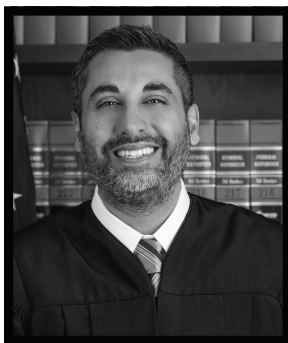


Q&A with the Hon. Jay C. Gandhi

By Caitlin S. Peters



[Editorial Note: Before his appointment to the United States District Court for the Central District of California as a Magistrate Judge in 2010, Judge Gandhi was a litigation partner at Paul Hastings LLP. There, he specialized in complex business litigation and class actions, and represented both plaintiffs and defendants in a variety of state and federal jurisdictions. Judge Gandhi's accolades include, most recently, the 2015 Benjamin

Aranda III Judge of the Year Award and the 2014 Judicial Excellence and Public Service Award. Judge Gandhi currently serves as a vice-chair of the Court's ADR committee, sits on the board of directors of the Federal Bar Association, and is a member of the judicial advisory board of the Constitutional Rights Foundation. Judge Gandhi graduated Order of the Coif from the University of Southern California Law School and clerked for United States District Judge Kenneth M. Hoyt.]

Q: You are a strong supporter of, and frequent participant in, alternative dispute resolution. What sug-

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The Road to the Gavel: What to Expect When Applying for a Judicial Appointment or Nomination

By Kimberly A. Knill

Orange County's State Court bench boasts a long list of ABTL members, including many of the county's most recent judicial appointees. For those hoping to one day follow in their footsteps, this article addresses the appointment/nomination process in California. It also shares the experiences of several recent Governor Brown appointees to the Orange County Superior Court, and of the most recent appointee to the Fourth District Court of Appeal, Division Three in Orange County.



California's court system is the largest in the nation and serves a population of more than 38 million people – about 12 percent of the total U.S. population. The State's judiciary consists of 2,171 authorized judge positions in the superior courts of California's 58 counties, 105 authorized justice positions in the six courts of appeal, and seven Supreme Court justices. In Orange County, the Legislature has approved 124 judicial offices in the superior court and eight judicial offices in the Fourth District Court of Appeal, Division Three.

Superior court judges in California are appointed by the governor. Court of appeal and Supreme Court justices are nominated by the governor and must be confirmed by the Commission on Judicial Appointments before the appointment becomes effective. Under some circumstances, judges may also be elected by the public. Once appointed, a judge is required to compete in the next general election cycle on a nonpartisan ballot in order to retain his or her seat on the bench.

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The President's Message

By Scott B. Garner



I am pleased and honored to serve as this year's President of the Orange County chapter of the ABTL. With 2016 already underway, some introductions are in order, as well as a preview of what's ahead for us.

I am fortunate to follow in the footsteps of some great leaders, including our immediate past president, Michele Johnson. Michele balanced her hefty responsibilities as a securities litigation partner at Latham & Watkins and a member of the firm's executive committee with the task of heading up our chapter throughout 2015. We will continue to receive Michele's helpful input as she serves the role of immediate past president.

This year's executive committee consists of Vice President Mark Finkelstein, an intellectual property litigation partner at Jones Day; Treasurer Dan Sasse, an antitrust partner at Crowell & Moring; and Secretary Karla Kraft, a litigation partner at Stradling Yocca. Karla is the newest member of the executive committee, having just completed a one-year term as Dinner Program Chair, where she spearheaded our wonderful dinner programs in 2015.

The ABTL Board is an active and enthusiastic one consisting of lawyers and judges with a deep commitment to our mission. We are pleased that the Hon. Kathleen O'Leary, presiding justice of the Fourth District, Division Three Court of Appeal is rejoining our Board after having served on our Judicial Advisory Board, and having spearheaded many of ABTL's efforts over the years. Along with Justice O'Leary, we welcome to our Board new members Wayne Call of Call & Jensen, Lisa Sharrock Glasser of Irell & Manella, Ken Parker of Haynes and Boone, and Carol Sherman Zaist of Newmeyer & Dillion. We also welcome Hon. William Claster to our Judicial Advisory Board.

Although not a new Board member, I also want to acknowledge Todd Friedland of Stephens Friedland. We are honored to have Todd on our Board while at the same time serving as this year's Orange

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The Ever-Expanding Categories of Employee and Employer: Changing the Way Independent Contractor and Joint Employer Issues Will Be Litigated

By Peter Hering



"Is the worker we classified as an independent contractor really an employee?"

"Are we liable as a joint employer when using a third-party vendor to outsource some of our business functions?"

The issues of independent contractor misclassification and joint employer liability have been making national headlines, impacting high profile companies as well as small companies, and drawing the interest of federal and state regulators. While these issues are not new, and in fact are quite old, this last year has seen the acceleration of a trend to expand the employee and employer categories. In this rapidly evolving environment, is it inevitable that the answer to the two questions posed above will soon always be "yes"?

This article will outline the expansion of employee and employer categories, discuss how the expansion of these two categories will impact the way these issues may be litigated in the future, and ask whether expanding these categories makes sense in light of 21st century economic realities.

Expanding The Employee Category - Is Everyone An Employee Now?

For almost two centuries, courts have used variations of the "control" test to determine whether an individual is an employee or an independent contractor. See e.g., *Boswell v. Laird*, 8 Cal. 469 (1857) (discussing the "control" test in the context of third-party tort liability); *Ayala v. Antelope Valley Newspapers, Inc.*, 59 Cal. 4th 522, 533 (2014) (asking whether a business has the "right to control" the details of the individual's work, even if not exercised). However, over the last few years, courts and regulators have broadened these tests in ways geared towards finding that almost every worker is considered an employee.

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Federal Courts Battle Over Whether a "Breach" of a Cooperation Clause Supports a Cause of Action for Breach of Contract

By Jeff Hayes



A boilerplate term that is included in all standard form liability insurance policies—the cooperation clause—is causing disagreements among California federal courts. Despite the cooperation clause's ubiquity, courts have not yet reached a consensus on the scope of its application. Some courts hold that an insured's failure to cooperate may be invoked only as an affirmative defense to coverage. Others hold that an insured's failure to cooperate may form the basis of a cause of action for breach of contract. As this issue winds its way through the courts, the risks are high for policyholders. Allowing insurers to sue their policyholders for "breach" of the cooperation clause would upset the delicate relationship California law creates between the parties to an insurance policy.

The cooperation clause is tucked away in the back of the policy with the boilerplate, but it serves an important purpose. Because most liability policies impose on the insurer a duty to defend the policyholder against any potentially covered claims, the insurer needs some mechanism to ensure the policyholder will assist, or cooperate, with the defense. The cooperation clause serves this function. The cooperation clause requires a policyholder to "cooperate" with its insurer "in the investigation or settlement of the claim or defense" of a lawsuit. It exists to ensure policyholders "give a fair and frank disclosure of information reasonably demanded by the insurer" so that the insurer can mount an adequate defense. *Vallado v. Fireman's Fund Indem. Co.*, 13 Cal. 2d 322, 329 (1939). "Without such cooperation and assistance" the insurer would be "severely handicapped" and might "in some instances be absolutely precluded from advancing any defense." *Id.* at 329-30.

As correctly conceived, the cooperation clause is a *condition* to an insurer's obligation to defend and indemnify its policyholder. It is not an *affirmative obligation* by the policyholder towards the insurer. Couch on Insurance 3d § 199:6 (1999). This distinction mat-

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The Young Lawyers Division Report

By Adrienne E. Marshack

The 2016 Young Lawyers Division is off to a great start. The year's first Brown Bag Lunch was held on March 3, 2016, and included an engaging panel of four Orange County Superior Court Judges who were recently assigned to the Civil Panel: the Honorable Martha Gooding, James Crandall, Walter Schwarm, and Nathan Scott. Judge Gail Andler graciously hosted the lunch in her courtroom, which was well-attended. Attendees received incredible insight from these Judges who came to the bench with extremely different backgrounds and experiences. We thank Judges Gooding, Crandall, Schwarm, and Scott for participating and Judge Andler for hosting.



There are several upcoming YLD events to look forward to in the next several months. Some dates have been confirmed and other events are confirmed but yet to be scheduled, so members should look for emails and announcements about them. Upcoming events this year include:

April 21—Brown Bag Lunch with United States Magistrate Judge Jay Gandhi.

May 10—Whiskey tasting (“Whiskey Across America”) at Bosscat Kitchen & Libations in Newport Beach, sponsored by Network Deposition Services.

May-July —Judge Gail Andler of the Orange County Superior Court has agreed to participate in what will be her final Brown Bag Lunch before she retires.

In addition, Justice David Thompson of the California Court of Appeal, 4th District, Division 3, will be hosting a Brown Bag Lunch on a date when the Court of Appeal is hearing oral argument. Details to follow, but participants will be invited to arrive early or stay after the lunch to hear argument before the Court.

Later this year, ABTL will also be hosting an MCLE on the fundamentals of appellate practice in California and the Ninth Circuit. The MCLE will be

held at the Orange County office of Manatt, Phelps & Phillips, LLP, and the presenter will be Benjamin Shatz, a partner at Manatt, Co-Chair of the firm's Appellate Practice Group, and Certified Appellate Specialist. This will be a great opportunity to learn appellate procedure and substantive appellate practice tips from an experienced and engaging appellate practitioner.

We hope to make 2016 one of the most fun and informative yet for YLD members, and the calendar is shaping up nicely so far. We hope to see you at our YLD events!

♦ *Adrienne E. Marshack is a partner at Manatt, Phelps & Phillips and the chair of the YLD.*

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gestions do you have for advocates who appear before you in mediation?

A: Preparation is key. A settlement conference with me mirrors a traditional, comprehensive mediation, which includes – along with a fierce commitment to neutrality – pre-mediation discussions, merit-based evaluation, and tenacious follow-up. So if throughout that process, you understand your client's interests and priorities and appreciate your case's strengths and weaknesses, you can both negotiate more effectively at the bargaining table and make your client feel confident that he, she, or it is well-situated to secure the best available settlement.

Q: Parties often posture or believe that their opponents are “too unreasonable,” or the parties are “too far apart,” to mediate. When is the right time to come to the table?

A: I'm an eternal optimist and, given any lawsuit's innate uncertainty and notable expenses, both economic and non-economic, the time is *always* ripe to at least explore settlement. In nearly every case I mediate, the parties begin the proceeding sitting at polar opposites, but end the long, tiring day – or days – shaking hands in agreement. Why? Because the ending isn't about the beginning, it's about the process: a process of promoting dialogue, solving problems, and building momentum towards a resolution.

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Q: Besides mediation, what other work at the Court are you passionate about?

A: Trials. The Central District's voluntary consent list and direct assignment program allow parties in civil matters to agree to have their cases tried before Magistrate Judges. You've probably heard the familiar refrain that the wheels of justice grind slowly. But by "consenting," parties have the opportunity to have their cases heard sooner and on a firm schedule. And in turn, I have the opportunity to use my background in civil litigation to fairly and effectively manage their trials.

Q: Some commentators have bemoaned "the vanishing jury trial." Are trials declining, and if so, should we be alarmed by this trend?

A: Personally, my trial calendar feels as busy as ever. But I've heard a number of people make that observation and voice those concerns. On the negative side, even seasoned lawyers have less courtroom time today, so that skill set can suffer. But I see both sides of the coin. The sheer expense, time, and unpredictability of a trial, particularly a complicated or "high stakes" one, are not attractive features to most people. Accordingly, and understandably, many parties elect to resolve their differences via other mechanisms.

Q: Some highly anticipated changes to the Federal Rules of Civil Procedure went into place late last year. How have they affected your court's proceedings?

A: Primarily, the amended rules have underscored the importance of proportionality, especially as it relates to the growing volume, and the attendant cost, of discovery. Judges are being asked to act as deliberative gatekeepers: to be inquisitive and thoughtful of precisely what productions may be warranted under a cost-benefit calculus that accounts for the needs and importance of the case. Only time will tell if the amended rules will accomplish their intended purposes, but in the courtroom their effects are being felt already.

Q: Have you noticed any changes in the practice of law since you were at Paul Hastings, and if so, how do you address them now that you are on the bench?

A: The legal landscape has shifted in a number of ways. For example, many of my friends – whether plaintiff or defense, private or public, in big law or boutique firms – feel enormous pressure to practice

law as *efficiently* as possible. Being a lawyer, and especially a trial lawyer, is difficult and hard work nowadays, and I remain mindful of that fact.

Q: Your resume is filled with participation in committees, boards, and associations. Why is it important to you – and why should it be important to attorneys – to be involved in these "extracurriculars"?

A: Plainly put, the bench relies on the bar, and the bar relies on the bench. These kinds of activities allow judges and attorneys to get to know each other and to build communities. Those ties make individual practices, and our profession as a whole, more rewarding and fulfilling.

The ABTL thanks Judge Gandhi for his time.

♦Caitlin S. Peters is a litigation associate at Gibson, Dunn & Crutcher LLP.

-Road to the Gavel: Continued from page 1-

The first step in the judicial appointment process is to complete and submit an application. Judicial applications can be found on the governor's website (www.gov.ca.gov) and differ slightly depending on the court where appointment is sought. The application is intended to attract applicants from throughout the legal system and to result in a judiciary that is diverse in experience, gender, ethnic background, and geography. Those who have reviewed the application know it can appear daunting, and completing it will be a time-consuming task. Having a mentor judge who has successfully navigated the process can be invaluable. Starting a judicial application might be likened to reviewing jury instructions before filing a complaint – it provides a road map and sets forth the necessary elements for a successful outcome. Knowing the information the governor requests and finds important will assist the applicant in preparing for the task of submitting a comprehensive application.

A lawyer must practice law in California for 10 years before applying for the bench. Having passed the bar examination, most candidates will likely be presumptively qualified to know the law. What, then, are the qualities that set apart one applicant from the next? Most judges and lawyers agree impeccable judicial temperament is a paramount quality of a great judge. The application should therefore demonstrate the candidate's patience, appropriate demeanor, ability

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to maintain decorum in difficult circumstances, and similar attributes indicative of fitness to manage a heavy courtroom calendar with ease and finesse. The applicant should also describe life experiences that demonstrate good judgment and temperament and should spotlight these experiences in the application.

The judicial application requires the candidate's personal reflection on past legal and nonlegal experiences, education, training, practice areas, community service and involvement, teaching and writing history, bar association involvement, family life, hardships, leadership roles, and similar life experiences. The application requires the candidate to provide thoughtful insight on why he or she wants to become a judge, what the candidate has done to contribute to society, what role judges and attorneys serve in society, and similar-themed topics. It requires detailed explanations about past cases, including case names and numbers, names of opposing counsel, and the judge who presided over matters handled by the applicant. The candidate will also be asked to provide a writing sample.

After submission of a judicial application, the governor decides whether or not to send the candidate to the State Bar Judicial Nominees and Evaluation (JNE) Commission for vetting, and the governor cannot appoint until JNE has completed its evaluation. A candidate sent to JNE ordinarily will be required to undergo vetting by local bar associations as well. The multiple layers of vetting are designed to provide the governor with as much information as possible before making a decision on who should be a judicial officer.

The JNE Commission operates under the authority of Government Code Section 12011.5 and the JNE Rules, which can be found on the State Bar website (calbar.ca.gov). The Commission consists of up to 38 members, mostly attorneys and retired judges, but also non-attorney public members. The Commission convenes for a two-day meeting six times each year to evaluate candidates at the governor's request. The Commission conforms to strict rules of confidentiality to ensure its investigations of judicial candidates are undertaken with integrity, to encourage the free flow of information, and to promote the gathering of facts and opinions from members of the bench and bar without fear of recrimination by those who submit feedback.

When the governor submits a judicial candidate to JNE for vetting, JNE assigns two to four commissioners to each candidate investigation. In the lead commissioner's first contact with the candidate, the commissioner asks the candidate to provide a list of all persons referenced in the judicial application and another list of up to 75 personal references. Over the next 60 days, the investigating commissioners solicit input and feedback from members of the bench and bar familiar with the candidate's legal work and reputation through use of a Confidential Comment Form (CCF), usually sent through email. In addition to sending CCFs to those on the candidate's two lists, the commissioners send CCFs to randomly selected members of the bar and to members of the bench in the county in which the candidate is applying.

During the course of the investigation, the commissioners follow up on comments they receive and make other inquiries to arrive at a recommended rating. The Commission evaluates numerous qualities during this process, including impartiality, freedom from bias, industry, integrity, honesty, legal experience broadly, professional skills, intellectual capacity, judgment, community respect, commitment to equal justice, judicial temperament, communication skills, and job-related health. In addition, superior court candidates are expected to have the qualities of decisiveness, oral communication skills, and patience. Court of appeal candidates are expected to have the qualities of collegiality, writing ability, and scholarship, while Supreme Court candidates are expected to have the qualities of collegiality, writing ability, scholarship, distinction in the profession, and breadth and depth of experience.

The candidate's final step in the JNE investigative process is to interview with the investigating commissioners. No later than four days before the interview, the commissioners must disclose to the candidate as specifically as possible without breaching confidentiality, any substantial, credible, and corroborated adverse allegations – sometimes referred to as “negatives” – related to temperament, industry, integrity, ability, experience, health, physical or mental condition, or moral turpitude that would be determinative of unsuitability for judicial office unless rebutted. The candidate is given ample time to address any concerns at the interview.

At the full Commission meeting, each candidate is discussed, and the Commission assigns one of the

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following ratings: Exceptionally Well Qualified, Well Qualified, Qualified, or Not Qualified. At the conclusion of the investigation, the Commission's findings and rating are memorialized in a confidential report to the governor. Only a candidate rated Not Qualified is permitted to request a reconsideration of the JNE rating.

Senior members of the bench who are familiar with the judicial selection process offer the following advice. The governor is looking for candidates who will perform the judicial function with distinction. But the applicant should also be prepared to demonstrate in the application and interviews that, beyond his or her legal acumen and judicial temperament, the applicant has worked to make this a better world. For example, has the applicant served as a temporary judge? Has the applicant performed pro bono work? What has the applicant overcome in life? Does the applicant have a compelling or incredible story that has taught life lessons that give the applicant an appreciation for those less fortunate who will be appearing before him or her?

The most common mistake that can derail an applicant's chances for appointment is the failure to disclose a lawsuit, judgment, lien, arrest, or other negative event that the applicant hoped would never be discovered. Such failure to disclose magnifies the significance of the underlying event and generally weighs heavily against the applicant successfully emerging from the JNE investigation and evaluation. If the JNE investigative process uncovers undisclosed negative matters that the candidate clearly should have disclosed in response to the specifics of a question in the application, it can be a deal breaker. Consequently, candidates should err on the side of overinclusion in the judicial application.

After the JNE report reaches the governor's office, the JNE Commission has no further input or involvement with the candidate. The governor's decision to interview, appoint or nominate is made at the governor's discretion and on the governor's timetable, up to 11:59 p.m. on the last day of the governor's term in office.

Below, several recent appointees to the Orange County courts reflect on their experiences with the judicial selection process.

Judge Martha K. Gooding, former partner at Jones Day, currently assigned to an unlimited civil courtroom:

Q: What advice do you have for aspiring judicial applicants?

A: Even if you do not anticipate applying for several years, take a look now at the judicial application and begin to compile and keep a record of the information that you will need to complete it. Once you set about completing the application, take no shortcuts: invest time and care in it to ensure it accurately provides all the information requested and does so clearly and compellingly. Remember: a lot of eyes will see this application. Make it perfect.

Q: What was one of your valuable take-aways?

A: One of my take-aways from the judicial application and JNE process was how painstakingly thorough the vetting process is, beginning with the extremely detailed application and continuing through multiple evaluations and interviews by the governor's office, the local bar association judicial committee and, of course, the JNE Commission. That scrutiny is critical to the process and is a very positive thing. Everyone with a stake in the outcome of the judicial selection process – including the bar, litigants who appear in our courts, and existing bench officers who will be a new judge's colleagues – shares the goal of ensuring that we have the strongest bench possible. The best way to achieve that goal is for a diligent and thorough selection process. I advise aspiring judicial officers not to dread the scrutiny of the process, including the "panel interviews" (I believe my interview with the Orange County Bar Association Judicial Committee was conducted by at least 15 interviewers). View all of it as an opportunity to make your case. The interviews, in particular, are your chance to demonstrate, in a way that may not be as vividly conveyed in black and white on your application, that you have the demeanor and other attributes necessary for a judicial officer and why you would be an excellent addition to the bench. Make the most of those opportunities.

Judge Thomas A. Delaney, former partner at Sedgwick LLP, currently assigned to an open trial criminal courtroom:

Q: What advice do you have for aspiring judicial

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applicants?

A: Make sure you can articulate both a firm understanding of what the job of superior court judge entails and how you are qualified to fulfill that role. It may sound simple but your explanation must be accurate, authentic, and meaningful if you are going to gain support for your application. Ultimately it is the quality of your reputation and the strength of your supporters that will help you achieve your goal.

Q: What was the most enjoyable part of the process?

A: The most enjoyable part of the judicial appointment process for me was having the opportunity to speak with a variety of people inside and outside the legal profession about why I wanted to be a judge and how I felt strongly that the skills I developed over the years as a zealous advocate and trial attorney would make me an effective superior court judge.

Judge Julie A. Palafox, formerly in private practice, currently assigned to a family law courtroom:

Q: What advice would you give to someone wanting to become a judge?

A: Go to as many courts as you can and sit and watch and listen. Especially go to a court outside your chosen specialty field, because chances are if you receive an appointment, you will be sent to a court in an area of law where you have limited to no past experience. The judiciary has valuable educational programs and tools available to a new judge, but it still requires substantial self-study. For months I felt like I was studying for the bar exam once again. Fortunately, I like to learn so it's been enjoyable.

Q: How has being a judge changed your life?

A: Everything about my life has changed, so be ready. Suddenly people I don't know, know me. Suddenly everyone wants to talk to me or invite me to speak. There are Judicial Canons to navigate. That said, I think the biggest change for me is going from being an advocate to a neutral. I can't even represent myself for a parking ticket I think was unwarranted.

Judge Nathan R. Scott, former senior research attorney with the Court of Appeal, Fourth Appellate District, Division Three, currently assigned to an unlimited civil courtroom:

Q: What advice do you have for aspiring judicial applicants?

A: Start preparing now. Preparation is necessary if you are going to submit a complete application that errs on the side of disclosure. Try filling out the current application, even if you won't apply for years. Do you have all the names, dates, and details at your fingertips? If not, start gathering documents that will help you answer the questions thoroughly. Preparing now will also help you identify opportunities to fill gaps in your experience and assess whether you need to expand your network.

Q: What did you do to prepare for the JNE interview?

A: I prepared by reviewing my application repeatedly, thinking through possible questions on virtually every item on the application, and talking to people who had been through the process. Support and guidance from others was the key. Having two kind JNE commissioners made for a pleasant, if thorough, 90-minute interview. But what made me truly comfortable was having been prepared so well by so many. It takes a village.

Q: What did you dread, and was it as bad as you thought?

A: I was warned about being presented with "negatives," and was apprehensive about what might be dredged up. But nothing came out of the blue. I knew what the obvious holes were in my experience. And others had advised me to address them in forthright, productive, non-defensive ways. So the "negatives" portion of the interview was very matter-of-fact. The interview ended on a high note when my commissioners shared some of the extremely gracious comments they had received about me.

Judge Mary Kreber Varipapa, former attorney in the Orange County Public Defender's Office, currently assigned to an open trial criminal courtroom:

Q: What do you wish you had known at the time you applied?

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A: I did not realize there would be so much time between the JNE interview and any possible interview with the governor's office. It seemed like I was riding a wave of excitement getting ready for the JNE interview, and then there was silence. The JNE interview was very professional. Most of the questions focused on the answers in my application, and my JNE commissioners knew my application backwards and forwards. They were outstanding. I applied for judicial appointment twice, and I interviewed both times. It was good for me, because I did a lot during those years. If I were to do it again, I would just wait until I was actually ready. I learned more about myself during this process than I anticipated, and it was good for me to go through the vetting. The vetting process can feel very personal, because I was asking people to be critical of me, and it made me feel vulnerable, so my advice is to be ready.

Judge Nancy E. Zeltzer, former partner at Lewis Brisbois Bisgaard and Smith, currently assigned to a misdemeanor arraignments courtroom:

Q: What did you do to prepare for the JNE interview?

A: I went through my essay questions in the application and gave them a lot of thought, including why I wanted to be a judge. I would advise to answer from your heart and try to explain why being a judge is the next step for you and what value you have to impart if you become a judge. I considered how I would handle questions about areas of law where I had no experience. I thought about trends in the law and wanted to display my thinking process to the interviewers. I spoke with other judges about their experiences and asked for suggestions about what was productive. My most important advice – be yourself.

Q: How has being a judge changed your life?

A: I was a civil defense trial attorney with a very stressful private practice and billable hour demands. In my assignment now, I don't have outside pressures, and I may have added a couple years to my life! The work is fascinating, and I now have a new set of colleagues. I am learning new areas of the law, and having a criminal assignment allows me to feel more in touch with matters that impact people's lives. I feel I am part of something that is making a difference.

Judge Melissa R. McCormick, former partner at Irell & Manella LLP, currently assigned to an open panel trial courtroom:

Q: What advice do you have for aspiring judicial applicants?

A: As someone told me when I was considering applying to the bench, "if you don't apply, you can't be appointed," so my advice would be to go for it and submit your application.

Q: What did you do to prepare for the JNE interview?

A: I reviewed my application and I also tried to think of questions I might ask an applicant with my type of legal background. Throughout the process, I also kept current about major issues in the California courts and, in particular, about significant legal issues affecting my areas of practice.

Q: How has being a judge changed your life?

A: When I became a judge, my role changed from advocate to neutral decision maker. It was ingrained in me as a lawyer to be an advocate, and I needed to put that training and perspective aside. Judges also need to, whenever possible, positively influence the experience litigants, lawyers, jurors, and other individuals have in the courtroom, which means being mindful each day that a judicial officer represents the entire court system.

Justice David A. Thompson, former Orange County Superior Court Judge, currently an associate justice of the Fourth Appellate District, Division Three:

Q: What advice do you have for aspiring judicial applicants?

A: Be the best lawyer you can possibly be in whatever you are currently doing. Be mindful of ethics, civility, and professionalism. Demeanor, character, and reputation are just as important as practice experience. Also, find ways to be involved and give back to the legal community and to the community as a whole.

Q: What did you do to prepare for the JNE interview?

A: I went through the JNE process twice – first be-

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-Road to the Gavel: Continued from page 9-

fore appointment to the trial court and again after nomination to the appellate court. The second time no substantial, credible, and corroborated adverse allegations surfaced during the investigation, so I did not have to prepare any responses. I simply reviewed my application in detail. During the interview, the commissioners went through my application, and gave me the opportunity to elaborate on aspects of my experience. The interview was the most enjoyable part of the process. I was assigned two wonderful commissioners and was able to relax. It is important to get a good night's sleep before the interview and to leave early to avoid traffic delays.

Q: How has being a judge changed your life?

A: I came from a big firm background, with all its client-focused time demands. As a judge, I have achieved a better work-life balance. I realized after being appointed that I did not have many outside interests while practicing law, and now I have more time to spend on family and community activities.

Q: Any final thoughts?

A: I'd like to commend the ABTL for all that you do. It is a great organization that provides excellent education programs and positive opportunities for our legal community, including facilitating communication between the bench and bar. We in the Orange County legal community enjoy excellent bench-bar relations, and the ABTL has been a big part of that.

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County Bar Association President in his spare time. Hopefully his partner John Stephens will be putting in overtime to pay the bills while Todd devotes himself to a year of service.

We expect 2016 to be another busy and successful year. As in past years, the highlight of 2016 will

be our dinner programs. Our Dinner Program Chair for 2016 is Maria Stearns of Rutan & Tucker. Maria already has some great ideas and is working hard to make them realities. Maria will have big shoes to fill, as Karla Kraft put on some great programs in 2015, as well as the first dinner program of 2016, which we held on January 26 at the Westin South Coast Plaza. The topic was "Cybersecurity and Data Breaches: a Civil and Criminal Overview," and we learned about phishing, whaling, ransomware, and a bunch of other scary stuff from our highly knowledgeable panelists – the Cyber Chief of the U.S. Attorneys' Office for the Central District of California, Tracy Wilkison; Baker Hostetler partner and privacy law expert, Tanya Forsheit; and moderator Wendy Wen Yun Chang, a partner at Hinshaw & Culbertson and an ethics expert. Our next dinner program is April 13, and will feature Hugh Hewitt discussing the 2016 presidential election.

Another highlight of any ABTL year is our Annual Seminar – and this year is a Hawaii year. That means we will be retreating to the Ritz-Carlton, Kapalua on Maui from October 5-9. If you haven't been to an annual seminar – and, in particular, one in Hawaii – I cannot recommend it enough. Not only are the programs excellent, but you can't beat the comradery (or the beaches). Matt Sonne of Shepherd Mullin and Tom Vincent of Payne & Fears will be serving on the Annual Seminar Planning Committee this year.

After serving several years as editor of the ABTL Report, Will O'Neill of Ross Wersching & Wolcott has assumed the important role of Membership Chair, and Justin Owens of Stradling Yocca takes over as the new editor of the ABTL Report. James Carter of Paul Hastings has agreed to serve as Public Service Chair, and he will be heading up our many charitable activities, including our annual holiday gift-giving push and our now traditional Habitat for Humanity days. Todd Lundell of Snell & Wilmer has agreed to serve as Sponsorship Chair. This is an incredibly important, if unsung, job, as ABTL could not put on the excellent programs we do without our generous sponsorships. In that regard, I'd like to thank our current 2016 sponsors, which include DTI (our January 27 wine sponsor) and Zamucen & Curren (our January 27 and April 13 dinner sponsor), as well as Judicate West (our April 13 wine sponsor). I hope all ABTL members take the time to thank DTI, Judicate West, and Zamucen & Curren, and all of our past and future sponsors, for their support.

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Rounding out our chair positions is Tom McConville of Orrick, Herrington & Sutcliffe, who is our inaugural Social Networking Chair. We have tasked Tom with no less a job than bringing us into the 21st century, or at least making us cool with our kids.

One thing I am quite proud of is the ABTL's support of our Young Lawyers Division, which is focused on putting on programs for our lawyers who have been practicing for ten years or less. The YLD puts on brown bag lunches with our judges, and hosts various social and educational events throughout the year. This year the YLD will be led by Adrienne Marshack of Manatt, Phelps & Phillips.

As all of my predecessors have noted before me, one of the hallmarks of our chapter has been the participation of our judges, as members of our Board of Governors or our Judicial Advisory Council, and as attendees at our many functions. Having been involved with the ABTL for a number of years now, including interacting with the chapter leaders around the State, there is no question that the judicial involvement in the Orange County chapter dwarfs that of other chapters. It is one of the many things that make our chapter special.

As for me, after 24 years spent at big firms – most recently Morgan, Lewis & Bockius – I recently joined the litigation boutique of Umberg Zipser. My new partner and long-time friend Dean Zipser is among the most supportive members of the Bar and, in particular, the ABTL (where he previously served as President); Adina Stowell has just completed two terms on our Board; and my other partners have been involved with ABTL-OC since its inception. Needless to say, they are firmly behind my efforts to lead the Orange County chapter this year.

I look forward to the year ahead and welcome your thoughts and suggestions.

♦*Scott B. Garner is a litigation partner at Umberg Zipser LLP.*

-Programs and Service: Continued from page 3-

Most recently, the U.S. Department of Labor (“DOL”) issued guidance on how it analyzes whether an individual is an employee or independent contractor under the Fair Labor Standards Act (“FLSA”). In its guidance, the DOL uses an “economic realities” test to broadly find that “most workers are employees under the FLSA.” Department of Labor, Wage and Hour Division, Administrative Interpretation No. 2015-1 (July 15, 2015), at 2 (“DOL 2015-1”). The DOL’s “economic realities” test asks six questions: (1) Is the work an integral part of the employer’s business?; (2) Does the worker’s managerial skill affect the worker’s opportunity for profit or loss?; (3) How does the worker’s relative investment compare to the employer’s investment?; (4) Does the work performed require special skill and initiative?; (5) Is the relationship between the worker and the employer permanent or indefinite?; and (6) What is the nature and degree of the employer’s control? *Id.* at 6-14. The underlying inquiry for all these questions is “whether the worker is economically dependent on the employer (and thus its employee) or is really in business for him or herself (and thus its independent contractor).” *Id.* at 2. Although control remains one factor in the analysis, the DOL’s guidance implies that control has little relevance. *Id.* at 13-14.

In California, the same trend has been underway. Although California courts have not yet incorporated the federal “economic realities” test into the independent contractor analysis, the trend is to expand the employee category. In *Dynamex Operations West, Inc. v. Superior Court*, 230 Cal. App. 4th 718 (2014), which is currently under review by the California Supreme Court, the appellate court applied the *Martinez* test (discussed below) to an independent contractor misclassification claim rather than the common law “right to control” test. Additionally, both the California Division of Labor Standards Enforcement (“DLSE”) and the California Employment Development Department (“EDD”), although claiming to apply the “right to control” test, have in practice moved towards an “economic realities” test. *See, e.g.*, Division of Labor Standards Enforcement, 2002 Update of the DLSE Enforcement Policies and Interpretation Manual 28.3 (revised January 14, 2014).

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Expanding The Employer Category—Joint
Employer Liability is Reaching
Much Further These Days

Similar to the expansion of the employee category, legislators, courts, and regulators have greatly expanded the employer category under various joint employer tests, even as the traditional “control” test has fallen in significant disrepute.

On January 20, 2016, the DOL issued new guidance on joint employer liability under the FLSA. Department of Labor, Wage and Hour Division, Administrative Interpretation No. 2016-1 (January 20, 2016). Just as the DOL broadly defines the employment relationship, it also broadly defines *joint* employment relationship. *Id.* at 4.

Per the DOL’s guidance, joint employment can exist “horizontally” and “vertically.” First, if an individual has a recognized employment relationship with two different employers who share economic ties or common management, both employers will be held liable as “horizontal joint employers.” Second, if an individual is employed by an intermediary employer but is also economically dependent on another company, the DOL considers both companies to be “vertical joint employers.” *Id.* at 5. The focus in finding a horizontal joint employer relationship is on the relationship between the two employers (*e.g.*, a waiter working for two separate restaurants operated by the same entity). *Id.* at 7. In contrast, the focus in finding a vertical joint employer relationship is on whether the employee of the intermediary employer is economically dependent on the potential joint employer under an “economic realities” test. *Id.* at 10-11. While the DOL did not identify what specific factors it would look at under its “economic realities” test, it expressly rejected control as an important factor and emphasized that the “ultimate inquiry” is economic dependence. *Id.* at 13.

Likewise, the National Labor Relations Board (“NLRB”) recently rejected its previous standard that a business had to have “direct and immediate” control over the terms and conditions of employment to be considered a joint employer. *Browning-Ferris Industries of California Inc.*, 362 NLRB No. 186, at *15-16. Instead, the NLRB now only requires the business to have the “right to control” the terms of conditions of employment, whether exercised or not. *Id.* at *16.

In California, this broadening of the employer category is most evident in the progeny of *Martinez v. Combs*, 49 Cal. 4th 35 (2010), where the California Supreme Court held that for claims under California’s wage orders a company could be held liable as a joint employer if the business (1) exercised control over the individual’s hours, wages, or working conditions; (2) suffered or permitted the employee to work; or (3) engaged the individual in a common law employment relationship (*i.e.*, the “right to control” test). *Id.* at 64. Thus, under the *Martinez* test, establishing “right to control” is only one of three ways to find joint employer liability. In 2014, the California legislature went even further when it added Section 2810.3 to the Labor Code, which created statutory joint employer liability for wages and workers’ compensation for businesses using workers through staffing agencies.

A Shift In Focus Changes The Way Independent
Contractor and Joint
Employer Issues Will Be Litigated.

The recent expansions of the employee and employer categories will have an impact on how independent contractor and joint employer issues will be litigated.

The shift from the “control” test to the “economic realities” test, whether in the independent contractor or joint employer context, brings with it a shift in focus on the primary issue to be litigated. Under the control test, the primary focus is on the business. How much control did the business exercise over the individual? How much control did the alleged joint employer have over certain aspects of the employment relationship? Similarly, under the “right to control” test applied by California courts, litigants have focused on the amount of control a company reserved for itself, even if it did not actually exercise it.

In contrast, under the “economic realities” test, the primary focus is on the individual. How economically dependent is the individual on the business or the alleged joint employer? How important is the individual to what the business does? How enduring is the relationship between the individual and the business? While the employer’s control is still a part of the analysis, this aspect has been relegated to the backseat.

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For Plaintiffs: A New Look At FLSA Collective Actions? FLSA collective actions have historically been a disfavored litigation tool in California because they require potential class members to opt-in rather than opt-out, which makes them less attractive than class actions under California law. But the expanded categories under the DOL's guidance may cause plaintiffs' attorneys in California to take a fresh look at litigating independent contractor or joint employer issues under the potentially more malleable FLSA test rather than California's "right to control" test. Similarly, plaintiffs' attorneys might seek to litigate joint employer issues under the "economic realities" analysis.

For Defendants: A License To Pry Into Plaintiffs' Outside Activities? The focus on the economic realities of the individual's relationship with the business may support broader discovery into the individual's activities beyond the job. Such discovery would go beyond the obvious areas of inquiry, such as the individual's other employment activities and other sources of income, and could potentially include discovery into the individual's personal life situation. For example, the "economic reality" of a full-time student earning money on the side is arguably different from that of a single parent trying to support a family.

Immediate Impact On
California Businesses?

Although California's wage and hour laws are often considered more onerous than federal law, it would be a mistake for attorneys representing California businesses to dismiss DOL's guidance on these issues. First, as discussed above, some California agencies, including the EDD, have already adopted a de facto "economic realities" test in determining whether an individual is an employee or an independent contractor. Second, California's legislature has already signaled a willingness to impose statutory joint employer liability in certain situations. Third, it may be only a matter of time before California adopts a version of the "economic realities" test, especially after the DOL based its test on a definition of "employ" also found in California's Wage Orders.

Finally, even aside from the changes in how these issues may be litigated in the future, employers in California must also be mindful of the dangers that come with more active enforcement stances by the DOL. With its new guidance on these issues, the

DOL has announced that it will more aggressively investigate the proper classification of individuals and seek to hold companies liable for any wage and hour violations. *See* DOL 2015-1, at 1. Following step, the California legislature recently equipped the Labor Commissioner with additional enforcement tools to hold companies and individuals liable for wage and hour violations.

Expanded Employee And Employer
Categories – Defying 21st Century
Economic Realities?

The trend to expand the categories of employee and employer will likely continue in the years to come, especially in California, given the apparent interest of regulatory agencies such as the DOL, the NLRB, and the DLSE in expanding their spheres of influence. Nonetheless, it is worth asking whether expanding these categories actually defies 21st century economic realities. This century is one of a vibrant sharing economy that has brought innovation and increased outsourcing of various business functions to take advantage of the expertise of others. Are regulators foreclosing future innovation and employment opportunities by expanding these categories to become all-encompassing? Further, aren't these changes depriving individuals of the choices that the sharing economy and outsourcing economy have brought? Policymakers are likely to grapple with these questions for years to come, and attorneys should assume that the categories of "employer" and "employee" will continue to evolve.

♦*Peter Hering practices in Rutan & Tucker's Employment and Labor Section, where he handles a variety of employment-related litigation and non-litigation matters.*

-Cooperation Clause: Continued from page 3-

ters. If the cooperation clause were an affirmative obligation by the insured, its breach would support a cause of action for breach of contract, which could allow an insurer to recover monetary damages from its policyholder. However, as a condition to coverage, the cooperation clause only requires the insured to cooperate if it desires to secure the benefits of the policy. If a policyholder fails to cooperate, and causes prejudice to the insurer, the insurer is released from its policy obligation to defend and indemnify. Simply

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put, the duty to cooperate gives the insurer a potential defense; it does not create a cause of action.

Reflecting on the nature of the bargain between an insurer and a policyholder illustrates why it makes sense that the policyholder's noncooperation should, at most, lead to a loss of policy benefits. The policyholder pays premiums to secure protection from the insurer in the event the policyholder has the misfortune of being sued. The insurer accepts the premiums, but is only required to perform if the policyholder meets certain conditions. If a policyholder fails to cooperate, the insurer may treat this as a failure of a condition to the insurer's obligation and decline to defend and indemnify the policyholder. In this sense, the insurer actually obtains a benefit when a policyholder does not cooperate because the insurer is freed from what would otherwise be a costly obligation. Allowing an insurer to sue for damages when a policyholder fails to cooperate represents a disproportionate remedy because, in a real sense, a policyholder's non-cooperation has already conferred a benefit on the insurer. A policyholder who does not cooperate with its insurer already forfeits its policy benefits, as well as the premiums it paid, so it should not *also* face a costly breach of contract claim.

Historically, California state courts have been careful to observe that the cooperation clause operates as a condition to an insurer's obligation to defend and indemnify its policyholder. *See, e.g., Brizuela v. Calfarm Ins. Co.*, 116 Cal. App. 4th 578, 590 (2004) (cooperation requirement "is a condition precedent to any claim" for coverage). In this vein, the California authority that addresses the cooperation clause consistently assumes that insurers will raise a policyholder's failure to cooperate as an affirmative defense, not as a cause of action for breach of contract. *See, e.g., Billington v. Interinsurance Exch. of S. Cal.*, 71 Cal. 2d 728, 736 (1969) (insurer's "answer disclaimed liability on the basis of [the policyholder's] refusal to comply with the cooperation clause."); *Campbell v. Allstate Ins. Co.*, 60 Cal. 2d 303, 305 (1963) ("An insurer may assert defenses based upon a breach by the insured of a condition of the policy such as a cooperation clause..."); *Hall v. Travelers Ins. Cos.*, 15 Cal. App. 3d 304, 308 (1971) (same).

Even though California case law views the cooperation clause through the analytical lens of a condition to coverage, many decisions use imprecise rhetoric when referring to a policyholder's lack of cooper-

ation. Specifically, court decisions often refer to a policyholder's non-cooperation as a "breach" of the cooperation clause. *See, e.g., Billington*, 71 Cal. 2d at 737 (finding "sufficient evidence to justify the trial court's finding that [the policyholder] had *breached the cooperation clause* of the policy") (emphasis added); *Campbell*, 60 Cal. 2d at 305 (finding the "evidence [wa]s clearly sufficient to support the finding of the trial court that [the policyholder] *breached the contract of insurance* by failing to cooperate . . .") (emphasis added); *Hall*, 15 Cal. App. 3d at 309 ("[T]he insured breached the cooperation clause in failing to cooperate. . ."). This imprecise language invites mischief. Insurers are, with increasing frequency, suing their policyholders in federal court for breach of contract based on a theory that the policyholder violated the cooperation clause.

To date, there is no California appellate authority that squarely rejects the notion that an insurer can state a claim for breach of contract based on a policyholder's non-cooperation. However, policyholders do have a powerful, but unpublished, legal authority on their side in arguing that these claims are not cognizable: *Insurance Co. of the State of Pennsylvania v. The Roman Catholic Archbishop of Los Angeles*, 227 F. App'x 643 (9th Cir. 2007). In this case, two insurers sued the Archbishop of Los Angeles for specific performance of his duty to cooperate under several liability insurance policies, hoping the court would force the Archbishop to turn over certain documents the insurers wanted to utilize in the defense of sexual abuse claims. *Id.* at 644. The district court tossed the claim for specific performance for failure to state a claim, but the insurers appealed. On appeal, the Ninth Circuit agreed with the Archbishop, holding that "the insured's duty to cooperate [was] a condition precedent to coverage [and] *not* . . . a basis on which to assert an independent cause of action." *Id.* (emphasis in original). As a consequence, the Ninth Circuit determined that the insurers could only "present their theories as to how the Archbishop breached his duty to cooperate as a defense to liability under the policies." *Id.*

Despite the Ninth Circuit's holding in *Archbishop of Los Angeles*, federal district courts are reaching different results when faced with motions to dismiss that raise the same question. Two decisions—both from the Eastern District of California—illustrate this divergence. In *Travelers Indemnity Co. of Connecticut v. Centex Homes*, 2014 WL 2801050 (E.D. Cal. June 19, 2014), an insurer sued its policyholder for breach-

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ing the cooperation clause by requesting independent counsel under California Civil Code Section 2860. In reliance on *Archbishop of Los Angeles*, the policyholder moved to dismiss, arguing that the insurer's allegation that an insured had "breached the insurance policy's cooperation clause" could not, "as a matter of law, form the basis for a cause of action for breach of contract." *Id.* at *1.

The court disagreed, finding that *Archbisop* was both not binding and unpersuasive because the Ninth Circuit "only speculated that the California Supreme Court" would not allow such a cause of action. *Id.* at *2. Instead, the court reasoned that even though California appellate authorities typically referenced "an insured's breach of a cooperation clause as a valid affirmative defense for an insurer opposing an insured's action," the court could find "no compelling reason" why an insured's failure to cooperate could not "as a matter of law, form the basis for both an affirmative defense . . . and an independent cause of action against [a policyholder] for breach of contract . . ." *Id.* at *3. In reaching this conclusion, the court relied on several other California district court decisions—all of which post-date the Ninth Circuit's unpublished decision in *Archbishop of Los Angeles*—that allowed breach of contract claims to proceed, even though they were based on a theory of policyholder non-cooperation. See, e.g., *Great Am. Ins. Co. v. Chang*, 2012 WL 3660005, at *2 (N.D. Cal. Aug. 24, 2012) (allowing a claim for breach of the cooperation clause to proceed); *Sierra Pac. Indus. v. American States Ins. Co.*, 883 F. Supp. 2d 967, 976–77 (E.D. Cal. Aug. 1, 2012) ("[T]he Court cannot find, as a matter of law, that [the insurer] cannot state a cause of action for breach of contract").

In contrast, in *Lennar Mare Island, LLC v. Steadfast Insurance Co.*, 2015 WL 6123730 (E.D. Cal. Oct. 16, 2015), the court reached the opposite conclusion. In this case, an insurer asserted that a policyholder "breached" the cooperation clause by, among other things, misrepresenting facts and withholding information. *Id.* at *13. The insured moved to dismiss for failure to state a claim, citing the Ninth Circuit's unpublished opinion in *Archbishop of Los Angeles*.

The court granted the motion to dismiss, with prejudice. After surveying the relevant law, the court concluded that "California courts appear to have assumed the breach of a cooperation clause creates a defense only." *Id.* at * 14. In addition, the court ex-

plained that in *Archbishop of Los Angeles*, "the Ninth Circuit also understood California law to require an insurer to present cooperation-clause breaches in its defense, and not in an affirmative contract claim," even though it did so in an unpublished decision. *Id.* While *Centex Homes* and other recent decisions may have declined to follow *Archbishop of Los Angeles*, the court noted many other federal court decisions treat the cooperation clause as an affirmative defense. See *Pac. Dental Servs., LLC v. Homeland Ins. Co. of N.Y.*, 2013 WL 3776337, at *4 (C.D. Cal. July 17, 2013); *Allstate Ins. Co. v. Madan*, 889 F. Supp. 374, 379 (C.D. Cal. 1995) (citing *West v. State Farm Fire & Cas. Co.*, 868 F. 2d 348, 350 (9th Cir. 1989)). Ultimately, the court was also persuaded by the principle of comity: "In deciding decades of case law, no California court has even taken up the question of an affirmative cooperation-clause claim, which suggests adopting [the insurer's] position would be a groundbreaking move better left to the state courts as a matter of comity." *Id.* at *15.

Ultimately, the California Court of Appeal will need to resolve this question to give guidance to federal courts. Until then, the stakes are high for policyholders. Allowing an insurer to sue its policyholder for monetary damages disrupts the delicate balance of power between the parties to an insurance contract. With few points of leverage against policyholders under existing law, insurers are using "breach" of cooperation clause suits to discourage policyholders who assertively pursue their rights. If this trend continues, policyholders, especially financially vulnerable ones, may be forced to rethink how aggressively they want to pursue their disagreements with carriers about sensitive topics, such as independent counsel, in order to avoid defending themselves against costly breach of contract claims.

♦ *Jeff Hayes is a partner at Payne & Fears where he represents policyholders in disputes with their insurers.*

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