

## Best's Insurance Law Podcast

### Cumis Counsel Selection and Impact on Claims - Episode #172

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**Hosted by:** John Czuba, Managing Editor

**Guest Attorney:** Tim Agajanian of [Ropers Majeski PC](#)

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**John Czuba:** Welcome to "Best's Insurance Law Podcast," the broadcast about timely and important legal issues affecting the insurance industry. I'm John Czuba, Managing Editor of *Best's Insurance Professional Resources*.

We're pleased to have with us today, attorney, Tim Agajanian. Tim is a partner at national law firm, [Ropers Majeski](#). He represents corporations and insurers nationwide in commercial litigation, catastrophic injury, real estate, and tort matters.

Tim is also a frequent author and speaker and addresses updates to regulations and case law. Tim, thank you so much for joining us today.

**Tim Agajanian:** Thank you, John, very much for having me. I appreciate it.

**John:** Today's podcast discussion is about Cumis counsel and how it impacts insurance claims.

Tim, for our first question, what are the circumstances that trigger an insurer's obligation to provide independent counsel, often called Cumis counsel?

**Tim:** Very good question. Under 2860, Subpart B, as I'll read: "For purposes of this section, the 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."

The Cumis counsel name came from a case that was decided in 1984, in California, entitled, San Diego Navy Federal Credit Union v. Cumis Insurance Society, Inc. That decision, which came down in the Court of Appeals, in the 4th District, in 1984, created scenarios, wherein, insureds who were defended by insurance companies could choose their own counsel and be paid for by the insurance companies.

Since that time, because of some abuses and interesting background issues, the California legislature enacted a statute, now called the Cumis statute. It's 2860, California Civil Code, Section 2860.

Here are the circumstances that require insurance companies to provide its insureds with independent counsel when they're in a suit and providing defense. One, under 2860, Subsection 1, where the insurer reserves its right on an issue, and the outcome of that coverage issue can be controlled by the insured's retained counsel.

That's 98 percent of the time when that statute triggers independent counsel. That's the enabling legislation that came from the Cumis case. Very quickly, there were several other subparts that would institute or require independent counsel to be appointed.

The second one is when the insurer insures both the plaintiff and the defendant. A pretty obvious conflict of interest. Subpart 3 of 2860 is where the insurer has filed suit against the insured. Whether or not the suit is related to the lawsuit, the insurer is obligated to defend.

Clearly, a violation of California ethics code, which we'll talk about a little later in this presentation, the genesis of the Cumis rule and the independent counsel rule.

The fourth scenario, under the code section, is where the insurer pursues settlement in excess of the policy limits without the insured's consent, and leaving the insured exposed to claims by third parties.

I'm assuming that our audience is somewhat sophisticated as insurance folks. This is a pretty obvious example of when those interests would conflict and probably doesn't occur very often, but can occur.

Subsection 5 of California Code, Section 2860, is any other situation where an attorney who represents the interests of both the insurer and the insured finds that his or her representation of one is rendered less effective by reason of his or her representation of the other.

That seminal case, you can write down as James 3 Corporation v. Truck Insurance Exchange. That's a 2001 Cal. App. Decision. 91 Cal. App, 4th, at 1093. I've given you some basic situations that would trigger the Cumis statute. There are other states that have similar type of statutes or common law that would trigger the right to independent counsel.

The most common trigger of the obligation to provide independent counsel, in California, is an insurer providing a defense subject to a reservation of rights. In the Cumis case, the counsel was derived from a holding in that case, which I cited earlier.

The Cumis decision inadvertently created a broad and nearly unbridled opportunity for insured's personal counsel to demand and seek payment to serve as defense counsel for the insurer's expense. This apparent abuse created the need for the independent counsel statute.

There are some common examples of when the independent counsel is now triggered under the new code section. One is when there's an intentional act versus a negligent allegation, and the insurance company reserves its rights in regards to not obviously cover any acts that were intentional.

A simple example, a house burns down. There is a question as to whether the homeowners' child started the fire playing with matches, or it was a natural cause, or a negligent cause. Therefore, the defense counsel may be leaning towards showing that it was an intentional cause of the fire.

Very, very simple example. As we get further into this Q&A today, we can give you some more examples. There's some exceptions and what not. It gets kind of complicated, which we delve into more in a full hour and a half program we put on for this subject.

**John:** Tim, the duty to provide Cumis counsel is triggered by a conflict of interest. Can you provide some examples of scenarios that would create this type of conflict?

**Tim:** There are several examples of when it wouldn't create a conflict of interest. Any time that there is a general factual allegation in a complaint and in the reservation of rights that deviates or puts the insured at odds with the insurance company regarding behavior, conduct, intentional type acts the defense counsel can steer the case or control how the case is defended in putting the case more in an uncovered situation.

Meaning, they would have more of a tendency to defend the case, wherein, the insured, they would prove, or there would be jury instructions to prove that the insured acted intentionally to create the damage that would trigger Cumis counsel.

For instance, there's an environmental case that we handled, wherein, it was a dry cleaner. There were allegations that the dry cleaner, the insured on the environmental case, intentionally dumped cleaning fluid into the ground and did not dispose of it properly, as opposed to a negligent creation of a plume over a number of years by just leakage or just negligence. In that case, a reservation of rights triggered an independent counsel, and there's many other examples.

As an example that doesn't trigger Cumis, there are many examples when the insurance company simply denies coverage for certain uncovered claims. It's purely a coverage issue. That would not trigger the right to independent counsel.

As a matter of law, in a case where the damages may not be covered under the definition of the policy, and the rights are reserved, then that does not trigger Cumis under Section 2860. That's one of the examples.

There is an exception under construction defect cases, under the Blanchard case, which I can cite for you, wherein, if it's work product that's being challenged and you're reserving your rights. Workmanship was not good, but it did not result in damages. That's an exception where it does not trigger Cumis counsel.

Most of your construction defect cases, even though there's a reservation of rights made on the workmanship you just did not build the house or the detail correctly and there's no resulting damage, then there's no covered damages.

That's a good example under the Blanchard case. I can give you the cite, 2 Cal. App., 4th, 345, which is a carve out of a typical situation where there's an allegation of intentional acts or acts of the insured that will not trigger Cumis.

**John:** Tim, can you tell us, are there any other distinguishing conflicts that will trigger Cumis counsel and others that may not?

**Tim:** There's no simple test to determine when the right to independent counsel arises. Further, not every conflict of interest activates an obligation to provide the insured defendant with independent counsel at the insurer's expense.

For example, in James 3 case, the insurers owes no duty to provide independent counsel in these situation because the Cumis rule is not based on insurance law, but on ethical duty of an attorney to avoid representing conflicting interests.

Simply, in that case, if you're reserving rights on a claim that's not covered by insurance, that is an insurance coverage issue, that does not automatically trigger Cumis. In fact, under that James 3 case, it stands for the premise that simply because there's a reservation of rights on a claim that's not covered, that does not trigger Cumis.

**John:** Tim, how are Cumis attorneys selected, and what are their duties?

**Tim:** Under Subpart C, here are their requirements, under 2860, on selection of counsel. One, at least, five years of civil litigation practice, which includes substantial defense experience in the subject, in the issue, in the litigation.

Two, errors and omissions coverage. The insurer's obligation to pay the 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 is the codification of the rule. Practical experience, to answer your question, is that, obviously, the insured has a right to select counsel. Under the subsequent case law, the insured has a right to control the litigation. The insured has a right to select the expert witnesses.

Some of these qualifications on fees, the amount of fees paid, there are ample exemplars of cases, where, under this code section, there's a dispute in the hourly rate. This becomes a real issue in a lot of these cases because independent counsel normally are charging much higher rates than what we call agreed upon panel counsel rates, and this is where the dispute comes in.

The selection of counsel by the insured, to answer your question, we can get into some of the other issues and the other questions regarding the amount of fees and how those can be arbitrated.

**John:** Tim, how are attorneys' hourly fees established under the rules that you just mentioned? If there is a dispute over Cumis counsel rates, how is it typically resolved?

**Tim:** Under 2860(c), under the last provision of that code section, it says, any dispute will be by binding arbitration, and the arbitrator will have sole discretion to determine what the hourly fees would be.

Even though 2860 articulates a general requirement that you have to have five years' experience and be experienced in this field of practice, there's a lot of other factors here. Let me give you an example.

A case that we looked at, a case study we looked at is the Bobrick Washroom Equipment case v. Travelers Insurance Company. That was a very good example.

You can pull this up on Westlaw. It's cited at 2017 WL 10127812, Cal. Super., Arbitration Award I think that's the reference. In that case, there's a couple of very important lessons here, to answer your questions.

Even though the insurance companies will try to say that, "Gee, we have panel counsel, they handle these typical type of cases, and we charge \$250 an hour," for example, that's really not going to be the dictating factor in a case that goes to arbitration.

It's binding arbitration. Evidence can be presented. There are hearings. Ultimately, the arbitrator will make the ruling. Let me give you an example of some of the language that was articulated in this particular decision, which is informative to this audience.

"The rates of these panel counsel firms this is quoted from the arbitrator – "were not determined by reference to the legal claims.

Factual firms were not determined by reference to the legal claims, factual circumstances, location, potential exposure, or complexity of these cases were not determined by reference to the legal claims. Factual firms were not determined by reference to the legal claims, factual circumstances, location, potential exposure, or complexity of these cases.

"Thus, these cases cannot reflect rates paid to attorneys Travelers has retained in the ordinary course of business, in the defense of similar actions in the community, where the claims arose, or as being defended."

What that is informative of is that the arbitrator will take in consideration the complexity of the cases, of the location, the potential exposure, whether or not the law firm has represented the client before in similar matters, the expertise of the attorney, and not just the simple subject matter or the fact that the insurance company has paid other law firms much lower fees.

That is informative. With more time, I can give you more examples in regards to the factors involved. I can say this, too, in the arbitration, which is an important pointer to carriers.



If you get involved in a situation where you determine that Cumis counsel or independent counsel is required, this is very important. You should agree to disagree on the hourly rate, and indicate that you will work that out. Continue to pay the fees that the carrier thinks is fair or is standard in the community of this type of case, and agree to either arbitrate or negotiate the differential at some date in the future.

If you don't do that, as a carrier, you may waive all your rights under 2860 to binding arbitration and be precluded from challenging the actual hourly rate the law firm wants to charge you. You don't want to just not agree to pay something. That's just an interesting practice pointer from the carrier's perspective.

**John:** Tim, this was a very informative podcast. Thank you so much for joining us today, and thank you for providing the case law, so our listeners could go back and review further, if they need to.

**Tim:** Thank you very much. Appreciate the opportunity. I hope it was informative and helpful.

**John:** That was Tim Agajanian, from the national law firm, [Ropers Majeski](#). Special thanks to today's producer, Frank Vowinkel.

Thank you all for joining us for "Best's Insurance Law Podcast."

If you have any suggestions for a future topic regarding an insurance law case or issue, please email us at [lawpodcast@ambest.com](mailto:lawpodcast@ambest.com).

I'm John Czuba, and now this message.

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