

## [Insurers Can Only Seek to Pay "Cumis" Rates if They are Actually Defending the Insured](#)

Posted on April 8, 2011 by [Larry Golub](#)

In a decision issued March 25, 2011, [The Housing Group v. PMA Capital Insurance Co.](#), the [California Court of Appeal](#) held that an insurer who is not actually defending its insured cannot pursue its rights under [California Civil Code section 2860](#), and specifically the right to arbitrate the issue as to the hourly rate for "independent counsel" chosen by the insured when there is a conflict of interest between the insured and the insurer.

Under section 2860(c), an insurer's obligation to pay such independent counsel "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."

Since substantial evidence supports the trial court's finding that the insurer failed to provide a defense in the underlying litigation, the insurer was precluded from invoking the arbitration remedy for *Cumis* fee disputes in section 2860(c).

This recent decision was discussed in more length in a blog posted by [David McMahon](#) in [Barger & Wolen's Litigation Management & Attorney Fee Analysis](#) blog.