

## [2860 Fee Arbitration is Denied Where Insurer is Not Currently Defending](#)

Posted on April 7, 2011 by [David J. McMahon](#)

In [The Housing Group v. PMA Capital Insurance Co.](#), 2011 DJDAR 4441 (2011), the [California First District, Court of Appeal](#) decided a case arising under [California Civil Code § 2860](#).

This section of the civil code provides for arbitration of disputes under California's so called [Cumis](#) doctrine. That statute sets forth the rules for selection of "independent counsel" when the carrier reserves its rights creating a potential conflict between the carrier, its selected counsel and the insured.

The Housing Group (Plaintiffs) filed suit against their insurer, PMA Capital Insurance Co. (the "insurer"). The Plaintiffs sued the insurer for breach of contract and alleged "bad faith" arising out of liability in third-party actions relating to construction projects.

The insurer petitioned to compel arbitration of an alleged fee dispute pursuant to Civil Code Section 2860(c), contending the action involved disputes regarding the applicable fee to be paid to the Plaintiffs' independent counsel by the insurer incurred in the underlying litigation.

The Plaintiffs opposed the petition. Plaintiffs argued that the insurer had no standing to invoke the provisions of Section 2860(c) because it failed to prove that it had agreed to defend the case or make any payments to the defense costs incurred. The trial court denied the petition to compel arbitration.

The insurer appealed and the court of appeal affirmed the decision of the trial court. The court noted that where an insurer defends a case under a reservation of rights and has agreed to utilize independent counsel, an insurer may compel arbitration to resolve a dispute regarding the payment of defense fees pursuant to Section 2860(c).

The court noted that there was no evidence in the record that the insurer defended the case. The insurer did send two reservation of rights letters. However, the letters only expressed a future intent to defend, rather than an actual agreement to provide a defense or to pay defense costs.

The court of appeal concluded that an agreement to the payment of defense fees at the end of the litigation was not sufficient to trigger the provisions of Section 2860.