

## Policyholders May Not Be Limited to *Cumis* “Insurer Rates” If Defense Costs Are Not Timely or Fully Paid

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A recent California decision has held that an insurer may not take advantage of a California mechanism for forcing an attorney’s fees arbitration on its insured<sup>1</sup> if the insurer breached its duty to defend its insured either by failing to pay the full amount owed or by failing to make timely payment of defense costs. In addition to upholding a policyholder’s right to litigate its breach of contract and bad faith claims *before* an insurer compels arbitration of the reasonableness of the defense costs, the recent decision also holds that an insured cannot be limited to so-called *Cumis* rates if its insurer is found to be in breach of the duty to defend.

The decision was issued by the California Court of Appeal for the Fourth Appellate District in *Intergulf Development*.<sup>2</sup> *Intergulf* involved a dispute between the insured Intergulf and its liability insurer Interstate for the duty to defend a homeowners’ association lawsuit alleging defects in the construction of a condominium project. The insured tendered the complaint to Interstate, seeking defense and indemnity. Interstate did not respond to its insured’s request for independent counsel and later made only partial and delayed defense payments to its insured. Intergulf filed suit against Interstate for bad faith, breach of contract, and declaratory relief prompting Interstate to pay additional defense costs to its insured. Interstate then filed a petition to compel arbitration in a Section 2860 fee dispute arbitration (often called a *Cumis* fee dispute in reference to the eponymous landmark decision).

The plaintiff-insured in *Intergulf* challenged the trial court’s ruling granting an insurer’s petition to compel a *Cumis* fee dispute arbitration by filing a petition for writ of mandate in the California Court of Appeal.<sup>3</sup> The California Court of Appeal denied the petition.<sup>4</sup> The California Supreme Court granted Intergulf’s petition for review and transferred the matter back to the California Court of Appeal “with directions to vacate the order denying mandate and issue an order to show cause why the relief sought should not be granted.”<sup>5</sup>

Upon receiving the appeal for the second time, the California Court of Appeal concluded that the trial court had abused its discretion when it granted a party’s petition to compel arbitration under section

<sup>1</sup> See Section 2860 of the California Civil Code.

<sup>2</sup> *Intergulf Development v. the Superior Court of San Diego County*, 183 Cal. App. 4th 16 (2010).

<sup>3</sup> *Intergulf*, 183 Cal. App. 4th at 20.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

