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## Ruling takes insurers to task for untimely responses

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On Nov. 17, insurers were taught another costly lesson about the importance of promptly responding to tendered claims from their insureds. In *Janopaul + Block Cos. LLC v. Superior Court (St. Paul Fire and Marine Ins. Co.)*, 2011 DJDAR 16685, the 4th District Court of Appeal wrestled with an issue relating to insurance bad faith suits - one that is all too familiar in today's legal landscape.

Legal precedent in this area seems to be following a point-counterpoint format. The appellate court's decision in *San Diego Federal Credit Union v. Cumis Insurance Society*, 162 Cal. App. 3d 358 (1984) recognized that an insurer's decision to defend its insured under a reservation of rights creates a conflict of interest

sufficient to justify hiring independent counsel for the insured. In response to *Cumis*, the Legislature passed Civil Code Section 2860(c), providing insurers with a mechanism to control the costs of *Cumis* counsel through fee arbitration. Experience has shown, however, that disputes relating to reservations of rights, or even bad faith claims, were being wrapped up in the arbitration process.

The Janopaul entities were the owners of the El Cortez Hotel in San Diego, and began a project to restore the historic building, hiring a St. Paul insured to serve as general contractor for the project. Janopaul's contract contained an express indemnity provision stating that the general contractor would indemnify Janopaul for all claims arising from its work. When Janopaul was sued by the El Cortez Owners Association, it tendered its defense to the general contractor, and eventually, to St. Paul as the general contractor's insurer.

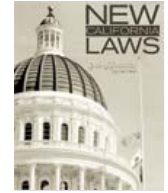
After Janopaul's independent lawyers defended the case for over two years without a coverage decision from St. Paul, the insurer eventually offered to defend under a reservation of rights. The parties could not, however, agree on the rate that St. Paul would pay for Janopaul's independent counsel. St. Paul filed a petition to compel arbitration under California Civil Code Section 2860(c). After St. Paul filed its petition to compel arbitration, Janopaul filed a bad faith suit based on an alleged breach of St. Paul's duty to defend due to the delayed response to Janopaul's tender.

In the *Janopaul* opinion, the 4th District Court of Appeal rejected St. Paul's petition to submit the matter to arbitration, finding that the trial court must first address the threshold questions of duty to defend, breach, and bad faith raised by Janopaul's lawsuit. The ruling allows Janopaul to pursue recovery of its full cost of defense from St. Paul, without the limitation imposed by Section 2860(c). In ruling that this was not a simple fee dispute between an insurer and its insured, the court reinforced its ruling from *Intergulf Development LLC v. Superior Court* (2010) 183 Cal. App. 4th 16, where it held that an insurer's bad faith failure to respond to a

### SPECIAL REPORT

#### New Laws

A list of all state laws that took effect on Jan. 1, 2012.



Thursday, January 5, 2012

#### Government

##### Allegations FBI illegally spied on Muslims take shape

Shadowy allegations that top FBI officials in Southern California discriminated against the local Muslim community are starting to take shape in a case that's drawing scrutiny of the law enforcement agency's counterterrorism efforts.

#### Redevelopment projects in limbo

Last week's state Supreme Court decision dissolving local redevelopment agencies has plunged hundreds of projects throughout the state into chaos.

#### Law Practice

##### Paul Hastings snags antitrust litigator from O'Melveny

In another move to boost its antitrust and competition practice in San Francisco, Paul Hastings LLP has hired corporate litigator Thomas Brown from O'Melveny & Myers LLP.

#### Litigation

##### Ecuadorean judgment against Chevron upheld in first round of appeals

An Ecuadorean appellate court on Tuesday upheld a lower court's ruling that Chevron Corp. should pay a group of Amazonian plaintiffs \$18 billion for damage to the region from oil contamination.

#### Government

##### EPA urged to assess risks posed by nanotechnology

A report has found that the federal Environmental Protection Agency needs to better manage the risks posed by the burgeoning field of nanotechnology.

#### Labor/Employment

##### Federal contractors may face new compliance burdens

Concern over discrimination of individuals with disabilities triggers a new set of proposed regulations. By **Jon A. Geier** and **Maria A. Audero** of Paul Hastings LLP

#### Insurance

##### Ruling takes insurers to task for untimely responses

Insurers learn a costly lesson about responding to tendered claims. By **Valentine S. Hoy** and **Timothy M. Hutter** of Allen Matkins Leck Gamble Mallory & Natsis LLP

tender could result in the forfeiture of the arbitration right provided by Section 2860(c). *Janopaul* broadens the potential reach of *Intergulf*, as the insured filed its bad faith suit after the insurer sought the refuge of statutory fee arbitration. *Intergulf's* timeline was reversed, with the insurer filing its petition to compel arbitration in the midst of bad faith litigation.

*Janopaul* has answered a question raised during oral argument in *Intergulf* - how will courts perceive a bad faith lawsuit filed *after* an insurer raises the specter of fee arbitration? Though perhaps trial judges were willing and able to sort the wheat from the chaff in discerning whether a bad faith suit was filed simply as a tactic to avoid impending fee arbitration, *Janopaul* provides a bright-line rule in holding that the "threshold questions of duty to defend, breach and bad faith" must be determined by a trial court before Section 2860(c) arbitration because "a determination of one or more of those issues in favor of the insured *may* eliminate altogether the need for arbitration."

After reading *Janopaul*, and in keeping with the trend in this area of law, insurers may be waiting for a Newtonian reaction by the state Supreme Court or the Legislature. For the time being, however, this case should serve as a reminder that companies with the possibility of insurance coverage should tender their claims early and realize that they are entitled to a response in a timely manner. An untimely response by the insurance company may have serious consequences.

[Previous](#)      [Next](#)

## Government

### Urban redevelopment: Ding, dong the witch is dead

Why California is better off without redevelopment agencies. By **Gideon Kanner** of Loyola Law School

### Up in smoke: the fall of the electric car

The perfect plan for U.S. automakers to make their comeback goes up in smoke. By **Jonathan Michaels** of Michaels Law Group

## Constitutional Law

### Were state officials wrong not to defend Prop. 8?

The refusal of state officials to defend Proposition 8 undermines the democratic process. By **Lawrence Waddington**

## Labor/Employment

### Hospital settles immigration verification suit

UC San Diego Medical Center reached an agreement to settle allegations that it discriminated against immigrant employees, the Justice Department announced Wednesday.

## Government

### Legal challenge expected to Obama's NLRB picks

President Barack Obama's three recess appointments to the National Labor Relations Board are likely to stick, at least until an employer with standing challenges the nominations in federal court.

## Labor/Employment

### Brief: Brinker ruling should apply to past, future cases

The state Supreme Court's decision in an important meal-and-rest break case should be both retrospective and prospective, lawyers for restaurant workers told the court Tuesday in a briefing.

## Government

### Hacker group crashes police union's website

A subset of the hacker collective known as Anonymous has struck again, this time targeting California law enforcement members.

### Report slamming rail project could aid litigation

An advisory panel's report this week strongly criticizing California's \$98.5 billion bullet train proposal could significantly boost litigation seeking to overturn the project, a plaintiff's attorney said.

## Judicial Profile

### Tamara L. Mosbarger

Superior Court Judge Butte County (Oroville)

## Corporate Counsel

### Bernard E. Schneider

General counsel for Anaheim Ducks Hockey Club LLC and Anaheim Arena Management LLC  
Corona Del Mar

## Law Practice

### Lawyer nabs arson suspect