, the court concluded the corporation was entitled to indemnification for the entire settlement because the corporation was concurrently liable to third parties along with its officers and directors, and the parties to the insurance contract would "expect [the insurer to] be responsible for any amount of liability that is attributable in any way to the wrongful acts

or omissions of the directors and officers, regardless of whether the corporation could be found concurrently liable on any given claim under an independent theory." (*Nordstrom*, *supra*, 54 F.3d at p. 1433.) At issue here, in contrast, is the public policy expressed in section 533 against the indemnification of an insured for liability caused by his own willful acts.

Moreover, County's liability for the *Monell* claims — the liability for which it cannot be indemnified — was not "purely derivative" of the claims against the individual defendants in *Colonies II*. As the Insurers point out, *Monell* instructs that a municipality is only liable under section 1983 if its policy, custom, or deliberate indifference was the "moving force" behind the constitutional violations committed by its employees. (*City of Canton*, *supra*, 489 U.S. at p. 389.) To state a *Monell* claim, "a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights." (*Brown*, *supra*, 520 U.S. at p. 404.) Thus, in *Colonies II*, even though the constitutional violations alleged were carried out by Ramos and Hackleman, the district court found evidence to support two plaintiffs' *Monell* claims, meaning the district court necessarily found evidence that County's policies had been the moving force behind the constitutional violations committed by Ramos and Hackleman. The *Monell* claims against County, indemnification for which is barred by section 533, were not purely derivative of the claims against the individual defendants.

For these reasons, the Court is not persuaded to apply the larger-settlement rule in this case.

C. The Insurers' Motion

The Insurers bring their own motion for summary adjudication of the stipulated issue: whether Insurance Code section 533 excludes indemnity under the Insurers' policies for some or all of the *Colonies II* Litigation settlements. They argue the answer is Yes. County opposes the motion on grounds that are the same as or similar to the grounds that support its motion.

As discussed, the Court is persuaded by County's argument that section 533 does nor bar indemnification of County for liabilities imposed by Government Code section 825. The Court is not persuaded by County's argument, based on the district court's mention of deliberate indifference in its order denying County's motion for summary judgment, that section 533 does not bar indemnification of County for the *Monell* claims. What remains is the issue of whether the *Monell* claims were indeed based on County's willful acts within the meaning of section 533.

The first of the two definitions of the term "willful" is an act "deliberately done for the express purpose of causing damage" or "intentionally performed with knowledge that damage is highly probable or substantially certain to result." (*Downey*, *supra*, 66 Cal.App.4th at p. 500.)

In *Colonies II*, County and the individual defendants were accused of a retaliatory campaign against the plaintiffs executed using the County's prosecutorial and investigative powers, a campaign that allegedly resulted in sham criminal proceedings. The defendants could not have recklessly mounted an alleged campaign of retaliation; such a campaign can only logically have been the result of willful acts. The district court found three evidentiary bases for holding County liable for the constitutional violations that resulted from the campaign of retaliation: evidence that County had a permanent and well-settled policy, evidence of a decision by a County official who had final authority to establish County policy with respect to the action ordered, and evidence that a final County policymaker ratified the acts of a subordinate that had caused the alleged violations of plaintiffs' constitutional rights. County's alleged retaliatory attack on the plaintiffs using its prosecutorial and investigative power could only have been deliberately done for the express purpose of causing damage.

IV. Conclusion

By stipulation per Code of Civil Procedure section 437c, subdivision (t), the parties presented the following issue to the Court for resolution:

> Whether Insurance Code section 533 excludes indemnity under the Insurers' policies for some or all of the *Colonies II* Litigation settlements.

The Court, for the reasons discussed above, rules on the issue as follows. Yes, Insurance Code section 533 excludes indemnity under the Insurers' policies for at least some of the *Colonies II* Litigation settlements. At least some of the settlements resolved the *Monell* claims against County, claims that were based, the Court concludes, on County's alleged willful conduct.

As for the claims against the individual defendants, to the extent County paid to settle these claims only because it had a duty to indemnify the individual defendants under Government Code section 825, then County, as an "innocent insured," can be indemnified for the amount it paid to settle these claims. However, as discussed, County was not an "innocent insured." A district court found evidence that its policies were necessarily the moving force behind the factual basis for the claims asserted against the individual defendants, and these policies, this Court concludes, resulted from County's willful acts. For this reason, the Court is not persuaded the larger-settlement rule applies to afford County indemnification for the settlements of the claims against the individual defendants. The Court thus ultimately concludes that Yes, Insurance Code section 533 excludes indemnity under the Insurers' policies for all of the *Colonies II* Litigation settlements.

Dated: 09/12/2025

Samantha Jessner/Judge

SAMANTHA P. JESSNER
JUDGE OF THE SUPERIOR COURT