

[Nonprofit Backs Office Depot In False Claims Coverage Row](#)

A nonprofit policyholder group has urged the Ninth Circuit to revive a coverage dispute between Office Depot and a unit of AIG, arguing that the lower court ruling could drastically curtail coverage in California False Claims Act cases.

U.S. District Judge Stephen V. Wilson had accepted AIG Specialty Insurance Co.'s argument that California Insurance Code Section 533 — which precludes coverage for a policyholder's willful acts — applies to all of the underlying claims against Office Depot, including allegations of reckless and negligent conduct, in a whistleblower's suit accusing it of overbilling public entities. The supply giant has sought reversal on appeal.

In a proposed amicus brief filed Tuesday, the nonprofit United Policyholders threw its support behind Office Depot and told the Ninth Circuit that Judge Wilson's findings improperly expand the scope of Section 533 and could lead to unfair coverage denials for claims premised on negligent conduct.

"The court's ruling raises public policy concerns by restricting the availability of insurance for types of claims widely understood to be insurable, and drawing a false dichotomy between negligent acts that directly injure and speech or acts) that cause injury by inducing the reliance of others," attorneys for UP wrote. "Neither the district court nor [AIG] offer justification for such a sea change in California law."

Counsel for Office Depot and AIG did not immediately respond to requests for comment Wednesday.

Former Office Depot account manager David Sherwin filed the underlying complaint in March 2009, claiming the company had promised rock-bottom prices to "hundreds or thousands" of public bodies working together through the U.S. Communities Government Purchasing Alliance, or USC, by giving those public bodies favorable pricing, deep discounts and price protections.

But Sherwin, who worked in his former position from 1996 to 2008, alleged Office Depot broke those promises and violated California's False Claims Act. For example, he alleged, the company repeatedly discontinued "core list items," taking away a 45 percent discount, and replaced them with "comparable" items with only a 10 percent discount. A number of California government entities that claimed to have been affected later intervened in the action.

Office Depot reported the suit to AIG in November 2012 and requested coverage under its media liability policy because some of Sherwin's allegations included references to bid sheets, catalogs and other so-called media material, but AIG denied coverage in January 2013.

Office Depot settled Sherwin's suit for \$77.5 million in January 2015 and followed up a few months later with a federal lawsuit against AIG seeking defense and settlement costs.

In June 2016, Judge Wilson ruled that AIG had no duty to indemnify Office Depot for the settlement costs, holding that a finding of liability under the CFCA requires a willful act for which insurance is unavailable under Section 533. Seven months later, the district judge held the insurance statute also relieved AIG of any duty to defend in the Sherwin matter, adding that Office Depot couldn't have had a "reasonable expectation" of defense coverage.

Office Depot told the Ninth Circuit in an opening brief filed in August that Judge Wilson's rulings are incorrect on multiple counts and could set a "dangerous" precedent narrowing the scope of coverage under similar policies. AIG has countered that Office Depot's arguments ignore the fact that the specific CFCA claims against the company require a showing of intent.

UP backed Office Depot's position that AIG's coverage obligations were triggered because some of the allegations in Sherwin's complaint are premised on mere recklessness or negligence. And Section 533 provides that, while an insurer isn't liable for losses tied to a policyholder's willful acts, it is not "exonerated by the negligence of the insured, or of the insured's agents or others," the nonprofit said.

"Any construction of section 533 thus requires a court to reconcile the statute's prohibition on insurance for 'willful' misconduct with its admonition that coverage must remain available for claims based on negligence," UP's attorneys wrote.

Moreover, California courts have consistently held that liability insurance coverage is available for

negligent misrepresentations and reckless acts, even if they haven't directly referenced Section 533 in doing so, UP contended.

"The critical thread running through all these decisions is the specific intent to cause harm of such a nature and severity that it triggers the public policy that intentional wrongdoers should not be able to insure themselves against wilful misconduct," UP said. "A mere intent to act, whether carefully or carelessly, does not equate an intent to harm, any more than a driver who intentionally speeds necessarily intends to injure a pedestrian in the process."

In addition, the nonprofit argued, Judge Wilson erred in applying Section 533 to hold that AIG never had a duty to defend Office Depot in the underlying suit, as the statute applies only to judgment or settlement payments, not to defense costs.

United Policyholders is represented by David B. Goodwin and Elizabeth S. Pehrson of Covington & Burling LLP.

Office Depot is represented by Brent W. Brougher and Heather W. Habes of Kilpatrick Townsend & Stockton LLP.

AIG is represented by Harvey W. Geller, Steven Brodie and Mark Neubauer of Carlton Fields.

The case is Office Depot Inc. v. AIG Specialty Insurance Co. et al., case number 17-55125, in the U.S. Court of Appeals for the Ninth Circuit.

-Editing by Orlando Lorenzo.