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About Allen Matkins

Allen Matkins Leck Gamble Mallory & Natsis LLP is a California law firm with more than 220 attorneys practicing out of seven offices in Los Angeles, Century City, Orange County, Del Mar Heights, San Diego, San Francisco and Walnut Creek. The firm's broad based areas of focus include corporate, real estate, construction, real estate finance, business litigation, employment and labor law, taxation, land use, bankruptcy and creditors' rights, intellectual property and environmental. [more...](#)

California Court of Appeal Rejects Insurance Company's Attempt to Cap and Arbitrate Damages

This decision should serve as a wake-up call to insurance companies, as their failure to provide a timely defense by the policyholder's independent counsel may entitle the policyholder to recover its full defense costs, rather than the more limited costs provided by statute.

Developers and other insurance consumers should be vigilant not only in demanding a defense, but also in documenting an insurer's delayed or inadequate response. In common practice, insurance companies refuse to pay the customary rates for attorneys hired by policyholders, leaving their customers with the Hobson's choice of accepting the insurance company's conflicted panel counsel or footing a portion of the bill to have their own trusted counsel defend the case.

This case, *Intergulf Development v. Superior Court of San Diego County (Interstate Fire & Casualty Company)*, decides that an insurance company that has breached its duty to defend a lawsuit against a real estate developer is not entitled to invoke the fee-capping and arbitration provisions of California law ([full text of the decision here](#)). Those provisions, which have been used to limit the hourly rate an insurer must pay to an insured's independent counsel, did not apply when the insurance company breached its duty to defend and offered to pay part of the developer's cost of defense only after the developer sued for breach of the insurance contract.

Section 2860 – Statutory Basis for Fee-Capping and Arbitration of Fee Disputes

Subdivision (c) of Civil Code Section 2860, a legislative reaction to the landmark decision in *San Diego Navy Federal Credit Union v. Cumis Insurance Society, Inc.*, sets out guidelines for both selection and payment of the insured's independent counsel. As attorneys and clients alike have learned, however, the biggest source of contention with regard to so-called *Cumis* counsel can often be the rates paid by the insurance company. Where an insurance company is performing as it should, Section 2860 provides that attorneys' fees for independent counsel will be limited to the rates typically paid by the insurance company for similar cases in the same geographical area. The statute further provides that any rate disputes be settled through binding arbitration.

Intergulf v. Superior Court: Limiting the Reach of Fee-Capping and Binding Arbitration

Last week, the Fourth Appellate District of the California Court of Appeal held that a trial court had "abused its discretion by granting [the insurer]'s petition to compel arbitration under section 2860,

subdivision (c) before the parties resolved the issues raised by [the insured]'s complaint." The insurance company, Interstate Fire & Casualty Company, tried to use the statute as a way to avoid trial on the issue of its insured's damages when the complaint alleged a failure to defend. The appellate court found that arbitration could not be ordered where the trial court had not yet decided whether there was a duty to defend, or whether that duty had been breached.

Impact on the Interplay between Insurers and their Policyholders

The decision should motivate insurance companies to perform their contracts and could allow a full recovery of defense costs by policy holders when they fail to do so. If your insurance company does not agree to provide a defense, and allow you to have your own independent counsel provide that defense, within the time period prescribed by law, it has breached its contract, and may not deprive you of a jury trial or limit your recovery based on its customary panel rates. It is important, however, that the policyholder make a clear record of the insurance company's breach of contract and not invite or accept performance afterward. This is an area where timely legal advice can preserve your right to receive the full cost of your defense.

If you have any questions about this decision and its ramifications, please contact Valentine S. Hoy, who argued the case before the Court of Appeal, at (619) 235-1521.

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