

1  **CUMIS ISSUES**

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2  **SIMPLE CUMIS RULE OF THUMB**

- An insurer must pay for its insured's independent *Cumis* counsel whenever a conflict of interest arises and the insurer has issued a Reservation of Rights letter on coverage issues.
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- \*\*\*NOTE: This "Rule of Thumb" is *Cumis* in its most simplistic form and much more goes into a Right-to-*Cumis* decision.\*\*\*

3  **BIRTH of CUMIS**

- San Diego Navy Federal Credit Union et al

v.

Cumis Insurance Society, Inc

(1984)

162 Cal. App. 3d 358

4  **FACTS UNDERLYING CUMIS**

- The San Diego Navy Federal Credit Union ("Credit Union") and two persons at the Credit Union were sued by Magdaline Eisenmann for wrongful termination, breach of contract, wrongful interference with contract, breach of the covenant of good faith and fair dealing, and intentional infliction of emotional distress, seeking \$750,000 in compensatory damages and \$6.5 million in punitive damages.

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- Cumis insured the Credit Union and accepted the tender of the Eisenmann action.
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- Cumis appointed insurer-retained defense counsel for the insureds.

• Cumis reserved its right to deny coverage.

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- The Credit Union retained independent counsel.
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- Independent counsel sent a claim for attorneys' fees and costs to Cumis.
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- Cumis agreed to pay the fees/costs of independent counsel.

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- Cumis paid two invoices from independent counsel, but subsequent invoices were not paid.
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- Cumis' home office determined there was no conflict of interest and decided to pay no further invoices from independent counsel.

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- Eisenmann demanded settlement within Cumis policy limits. Cumis made an offer below their policy limits.
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- Cumis did not contact their insureds or independent counsel before or during the

settlement conference, but informed the insureds after the fact.

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- The Credit Union sued their insurer *Cumis* for payment of independent counsel's fees and costs.
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- The *Cumis* trial court ruled in favor of the insureds and ordered *Cumis* to pay independent counsel.
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- *Cumis* appealed, and the trial court's judgment was affirmed.

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#### ***CUMIS APPELLATE OPINION***

- "We conclude the Canons of Ethics impose upon lawyers hired by the insurer an obligation to explain to the insured and the insurer the full implications of joint representation in situations where the insurer has reserved its rights to deny coverage. If the insured does not give an informed consent to continued representation, counsel must cease to represent both."

*Cumis*, *supra*;

*James 3 Corp. v. Truck Ins. Exch* (2001) 91 Cal. App. 4<sup>th</sup> 1093 (Footnote 1)

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#### **CIVIL CODE 2860**

- California Legislature codified *Cumis* in 1987.
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- Civil Code 2860 attached to handout package.
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#### **UNDERSTANDING *CUMIS/2860***

- *Cumis/2860* was NOT given birth based on Insurance Law principles.
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- *Cumis/2860* is based on the Canon of Ethics for attorneys prohibiting conflicts of interest.

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- Important to understand that you can not rely on the insurer to initiate the decision making process as to whether the insured (your client) has the right to independent *Cumis* counsel.
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- Under California Rules of Professional Conduct 3-310, an attorney must avoid the representation of "adverse interests."

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#### **DUTIES UNDER *CUMIS***

- Since *Cumis/2860* is based on ethics (and as expressly stated in *Cumis*), an attorney has a duty to explain any potential conflict of interest to the insurer and the insured.
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- Coverage counsel should assist insurers whenever *Cumis* issues arise.
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#### **WHAT CREATES A *CUMIS* SITUATION?**

- The Recipe:
  - There is a duty to defend the insured.
  - The insurer issues a Reservation of Rights on a coverage issue.
  - KEY = The outcome of that coverage issue can be controlled by insurer-retained defense counsel.
  - This combination may create a conflict of interest requiring *Cumis* independent counsel.

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#### **WHAT DOES NOT CREATE A *CUMIS* ISSUE?**

- 2860(b)
  - A denial of coverage.
  - A claim for punitive damages.
  - Solely because the insured is sued for an amount in excess of the policy limits.
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17  **Dynamic Concepts, Inc. v. Truck Ins. Exchange**  
(1998)61 Cal. App. 4<sup>th</sup> 999

- If the coverage issue is independent of or extrinsic to the issues in the underlying action.
- A mere possibility of an unspecified conflict.
- The conflict must be significant and not merely theoretical.
- The conflict must be actual and not merely potential.

18  **QUALIFICATIONS OF CUMIS COUNSEL**

- 2860(c)
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- When the insurer agrees to pay for independent *Cumis* counsel, they may exercise their right to require that counsel selected by the insured possess certain minimum qualifications:
  1. At least 5 years of civil litigation practice.

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- 2. Substantial defense experience in the subject at issue in the litigation.
- 3. Maintains E&O coverage.

20  **INSURER'S PAYMENT OF CUMIS FEES**

- 2860(C)
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- The insurer can limit what they pay in *Cumis* fees to the rates they pay defense attorneys in the community where the claim arose or is being defended.

21  **CUMIS FEE DISPUTES**

- 2860(c)
- 
- Resolved by final and binding arbitration by a single neutral arbitrator selected by the parties to the dispute.

Note: In extreme cases, the insurer can sue *Cumis* counsel for fraud and seek compensatory and punitive damages. *Firemans Fund v. Younesi* (1996) 48 Cal. App. 4<sup>th</sup> 451.

22  **WORKING RELATIONSHIP**

- 2860(f)
- - The statute requires both *Cumis* counsel and insurer-appointed defense counsel be allowed to "participate in all aspects of the litigation."
  - "Counsel shall cooperate fully in the exchange of information that is consistent with each counsel's ethical and legal obligation to the insured."

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- 2860(f)
- - Nothing in this section relieves the insured of his or her duty to cooperate with the insurer under the terms of the insurance contract.

24  **CUMIS CONTROLS THE LITIGATION**

- 2860(F) requires that both counsel be allowed to participate in all aspects of the litigation, but it is *Cumis* counsel that has the right to control the litigation.
- - This is because the insurance defense counsel has a conflict of interest, and therefore, can not control the litigation.

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- *United Pacific Ins. Co. v. Hall*  
(1988)199 Cal. App. 3d 551  
(1989)

"While *Cumis* may prohibit an insurer from dictating the tactics of litigation, it does not delegate to *Cumis* counsel a meal ticket immunized from judicial review for reasonableness."

26  **PRACTICAL POINTERS**

- Settlement Conferences
  - Because it is the insurer's money driving settlement, there are a lot of cases where the insurer excluded the insured and *Cumis* counsel from participating in settlement.
  - 2860(f) expressly states that both counsel shall participate in all aspects of the case.

*Seltzer v. Barnes* (2010) 182 Cal. App. 4<sup>th</sup> 953 held that the insurer is generally entitled to control settlement negotiations without interference from the insured even if *Cumis* counsel is controlling the defense.

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- Cumis Control
- - Even though Cumis counsel has the right to control the litigation – and does have the final word on tactics and strategies – they can not refuse to allow insurance defense counsel to participate in the litigation. [CC 2860(f)]

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- Insurer's Options
- - Just use *Cumis* counsel as defense counsel
  - Keep insurance defense counsel on board to work with *Cumis* counsel

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- Pros/Cons
  - Only using *Cumis* counsel
    - Maybe saves money??
    - No direct duty from *Cumis* counsel to insurer
    - Maybe no influence over defense tactics or strategies??
    - Maybe not going to get regular reports or feedback on litigation status??
    - Maybe putting the insurer's policy limits into the hands of *Cumis* counsel without any way to really monitor litigation.

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- Keeping insurance defense counsel on the case
  - Insurer pays two attorney fee bills
  - Insurer has trusted defense counsel to monitor litigation and report back on non-conflict issues
  - May be able to have some input in litigation strategies and tactics
  - Insurer is better able to monitor *Cumis* counsel billing
  - Insurer can better control costs if insurance defense counsel is doing a lot of the ground work
  - This will assist the insurer when it comes to settlement discussions with plaintiff

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#### **HONEST INTENTIONS DON'T COUNT**

- *Cumis*, supra @ p.366
  - “No matter how honest the intentions, counsel can not discharge inconsistent duties.”

#### *California Rules of Professional Conduct*

Rule 3-310 (C)(1): An attorney shall not

“without the informed written consent of each client:

(1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict....”

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#### **MEDIATING THE *CUMIS* CASE**

- Make sure your mediator is familiar with *Cumis* and CC 2860
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- Let the mediator know ahead of time if there are any problems between defense counsel and *Cumis* counsel
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- Discuss with the mediator whether coverage issues will need to be discussed as part of the settlement negotiations
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- Try to get defense counsel and *Cumis* counsel to pre-agree on how to structure the logistics of the mediation

CALIFORNIA CODES  
CIVIL CODE  
SECTION 2860

**2860.** (a) If the provisions of a policy of insurance impose a duty to defend upon an insurer and a conflict of interest arises which creates a duty on the part of the insurer to provide independent counsel to the insured, the insurer shall provide independent counsel to represent the insured unless, at the time the insured is informed that a possible conflict may arise or does exist, the insured expressly waives, in writing, the right to independent counsel. An insurance contract may contain a provision which sets forth the method of selecting that counsel consistent with this section.

(b) For purposes of this section, a conflict of interest does not exist as to allegations or facts in the litigation for which the insurer denies coverage; however, when an insurer reserves its rights on a given issue and the outcome of that coverage issue can be controlled by counsel first retained by the insurer for the defense of the claim, a conflict of interest may exist. No conflict of interest shall be deemed to exist as to allegations of punitive damages or be deemed to exist solely because an insured is sued for an amount in excess of the insurance policy limits.

(c) When the insured has selected independent counsel to represent him or her, the insurer may exercise its right to require that the counsel selected by the insured possess certain minimum qualifications which may include that the selected counsel have (1) at least five years of **civil** litigation practice which includes substantial defense experience in the subject at issue in the litigation, and (2) errors and omissions coverage. The insurer's obligation to pay fees to the independent counsel selected by the insured is limited to the rates which are actually paid by the insurer to attorneys retained by it in the ordinary course of business in the defense of similar actions in the community where the claim arose or is being defended. This subdivision does not invalidate other different or additional policy provisions pertaining to attorney's fees or providing for methods of settlement of disputes concerning those fees. Any dispute concerning attorney's fees not resolved by these methods shall be resolved by final and binding arbitration by a single neutral arbitrator selected by the parties to the dispute.

(d) When independent counsel has been selected by the insured, it shall be the duty of that counsel and the insured to disclose to the insurer all information concerning the action except privileged materials relevant to coverage disputes, and timely to inform and consult with the insurer on all matters relating to the action. Any claim of privilege asserted is subject to in camera review in the appropriate law and motion department of the superior court. Any information disclosed by the insured or by independent counsel is not a waiver of the privilege as to any other party.

(e) The insured may waive its right to select independent counsel by signing the following statement:  
"I have been advised and informed of my right to select independent counsel to represent me in this lawsuit. I have considered this matter fully and freely waive my right to select independent counsel at this time. I authorize my insurer to select a defense attorney to represent me in this lawsuit."

(f) Where the insured selects independent counsel pursuant to the

provisions of this section, both the counsel provided by the insurer and independent counsel selected by the insured shall be allowed to participate in all aspects of the litigation. Counsel shall cooperate fully in the exchange of information that is consistent with each counsel's ethical and legal obligation to the insured. Nothing in this section shall relieve the insured of his or her duty to cooperate with the insurer under the terms of the insurance contract.