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IN THE SUPREME COURT OF THE STATE OF NEVADA

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Appellant,

vs.

STEPHEN TANNER HANSEN,

Respondent,

Supreme Court No. 64484

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APPELLANT'S OPENING BRIEF

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I. JURISDICTIONAL STATEMENT

This Court's jurisdiction is established by the Court's "Order Accepting Certified Questions and Directing Briefing," filed on June 20, 2014 (hereafter the "Order Accepting Certified Questions"). (See concurrently filed Appendix ["App."] at 6.)[1] In this Order, the Court accepted two certified questions from the United States District Court for the District of Nevada pursuant to NRAP 5.

II. STATEMENT OF ISSUES

This Court has accepted the following two questions:

1. ***Does Nevada law require an insurer to provide independent counsel for its insured when a conflict of interest arises between the insurer and the insured?*** Appellant respectfully submits that the answer is no. Though independent counsel laws have existed in other states for nearly 80 years, neither this Court nor the Nevada legislature have found it necessary to impose this unwieldy and impractical solution to a problem which may or may not exist in a particular case. The existing Rules of Professional Conduct, as well as existing laws governing attorney malpractice and insurance "bad faith" provide more than sufficient guidance, remedies and deterrence for any conflicts that may arise in the tripartite relationship between insurers, insureds and defense counsel retained by insurers (hereafter the "tripartite relationship").
2. ***If yes, would the Nevada Supreme Court find that a reservation of rights letter creates a per se conflict of interest?*** Appellant respectfully submits that the answer, again, is no. Even among those states that do provide for independent counsel rights, the overwhelming majority have not adopted such a draconian *per se* rule.

[1] The page number references are to the numbering in the lower right corner of the documents contained in the Appendix.

III. STATEMENT OF THE CASE

These proceedings present two questions of law certified to this Court by the United States District Court, District of Nevada. The questions were certified in the context of the federal court's consideration of Appellant's motion for summary judgment. The federal court denied Appellant's motion on the grounds that Appellant, in the court's view, was required to have provided its insureds with independent counsel, despite the fact that neither this Court nor the Nevada legislature has ever imposed this obligation on insurance companies that conduct business in Nevada. Moreover, the federal court *retroactively* imposed this newly-created independent counsel duty, implicitly reasoning that Appellant should somehow have known of and applied this unwritten Nevada law nearly 10 years ago, when the salient events occurred.

IV. STATEMENT OF FACTS

A. The "311 Boyz" Incident

On July 18, 2003, respondent Stephen Hansen ("Hansen") and two friends, Craig LeFevre ("LeFevre") and Joe Grill ("Grill), attended a party in the suburb of Summerlin in Las Vegas, Nevada (when referred to collectively, Hansen, LeFevre and Grill are the "Plaintiffs"). (App. at 889.) Members of a local "gang" known as the "311 Boyz," including Brad Aguilar (appellant State Farm's insured) were also at the party. (*Id.*) At some point, Plaintiffs started to feel uncomfortable and left the party in LeFevre's vehicle. (*Id.*)

Brad Aguilar, driving in his State Farm-insured vehicle, followed the Plaintiffs and struck LeFevre's vehicle when LeFevre was stopped at the security gate. (App. at 547, 890.) As LeFevre exited the security gate and attempted to leave the development, however, his vehicle was showered with rocks, bottles and cans, which were allegedly hurled by individuals from the party. (App. at 890.) Though LeFevre and Grill suffered only minor injuries, respondent Hansen suffered severe and permanent injuries when he was struck by a large rock that crashed

through the windshield. (*Id.*)

It is undisputed that Brad Aguilar did not engage in the throwing of objects at Plaintiffs. (App at 306, 551 [lines 10-11] and 552 [lines 12-13].) Indeed, there is no evidence in the record that Brad did anything after colliding with LeFevre's vehicle that contributed to Hansen's injuries. (*Id.*)

B. The State Farm Insurance Policies

Prior to the subject incident, Brad Aguilar's father, Earnest Aguilar, had two State Farm insurance policies. The first was an automobile insurance policy (the "Auto Policy") issued by State Farm Mutual Automobile Insurance Company (hereafter "State Farm Auto"). (App. at 352.) The second was a homeowners' insurance policy (the "Homeowners Policy") issued by State Farm Fire and Casualty Company (hereafter "State Farm Fire"). (App. at 121.) (State Farm Auto and State Farm Fire may be referred to collectively hereafter as "State Farm").

C. The Underlying Tort Action and State Farm's Defense of the Aguilars

On December 30, 2004, Plaintiffs (and their parents) filed a lawsuit in Clark County District Court (Case No. A497445) against twelve alleged members of the "311 Boyz," including Brad Aguilar, arising out the subject incident. (App. at 453, 890.) (This underlying lawsuit will be referred to hereafter as the "Tort Action"). In their original Complaint, Plaintiffs asserted causes of action for negligence, negligent and intentional infliction of emotional distress, false imprisonment/assault/battery, civil conspiracy, concert of action and RICO. (*Id.*)

State Farm Auto agreed to defend Brad Aguilar under a reservation of rights, and retained defense counsel (Riley Clayton of Hall Jaffe & Clayton, LLP [hereafter "HJC"]). (App. at 328, 890.)[2] State Farm Auto reserved its right to deny coverage under the Auto Policy because "[i]t is questionable whether the bodily injury or

[2] Prior to and concurrent with State Farm's involvement in the Tort Action, Brad Aguilar was defended in the Tort Action by counsel retained by Allstate, Dennis Prince of Prince & Keating (Allstate had issued an insurance policy to Brad's mother). (App. at 283.)

property damage was caused by accident," and "[i]t is questionable whether the bodily injury or property damage was caused by an intentional act." (App. at 328.) State Farm also advised the Aguilars of the possibility of an excess judgment, their right to employ attorneys of their own choice at their own expense and that punitive damages may not be covered. (*Id*. at 329.)[3]

During his deposition on January 6, 2006, Brad Aguilar admitted that his vehicle struck LeFevre's vehicle, but maintained that the contact between the vehicles was accidental. (App. at 97-99, 891.) Brad denied any intentional wrongdoing. (*Id*.) Following this admission, the plaintiffs moved for summary judgment on their negligence claim, and this motion was subsequently granted. (*Id*. at 891.)

On or about April 14, 2006, State Farm Fire advised that it was reserving its right to deny defense or indemnity to the Aguilars under the Homeowners Policy in connection with the Tort Action because questions existed as to (1) whether the Plaintiffs were seeking damages caused by an "occurrence" (i.e., an accident); and (2) whether coverage was precluded by the motor vehicle exclusion contained in the Homeowners Policy. (App. at 688-90.)

In a letter to HJC dated May 30, 2006, Plaintiffs' counsel communicated a "formal settlement demand for your clients' State Farm Insurance policy limits of $125,000.00." (App. at 780.) In a subsequent letter to HJC dated June 19, 2006, Plaintiffs' counsel clarified his demand that "all Plaintiffs [i.e., Hansen, LeFevre and Grill] demand $125,000 (i.e., State Farm policy limits - $100,000 homeowners policy; $25,000 auto policy) from each of your insureds (i.e., $125,000 for Brad and $125,000 from [sic] Ernest S. Aguilar) in settlement. In other words, $250,000 in

[3] In March 2006, State Farm Auto also agreed to defend Brad's father, Ernest Aguilar, after Ernest was added as a party in the Tort Action. (App. at 891.) State Farm Auto assigned HJC to defend Ernest in the Tort Action. (*Id*.)

total for settlement of the State Farm policies." (App. at 782.)[4]

In a letter to State Farm Auto dated June 20, 2006, defense counsel Riley Clayton (of HJC) clarified the settlement terms and, notably, recommended that State Farm accept the offer is it related to Hansen. (App. at 985.)

In a letter to Plaintiffs' counsel dated July 10, 2006, defense counsel Clayton advised that he was still he was still awaiting additional information and clarification on several issues. (App. at 785.) Nevertheless, he communicated that State Farm Auto was still willing to extend its fully policy limits of $50,000 ($25,000 to Hansen, $12,500 to LeFevre and $12,500 to Grill) to resolve Plaintiffs' claims against the Aguilars. (*Id.*) Grill and LeFevre accepted these settlement offers, but Hansen rejected the offer. (*Id.* at 788.)

On or about July 20, 2006, State Farm Fire advised the Aguilars that no coverage was available under the Homeowners Policy for the Tort Action because (1) the Plaintiffs were not seeking damages caused by an "occurrence" (i.e., an accident); (2) even if there were damages caused by an occurrence, coverage was precluded by the intentional act and motor vehicle exclusions. (App. at 104.)

In a letter to State Farm Auto and State Farm Fire dated August 10, 2006, defense counsel enclosed an offer of judgment from Hansen to Ernest Aguilar (for $49,000). Though this offer exceeded the "per person" bodily injury limits available under the Auto Policy, HJC recommended, based on their assessment of exposure "in the millions of dollars," that State Farm accept the offer of judgment to settle Ernest out of the case. (App. at 988.)

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[4] These figures reveal a misunderstanding of the available policy limits. Plaintiffs' counsel apparently believed that two separate limits of $25,000 under the Auto Policy and $100,000 under the Homeowners Policy were each available because he had sued both Brad and Ernest. The Auto Policy limits were actually $25,000 for each person injured, up to a total for any one accident of no more than $50,000, regardless of the number of claimants or insureds. The Homeowners Policy liability limits were $100,000 for one occurrence, regardless of the number of claimants or insureds.

In a letter to State Farm Auto dated February 1, 2007, defense counsel Clayton advised of yet another settlement demand, this one for $299,000 on behalf of all Plaintiffs. (App. at 994.) Even though this settlement demand also exceeded all potentially available State Farm policy limits, HJC again recommended that the settlement offer be accepted. (*Id.*)

On August 26, 2008, Brad and Ernest Aguilar agreed to a settlement with Plaintiffs. Under the terms of this settlement, Brad and Ernest (1) stipulated to the entry of judgment against them and in favor of Hansen and LeFevre on the negligence claims in the Tort Action (App. at 498); and (2) assigned their potential rights against State Farm to Hansen and LeFevre. (*Id.* at 332, 547.)

D. The Insurance Dispute Action (i.e., the Instant Action)

Based on the purported assignment agreements, Respondents (Hansen and LeFevre) filed a lawsuit in Clark County District Court against State Farm Auto and State Farm Fire (Case No. A597966). (App. at 16.)[5] Respondents asserted causes of action against the two State Farm entities for breach of contract, breach of the implied covenant of good faith and fair dealing and violation of the Nevada Unfair Insurance Practices Act. (*Id.*)

1. The federal court finds no coverage under the Homeowners Policy as a matter of law and grants State Farm Fire's motions for summary judgment.

State Farm Fire moved for summary judgment as to the claims purportedly assigned by Brad Aguilar. (App. at 34-62.) In this motion, State Farm Fire demonstrated that State Farm Fire did not owe defense or indemnity to Brad Aguilar for the Tort Action under the Homeowners' Policy because (1) the motor vehicle

[5] Respondent also joined an insurance agent, Mark Scheppmann, as a defendant. Mr. Scheppmann was the only Nevada defendant. After Mr. Scheppmann obtained summary judgment on the grounds that the Aguilars' claims against him could not be assigned as a matter of Nevada law, State Farm removed the case to federal court. (App. at 11.)

exclusion precluded coverage; (2) the causes of action (other than the negligence claims) could not, as a matter of law, constitute "occurrences" (i.e., accidents); and (3) the intentional acts exclusion precluded coverage for several of the intentional tort causes of action. (*Id.*) In the absence of coverage for Brad under the Homeowners' Policy, there could be no breach of contract or bad faith as a matter of law. (*Id.*)

Judge Kent Dawson granted State Farm Fire's motion for summary judgment. (App. at 546-555.) Judge Dawson specifically found that "Plaintiffs have failed to provide any facts that demonstrate negligent conduct by Brad independent of his use of a motor vehicle," and that "[a]ny negligence or negligent infliction of emotional distress claims that could be asserted against Brad arise from his use of a vehicle." (App. at 551.) "Accordingly, the clear and unambiguous terms of the State Farm Fire [Homeowners] Policy exclude coverage and State Farm Fire was under no obligation to defend Brad for negligence or negligent infliction of emotional distress." (*Id.*)

Judge Dawson also held that the remaining (i.e., non-negligence) claims asserted against Brad in the Tort Action all required proof of intent or willful conduct to establish liability. (App. at 552.) As such, any potential coverage for Brad for these non-negligence claims was precluded because the Policy only covered "occurrences" (i.e., accidents), and excluded coverage for expected or intended injury. (*Id.*)

The federal court (Judge Miranda Du, who had been assigned to the case) subsequently granted the insurance coverage portion of State Farm Fire's motion for summary judgment as to the claims assigned by Ernest Aguilar. (App. at 926.) As with Judge Dawson's prior granting of State Farm Fire's motion as to the claims assigned by Brad Aguilar, Judge Du reasoned that the Homeowners Policy expressly precluded coverage for claims arising out of the use of an automobile, and *the undisputed facts showed that Brad Aguilar's only wrongdoing was the allegedly*

negligent collision with LeFevre's vehicle. (App. at 918-19.) With respect to the intentional tort allegations, Judge Du concluded that, even assuming arguendo that Brad was involved with non-vehicular activities (which she noted was contrary to the "clear facts" and allegations), any such involvement would necessarily involve intentional (and not accidental) conduct, and was therefore also excluded by the Homeowners Policy. (App. at 920.)

In other words, *two federal judges have now independently concluded that the material facts are undisputed, and that there is no coverage for the Aguilars under the Homeowners Policy*.[6]

2. The federal court denies State Farm Auto's motion for summary judgment on *Cumis* grounds.

State Farm Auto moved for summary judgment on the grounds that there is no coverage under the Auto Policy for the stipulated judgments obtained by Plaintiffs against either Brad or Ernest because the Aguilars violated multiple provisions of the Auto Policy. (App. at 275-299.) Specifically, the Aguilars' settlement with the Plaintiffs without State Farm's consent violated State Farm Auto's right to defend the Tort Action and breached the insureds' duty to cooperate, as well as the "no action" provision of the Auto Policy. (*Id*.)

In their opposition to State Farm Auto's motion for summary judgment, Plaintiffs argued, despite the lack of any such allegation in their complaint, that State Farm breached its duty to defend by failing to advise the Aguilars that they had a "right to independent counsel." (App. at 535.) Plaintiffs notably did not argue

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[6] In her order, Judge Du clarified that, because State Farm Fire's motions for summary judgment did not specifically address Respondents' claims for alleged violations of the Nevada Unfair Claims Practices Act and misrepresentation, those claims technically remained "viable." (App. at 924.) The salient ruling by both federal judges, however, is that there is no coverage for the Aguilars as a matter of law for the Tort Action under the Homeowners Policy. State Farm Fire's motion to summarily adjudicate these residual claims remains pending before the federal court.

the legal viability of any such requirement under Nevada law, relying instead on California law as support for their assumption that a right to independent counsel exists in this state.

In response to State Farm Auto's motion, Judge Du requested that the parties provide supplemental briefing (limited to 10 pages) on the following: (1) the applicability of *San Diego Navy Fed. Credit Union v. Cumis Ins. Soc'y*, 162 Cal.App.3d 358 (1984) to the facts of this case, including whether not providing *Cumis* counsel, if required, would constitute a breach of the auto insurance contract; and the impact of State Farm's reservation of rights on any potential *Cumis* claim (e.g., did the reservation of rights create a conflict of interest under *Cumis* and its progeny?); (2) whether Nevada courts presently apply the *Cumis* requirement to insurance cases in light of the holdings in *Commercial Stand. Ins. Co. v. Tab Constr.,* 583 P.2d 449, 451 (1978)[7] and *Nevada Yellow Cab Corp. v. Eighth Judicial Dist. Ct.*, 152 P.3d 737, 742-43 (2007); and (3) if Nevada courts do impose a *Cumis* requirement, what impact this has on the resolution of State Farm Auto's Motion for Summary Judgment. (App. at 751-52.)

In its supplemental brief, State Farm Auto explained that Nevada has never adopted the *Cumis* case, or California Civil Code § 2860 (the California Legislature's codification and modification of *Cumis*). (App. at 754-767.) State Farm Auto also detailed why, even if a right to independent counsel hypothetically did exist in Nevada, there was no conflict of interest in the instant case that would trigger any right to independent counsel. (*Id*.)

Judge Du ultimately denied State Farm Auto's motion for summary judgment on the sole grounds that State Farm Auto should have provided independent counsel (or "*Cumis* counsel") to the Aguilars for the defense of the Tort Action. (App. at 889-907.) Though the court acknowledged that "[i]n the nearly 30 years since the

[7] The *Commercial Standard* case does not involve insurance issues (let alone independent counsel rights). It merely shows that Nevada courts will sometimes look to California law.

Cumis decision, neither the Nevada Supreme Court nor the federal district courts sitting in Nevada ha[ve] adopted or applied the *Cumis* requirement to insureds in Nevada," it nevertheless imposed a **retroactive** *Cumis* requirement on State Farm, based largely on the premise that this Court's *Nevada Yellow Cab* opinion "is in accord with the reasoning underlying *Cumis*." (*Id*. at 898.) The federal court also reasoned that "Nevada courts simply found no need to expressly adopt a *Cumis* requirement" because Nevada routinely looks to California law when Nevada law is silent. (*Id*. at 902.) Finally, the court concluded that *Cumis* is the "majority rule" nationally. (*Id*.)

State Farm Auto filed a motion for reconsideration. (App. at 928-957.) In the motion, State Farm argued that Nevada has implicitly rejected *Cumis* rights, and that nothing in *Yellow Cab* altered the longstanding rule in Nevada that, when a conflict exists in the context of the tripartite relationship, the insured is defense counsel's only client. (App. at 941-44.) Additionally, even if "*Cumis*" counsel rights were to be recognized, any such requirement could not be applied retroactively in the instant case. (*Id*. at 945-46.) Alternatively, State Farm requested that the federal court certify the important questions of state law to this Court. (*Id*. at 949-953.) Judge Du ultimately declined to reconsider her summary judgment ruling, but did determine, given the lack of any express recognition of *Cumis* rights by this Court, that certifying the *Cumis* issues to this Court was appropriate. (App. at 999-1000.)

3. Response by the Nevada Supreme Court

On or about April 23, 2014, this Court issued its "Order regarding NRAP 5 Certification Order." (App. at 2.) In this Order, this Court noted that, although the certified questions presented questions of law, "their resolution will necessarily depend on the specific facts presented." (*Id*.) Accordingly, this Court invited Judge Du to transmit a copy of the salient summary judgment order and deferred ruling as to whether to accept the certified questions. (*Id*. at 3.) On June 20, 2014, after the federal court had complied with this Court's April 23, 2014 order, this

Court issued its Order Accepting Certified Questions. (App. at 6-7.)[8]

V. SUMMARY OF THE ARGUMENT

Over the last eight decades, courts in other states have issued varied, inconsistent and confusing pronouncements about independent counsel issues. Yet, as this morass of independent counsel law has lead to wasteful and unnecessary collateral litigation in many other states, neither this Court nor the Nevada Legislature have found it necessary to establish any requirement that insurers must forfeit their right to select defense counsel in tort lawsuits and permit insureds to retain their own non-screened counsel when a coverage dispute, theoretical or actual, is presented. Instead, Nevada has implicitly recognized that its ethical rules, as well as well-established laws relating to attorney malpractice and insurance "bad faith," provide sufficient checks and balances to enable insurers and retained counsel to deal with the highly individualized facts and circumstances presented by any given tripartite situation.[9] There is no compelling public policy reason to now impose a new requirement that would significantly alter the manner in which insurers conduct business in Nevada. The facts and circumstances of *this case*, where defense counsel demonstrably placed the interests of the Aguilars ahead of State Farm Auto's interests, certainly do not implicate any need to adopt an independent counsel obligation. Indeed, this case demonstrates precisely why "*Cumis* counsel" rights are *unnecessary* in Nevada.

Even if an exploration of this type of industry-changing law were desired, which remains a highly questionable premise, any such inquiry should be conducted by the Nevada legislature, which has the means and resources to investigate and

[8] Pursuant to this Order, Appellant's opening brief was originally due on August 4, 2014. The parties have stipulated to extend this deadline to September 3, 2014. (App. at 9.)

[9] Indeed, it is the highly individualized nature of any given lawsuit and accompanying tripartite relationship that has lead the vast majority of courts – even those that have recognized independent counsel rights under some circumstances – to reject the notion that a reservation of rights letter creates a "per se" conflict of interest.

hear evidence as to whether this type of change is needed and desirable. If thorough legislative investigation and analysis were to reveal any need for such a drastic change, then the legislature would be in the best position to craft nuanced statutory law that reflects particular Nevada needs and public policies.

Finally, even if this Court were inclined to impose a new independent counsel requirement, any such requirement should not be applied retroactively. It is well-established that, absent a clearly expressed legislative intent, new laws and duties – whether established by the Legislature or this Court, apply prospectively only. Accordingly, due process and fundamental fairness mandate that any new duty created by this Court apply prospectively only, and not to any insurance claim handling in this case, especially given that the salient events took place nearly 10 years ago.

VI. ARGUMENT

A. There is no national consensus as to the existence and desirability of Independent Counsel laws.

For nearly 80 years, courts in other states have grappled with the issue of whether, and under what circumstances, an insured may be entitled to select its own attorney when an insurer is providing a defense of a third-party lawsuit pursuant to a liability insurance policy.[10]

1. Uncertainty and unnecessary collateral litigation persist in California - the state where independent counsel law was largely created.

In 1984, the California Court of Appeal issued what is generally regarded as the leading case in the development of independent counsel jurisprudence, *San Diego Navy Federal Credit Union v. Cumis Ins. Society*, 162 Cal. App. 3d 358, 208 Cal. Rptr. 494 (1984) (hereafter "*Cumis*"). In *Cumis*, the court held that, when an

[10] One of the first such cases was decided in 1936. *See Shehee-Ford Wagon & Harness Co. v. Cont'l Cas. Co.*, 170 So. 249 (La. App. 1936).

insurer and insured have divergent interests (e.g., as to whether some or all of the claims asserted against an insured are covered under the insured's policy), counsel retained by the insurer could not represent both the insured and the insurer, and the insurer was obligated to pay the costs for the insured to hire independent counsel of the insured's own choosing. Notably, "the *Cumis* rule is not based on insurance law but on the **ethical duty** of an attorney to avoid representing conflicting interests." *James 3 Corp. v. Truck Ins. Exch*., 91 Cal. App. 4th 1093, 1101 (2001) (emphasis added).

In 1987, three years after *Cumis* was decided, the California Legislature passed Civil Code Section 2860, which was intended to "clarify and limit the rights and responsibilities of insurer and insured as set forth in *Cumis*." *James 3, supra,* 91 Cal. App. 4th at 1101. This statute illustrates the numerous complexities inherent in any "independent counsel" requirement, and, as demonstrated by the litany of cases in California relating to independent counsel rights, it may actually create more problems than it resolves.[11]

The following is a sampling of some of the salient provisions of Section 2860:

> (a) If the provisions of a policy of insurance impose a duty to defend upon an insurer and a conflict of interest arises which creates a duty on the part of the insurer to provide independent counsel to the insured, the insurer shall provide independent counsel to represent the insured unless, at the time the insured is informed that a possible conflict may arise or does exist, the insured expressly waives, in writing, the right to independent counsel. An insurance contract may contain a provision which sets forth the method of selecting that counsel consistent with this section.

Cal. Civ. Code § 2860(a). This subsection (a) is a tautology that provides no guidance – if a conflict arises which creates a duty to provide independent counsel, the insurer must provide independent counsel. Whether a conflict gives rise to

[11] Since the passage of Section 2860, California state and federal courts have issued no fewer than 175 opinions regarding various aspects of this independent counsel law.

independent counsel rights in any given situation, however, is left for case-by-case determination.

> (b) For purposes of this section, a 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.

Cal. Civ. Code § 2860(b). This subsection (b) provides that, if the outcome of a coverage issues can be controlled by counsel retained by the insurer, a conflict of interest "*may*" exist. As with subsection (a), this provision provides an invitation to litigation more than meaningful guidance. A conflict of interest always "may" exist when an attorney has multiple clients. This subsection of the statute also makes clear that independent counsel rights do not exist for commonly encountered situations, such as when punitive damages, or damages in excess of policy limits, are sought against the insured.

Given the numerous questions raised by Section 2860, it is not surprising that, nearly 30 years later, confusion reigns as to when independent counsel is required in California. *See Hurvitz v. St. Paul Fire & Marine Ins. Co.*, 109 Cal.App.4th 918, 931, 135 Cal.Rptr.2d 703 (2003) (insured's objection to settlement within policy limits does not trigger right to *Cumis* counsel); *James 3 Corp., supra*, 91 Cal. App. 4th at 1101 (no entitlement to independent counsel merely because the insurer reserved its right to seek reimbursement for the costs associated with the defense of uncovered claims); *Dynamic Concepts v. Truck Ins. Exch.*, 61 Cal.App.4th 999, 1007, 71 Cal.Rptr.2d 882 (1998) (the fact that the damages claimed are only partially covered by the policy does not itself create a conflict of interest requiring *Cumis* counsel); *Native Sun Invest. Group v. Ticor Title Ins. Co.*, 189 Cal.App.3d

1265, 1277-78, 235 Cal.Rptr. 34 (1987) (insurer can avoid furnishing independent counsel by instructing defense counsel to disregard coverage issues in defending the third party action).

One issue that is clear under California law is that the mere issuance of a reservation of rights letter does *not* automatically trigger a right to independent counsel. *See, e.g., Long v. Century Indem. Co*., 163 Cal.App.4th 1460, 1470, 78 Cal.Rptr.3d 483 (2008); *Dynamic Concepts, supra*, 61 Cal.App.4th at 1007-8; *Golden Eagle Ins. Co. v. Foremost Ins. Co*., 20 Cal.App.4th 1372, 1394 (Cal. App. 1993); *Blanchard v. State Farm Fire & Casualty Co*., 2 Cal.App.4th 345, 348, 2 Cal.Rptr.2d 884 (1992); *see also* California State Bar Standing Committee on Professional Responsibility and Conduct, Formal Opinion 1995-139 (mere reservation of rights does not rise to level of "overt" potential conflict that must be remedied). This rule is based on the practical reality that the shared goal of both the insurer and the insured is minimization of the exposure to insured. *Blanchard, supra*, 2 Cal.App.4th at 348.

Accordingly, in the absence of *evidence* showing how the defense attorney could control the outcome of the damages issue to the detriment of the insured, or that counsel had incentive to do so, the insured does not have a right to independent counsel under California law. *See, e.g*., *James 3, supra*, 91 Cal.App.4th at 1109 ("[T]here is nothing in the record to suggest that defense counsel would violate his ethical duties to completely defend the insureds 'as if [they] had retained [him] personally."); *Blanchard, supra*, 2 Cal.App.4th at 348. Rather, the entitlement to independent counsel is limited to conflicts that are "significant, not merely theoretical, [and] **actual, not merely potential**." *Dynamic Concepts, supra*, 61 Cal. App. 4th at 1007-08 (emphasis added).

Ultimately, notwithstanding over 30 years of legislative and judicial efforts to establish reliable, consistent rules as to when independent counsel is required, the inquiry as to whether a California insured is entitled to independent counsel in any

given case is still largely a case-by-case endeavor which largely turns on an application of the rules of professional conduct relating to conflicts and attorney duties.

2. There is no consensus whatsoever in other states as to whether independent counsel rights exist, or should exist, let alone as to what circumstances should trigger a right to independent counsel.

Outside of California, 21 other state courts have recognized the existence of independent counsel rights under varying circumstances, where the insurer may be obligated to pay the costs of defense counsel selected by the insured. These states include Alaska,[12] Florida,[13] Idaho,[14] Illinois,[15] Indiana,[16] Iowa,[17] Louisiana,[18] Maine,[19] Maryland,[20] Massachusetts,[21] Minnesota,[22] Mississippi,[23] Missouri,[24] New

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[12] *CHI of Alaska v. Employers Reinsurnce Corp*., 844 P.2d 1113 (Alaska 1993). Alaska also has a statute similar to California Civil Code § 2860. *See* A.S. 21.96.100.

[13] *Taylor v. Safeco Ins. Co*., 361 So.2d 743, 745-46 (Fla. App. 1978). Florida also has a claims administration statute that mandates the insurer to retain independent counsel "which is mutually agreeable to the parties" if it preserves its right to deny coverage. *See* Florida Statutes § 627.426.

[14] *Boise Motor Car Co. v. St. Paul Mercury Indem. Co*., 112 P.2d 1011 (Idaho 1941).

[15] *Md. Cas. Co. v. Peppers*, 355 N.E.2d 24 (Ill. 1976).

[16] *Snodgrass v. Baize*, 405 N.E.2d 48 (Ind. App. 1980).

[17] *First Newton Nat'l Bank v. General Cas. Co*., 426 N.W.2d 618 (Iowa 1988).

[18] *Shehee-Ford Wagon & Harness Co. v. Cont'l Cas. Co*., 170 So. 249 (La. App. 1936).

[19] *Patrons Oxford Ins. Co. v. Harris*, 905 A.2d 819 (Me. 2006).

[20] *Brohawn v. Transamerica Ins. Co*., 347 A.2d 842 (Md. 1975).

[21] *No. Security Ins. Co. v. R.H. Realty Trust*, 941 N.E.2d 688 (Mass. App. 2011).

[22] *Mutual Service Cas. Ins. Co. v. Luetmer*, 474 N.W.2d 365 (Minn. App. 1991).

[23] *Moeller v. Am. Guar. and Liab. Co*., 707 So.2d 1062 (Miss. 1996).

[24] *State ex re. Rimco, Inc. v. Dowd*, 858 S.W.2d 307 (Mo. App. 1993).

Jersey,[25] New York,[26] North Carolina,[27] North Dakota,[28] Ohio,[29] Oklahoma,[30] Pennsylvania [31] and Texas.[32] Even among these states that have recognized varying degrees of independent counsel rights, many, like California, require an actual conflict of interest, and not merely the appearance of or potential for a conflict, before the insured is entitled to select his own counsel.[33]

In contrast, the remaining 29 state courts have not recognized independent counsel rights (i.e., an insured's right to choose its own counsel). Some state courts, like Nevada, have not explicitly addressed the issue (Arkansas, Colorado, Delaware, District of Columbia, Georgia, Kansas, Kentucky, Michigan,[34] Nebraska, Nevada, Oregon, Vermont, West Virginia and Wyoming). Other state courts have issued cursory, vague and/or conflicting authorities, or have opined on the issue only in dicta (Arizona,[35] Montana, New Hampshire, New Mexico, Rhode Island, South

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[25] *Burd v. Sussex Mut. Ins. Co*., 267 A.2d 7 (N.J. 1970).

[26] *Public Serv. Mut. Ins. Co. v. Goldfarb*, 425 N.E.2d 810 (N.Y. 1981).

[27] *Nat'l Mortgage Corp. v. Am. Title Ins. Co.*, 255 S.E.2d 622 (N.C. App. 1979).

[28] *Fetch v. Quam*, 530 N.W.2d 337 (N.D. 1995).

[29] *Socony-Vacuum Oil Co. v. Cont'l Cas. Co*., 59 N.E.2d 199 (Ohio 1945).

[30] *Nisson v. Am. Home Assur. Co*., 917 P.2d 488 (Okla. App. 1996).

[31] *Babcock & Wilcox Co. v. Am. Nuclear Ins*., 76 A.3d 1 (Pa. Super. 2013).

[32] *N. County Mut. Ins. Co. v. Davalos*, 140 S.W.3d 685 (Tex. 2004).

[33] *See, e.g., Mutual Service Cas. Ins. Co. v. Luetmer*, 474 N.W.2d 365, 368-69 (Minn. App. 1991) (defense counsel's prior direct representation of insurer and insurer's bringing of declaratory relief action in subject case not sufficient to create conflict that would entitle insured to independent counsel if his choice). The finding of a conflict "must rest on more substantial evidence, such as actions which demonstrate a greater concern for [the insurer's] interest than [the insured's] interests." *Id*. at 369.

[34] Federal courts sitting in Michigan have strongly opined that Michigan would not recognize *Cumis* rights. *See, e.g., Central Mich. Bd. of Trustees v. Employers Reins. Corp.,* 117 F.Supp.2d 627 (E.D. Mich. 2000); *Fed. Ins. Co. v. X-Rite Inc*., 748 F. Supp. 1223 (W.D. Mich. 1990).

[35] *Paradigm Ins. Co. v. The Langerman Law Office*, 24 P.3d 593 (Ariz. 2001) (when a conflict exists between client and the insurer, the defense counsel's duty is exclusively

Dakota, Utah and Wisconsin), leaving it unclear as to whether these states recognize independent counsel rights.[36] Finally, other state courts have, expressly or implicitly, rejected independent counsel rights (Alabama,[37] Connecticut,[38] Hawaii,[39] South Carolina,[40] Tennessee,[41] Virginia[42] and Washington[43]).

Accordingly, the notion that the "majority" of states recognize an insured's right to independent counsel in conflict situations (as noted by the federal court in this case, and, in fairness, by other courts as well) is questionable. In fact, it appears that only a *minority* of states (21) have expressly recognized varying forms of independent counsel rights. The states that have recognized such rights have done so based on the particular facts and circumstances presented, and have resolved the issues based largely on the applicable rules of professional conduct. In contrast, most states (29) have not recognized such rights, either by rejection, silence or uncertainty. Moreover, even among the states that do recognize *Cumis* rights, virtually none utilize a "*per se*" rule that the mere reservation of rights by an insurer

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owed to the insured).

[36] One problem, for example, is that the phrase "independent counsel" is frequently not defined in the case law. *See Fed. Ins. Co. v. X-Rite Inc.*, 748 F. Supp. 1223, 1228 n.1 (W.D. Mich. 1990). The phrase does not always mean selected by the insured. Some courts have recognized that the phrase simply means that the defense attorney only represents the insured in the defense of the third-party lawsuit, and not also the insurer with respect to insurance coverage issues. *Id*.

[37] *L&S Roofing Supply Co. v. St. Paul Fire & Marine Ins. Co.*, 521 So.2d 1298, 1303 (Ala. 1988).

[38] *Higgins v. Karp*, 687 A.2d 539 (Conn. 1997).

[39] *Finley v. Home Ins. Co.*, 975 P.2d 1145 (Haw. 1998).

[40] *Twin City Fire Ins. Co. v. Ben Arnold-Sun Belt Beverage Co.*, 336 F.Supp.2d 610 (D.S.C. 2004); *Allstate Ins. Co. v. Wilson*, 193 S.E. 2d 527 (S.C. 1972).

[41] *In re Petition of Youngblood*, 895 S.W. 2d 322 (Tenn. 1995); *Givens v. Mullikin*, 75 S.W.3d 383 (Tenn. 2002).

[42] *Norman v. Ins. Co. of N. Am.*, 239 S.E.2d 902 (Va. 1978).

[43] *Johnson v. Cont'l Casualty Co.*, 788 P.2d 598 (Wash. App. 1990); *Tank v. State Farm Fire & Cas. Co.*, 715 P.2d 1133 (Wash. 1986).

1 automatically gives rise to independent counsel.[44]

2 B. **Independent Counsel requirements are unduly cynical,**
3 **unnecessary, constraining and wasteful.**

4 The states that have rejected imposing independent counsel rights on insurers 5 have done so for three primary reasons. *First*, some states deal with potential 6 conflicts inherent in the tripartite relationship by emphasizing their expectation that 7 their licensed attorneys are willing and able to comply with the rules of ethics. 8 When a conflict arises between the insurer and the insured, retained counsel 9 represents only the insured. *See Finley, supra*, 975 P.2d at 1152. Because counsel 10 is required to comply with the rules of professional conduct, he is sufficiently 11 "independent" to provide competent and ethical representation for the insured. *Id*. at 12 1154 ("[W]e will not adopt a blanket rule based on the *assumption* that the attorney 13 will slant his or her representation to the detriment of the insured.") (Emphasis 14 added); *see also Travelers Indem. Co. v. Royal Oak Enters*., 344 F.Supp.2d 1358, 15 1374 (M.D. Fla. 2004) ("The Court is not willing to graft such an unwarranted 16 presumption [that retained defense counsel will not act independently and ethically] 17 into the law."); *X-Rite, supra,* 748 F. Supp. at 1229 ("The Court is unable to 18 conclude that Michigan law professes so little confidence in the integrity of the bar 19 of this state.").

20 "An attorney occupies a fiduciary relationship with her client. [Citation 21 omitted]. The essence of the fiduciary duty is the recognition that one who acts in a 22 representative capacity frequently must subjugate his interest to the person 23 represented. To suggest that human nature prevents the harnessing of action 24 motivated by self-interest is to contend that fiduciary relationships are unworkable.

25 [44] It appears that the only two states that adhere to a *per se* rule are Maine and Mississippi. 26 *See Patrons, supra*, 905 A.2d at 826; *Moeller, supra*, 707 So.2d at 1069-70. "This [*per se* 27 rule] is not, however, the majority view, ***and it is not good law***." *Twin City, supra*, 336 F.Supp.2d at 619 (quoting a leading insurance law commentator, Allen D. Windt, 28 *Insurance Claims and Disputes* § 4:20) (emphasis added).

The law soundly rejects this contention." *Cent. Mich. Board, supra,* 117 F.Supp.2d at 636; *see also Twin City, supra,* 336 F.Supp.2d at 615 (rejecting rule that would disqualify defense counsel retained by insurer based on reservation of rights, which would be "premised upon the supposition that attorneys employed by insurance carriers will always behave unethically.")

Second, "[i]f the duties prescribed by the [rules of professional conduct] are not followed by retained counsel, various remedies exist to protect the insured. These remedies include: (1) an action against the attorney for professional malpractice; (2) an action against the insurer for bad faith conduct; and (3) estoppel of the insurer to deny indemnification." *Finley, supra*, 975 P.2d at 1155; *X-Rite, supra*, 748 F. Supp. at 1229-30; *Twin City, supra*, 336 F.Supp.2d at 620.

Third, the imposition of any kind of rule requiring independent counsel infringes on an insurer's contractual right to defend. Under most liability policies, the insurer not only has the "duty" to defend, but the "right" to defend as well. This "right to defend" confers upon the insurer some prerogative with respect to the defense beyond just simply paying expenses. *See X-Rite, supra,* 748 F. Supp. at 1229. A rule that the mere potential for a conflict of interest automatically and completely negates the insurer's "right to defend" is simply not fair or reasonable. *Id*. "The right to control the defense is a valuable one in that it reserves to the insurer the right to protect itself against unwarranted liability claims and is essential in protecting its financial interest in the outcome of litigation. This meaningful contractual right should not be penalized merely because there exists the potential for insurer-selected counsel to become impermissibly conflicted in its representation." *Royal Oak, supra*, 344 F.Supp.2d at 1374.

If we can learn anything from the quagmire of case law from other states, it is that any attempt to establish any kind of reliable independent counsel "rule" by judicial fiat is fruitless, and will inevitably lead persistently to collateral litigation in civil tort cases. As with any newly established duty, the potential for abuse is

present, and this risk must be carefully weighed against the potential benefit.[45] "[T]he best result is to refrain from interfering with the insurer's contractual right to select counsel and leave the resolution of the conflict to the integrity of retained defense counsel." *Finley, supra*, 975 P.2d at 1151-52.

C. Despite the existence of independent counsel requirements in other states for decades, Nevada has never adopted this requirement.

As a basis for its conclusion that a right to independent counsel exists under Nevada law, the federal court relied heavily on this Court's opinion in *Nevada Yellow Cab Corp. v. Eighth Jud. Dist. Ct.*, 123 Nev. 44, 152 P.3d 737 (2007) (hereafter "*Yellow Cab*"). *Yellow Cab*, however, did not address the issue of whether an insured was entitled to independent counsel. Rather, *Yellow Cab* involved the issue of whether a law firm retained by an insurer to represent an insured in a tort lawsuit could subsequently represent the insured against the insurer in a dispute between the insured and insurer *arising out of the same claim*.

In concluding that writ relief was not warranted to reverse the disqualification, this Court in *Yellow Cab* adopted the rule that "counsel retained by an insurer to represent its insured represents both the insurer and the insured **in the absence of a conflict**." *Yellow Cab*, 123 Nev. at 47, 50-51 (emphasis added). This Court further reiterated, however, that "**the primary client remains the insured**." *Id*. at 51 (emphasis added). The issue this Court did not confront in *Yellow Cab*, however, is what happens when there is in fact a non-speculative conflict between the insurer and the insured. On this point, the State Bar of Nevada's Standing Committee on Ethics and Professional Responsibility (hereafter the "Standing

[45] For example, as one commentator has explained: "Private attorneys are often able to abuse the position of *Cumis* counsel which unnecessarily adds to the growing defense costs of insurers, and increased costs to insurers inevitably brings about increases in insurance premiums which burdens society as a whole." Alison M. Mizuo, *Finley v. Home Insurance Co: Hawaii's Answer to the Troubling Tripartite Relationship*, 22 Hawaii L. Rev. 675, 706-707 (2000).

Committee") has issued three relevant formal opinions.[46]

In Formal Opinion No. 9, issued in 1988 – four years after *Cumis* was decided and one year after California Civil Code § 2860 was adopted -- the Standing Committee addressed whether an attorney retained by an insurance company was required to disclose damaging confidential information conveyed to the attorney by the insured client. (The client had potentially defrauded the insurer with respect to the procurement of the subject auto policy). Reasoning that "[a]n attorney hired by an insurance company to represent an insured owes that person the same unswerving allegiance and fidelity that would be owed if the attorney were retained and paid personally by the insured,"[47] as well as the Nevada Rules of Professional Conduct (former SCR 156), the Standing Committee concluded that the attorney could not disclose this confidential information to the insurer.[48] The attorney's "paramount" duty is owed to the insured, not the insurer. That is, the attorney's duty is to defend the insured, and not advise or assist the insurer on questions of coverage. Under these circumstances, there is no conflict of interest problem under former SCR 157.[49]

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[46] Though these formal opinions are not binding on this Court, they do provide important guidance on issues of ethics and professional responsibility. *See, e.g., In re Schaefer*, 117 Nev. 496, 508, 25 P.3d 191 (2001) (relying on Standing Committee formal opinion).

[47] In support of this proposition, the Standing Committee cited to case law from California, Georgia, Illinois and New York, all of which would have alerted the Committee to the existence of the concept of *Cumis* counsel.

[48] Former SCR 156 is now codified as RPC 1.6, which provides, subject to exceptions, that "[a] lawyer shall not reveal information relating to representation of a client unless the client gives informed consent."

[49] Former SCR 157 is now codified as RPC 1.7, which provides that "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) The representation of one client will be directly adverse to another client; or (2) There is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."

In Formal Opinion No. 26, issued in 2001 – seven years after *Cumis* was decided and four years after Cal. Civil Code § 2860 was adopted -- the Standing Committee took the analysis a step further, addressing whether an insurance company could demand information from the law firm it hired to represent the insured (a subcontractor), when that information might be used by the insurer to deny benefits to the insured. The Standing Committee first noted, consistent with Formal Opinion No. 9, that the law firm represented the insured subcontractor, not the insurer. Accordingly, based on the law firm's obligations to its client, as well as Model Rule 5.4(c) (prohibiting a lawyer from permitting a person who employs or pays the lawyer from directing or regulating the lawyer's professional judgment), the law firm would be precluded from providing the potentially damaging information requested by the insurer.[50] Importantly, the Standing Committee also explained that, even if the insurer was considered to be another client of the law firm, existing ethical conflict rules would prohibit the law firm from providing adverse information from or about the client to the insurer.

Finally, in Formal Opinion No. 28, issued in 2002 – eight years after *Cumis* was decided and five years after Cal. Civil Code § 2860 was adopted -- the Standing Committee concluded that the attorney's file in a matter defended by the insurer is the property of the client-insured. As the Standing Committee instructively explained: "It is the policyholder against whom a third-party liability claim has been made. It is on behalf of the policyholder that counsel enters an appearance. It is the policyholder that may make statements about the matter to counsel in confidence. It is the policyholder who will be named in any complaint and who will sit at counsel table with the attorney." (Formal Opin. No. 28 at 3).

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[50] The Standing Committee did recognize that the law firm could provide some information to the insurer. "A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client." Former SCR 169(1) (now RPC 2.3).

In all three of these scenarios, the Standing Committee found the Nevada Rules of Professional Conduct to be wholly sufficient to guide attorneys who are retained by insurance companies to represent insureds. No need or desire for independent "*Cumis*" counsel was ever suggested or referenced by the Committee. Moreover, though the Committee has acknowledged, post-*Yellow Cab*, that portions of Formal Opinion Nos. 9, 26 and 28 that are contrary to *Yellow Cab* have been superseded, "the Court's holding [in *Yellow Cab*] does not otherwise overrule or alter this opinion or its conclusions." Thus, nothing in *Yellow Cab* alters long-standing Nevada law that, if a conflict *does* exist, "the insured remain the lawyer's 'primary' client." (See 2007 advisory note to Formal Opinion Nos. 8, 26 and 28).

It is not only the Standing Committee that has not mentioned (let alone adopted) *Cumis*. **<u>In the 30-plus years since *Cumis* was decided, neither this Court nor the Nevada legislature have found it necessary to recognize independent counsel rights</u>.** Instead, Nevada has implicitly recognized that its own Rules of Professional Conduct, as well as laws relating to insurance bad faith and legal malpractice, provide sufficient protections against any issues that may arise out of the tripartite relationship. Nevada simply does not view its licensed attorneys with the cynicism and pessimism which colors the view of the states that have recognized independent counsel rights. Moreover, as demonstrated by the California experience, any attempt to establish rules as to when independent counsel is required will likely lead to less clarity and create more collateral litigation.

D. <u>The instant case demonstrates why *Cumis*-type rights are not needed in Nevada.</u>

On or about November 9, 2005, State Farm Auto advised the Aguilars that it was providing a defense in the Tort Action. (App. at 328.) Less than two months later, on January 6, 2006, Brad Aguilar was deposed in the Tort Action. During the deposition, Brad (1) admitted to accidentally bumping the LeFevre vehicle with his car; and (2) denied any intentional conduct in that accident. (App. at 97-99.) The

facts with respect to the coverage issue of an "occurrence" under the State Farm Auto policy were thereby established in early January 2006, approximately two month after State Farm Auto retained HJC as defense counsel and approximately two months before Ernest Aguilar was even sued. Short of advising Brad to admit to intentional conduct (which obviously didn't happen), there was no action HJC could have possibly undertaken to affect the issue of whether the actionable conduct by Brad was accidental or negligent. Thereafter, the interests of the Aguilars and State Farm Auto were completely aligned – i.e., their common goal was to minimize the exposure to the Aguilars in the Tort Action.[51]

With respect the Homeowners Policy, the fiction that there was ever a potential for indemnity coverage has now been disposed of by the federal court in two summary judgment orders, by two separate federal judges. As both Judge Dawson and Judge Du separately and independently concluded, State Farm Fire could owe no coverage under the Homeowners Policy unless there was evidence of negligent conduct by Brad that did not involve the use of a vehicle. (App. at 551-52, 918-21.) The undisputed facts here demonstrate that Brad's only negligent alleged wrongdoing was his collision with LeFevre's vehicle, and that any other alleged conduct by Brad would, by definition, be intentional (e.g., Plaintiffs' conspiracy and concert of action claims). Therefore, there was no potential for coverage under the Homeowners Policy, and no duty to defend by State Farm Fire. (*Id.*) There is no plausible argument that HJC could do anything that would affect these coverage questions. In other words, there was never any actual conflict between State Farm and the Aguilars that would trigger any independent counsel rights, even if such rights were to be recognized in Nevada.

[51] The fact that State Farm Auto continued to "reserve rights" based on the potential excess and punitive damages exposure did not create a conflict of interest that would entitle the Aguilars to independent counsel under, for example, California Civil Code § 2860.

Moreover, even if, for sake of argument, there was a conflict between State Farm Auto and the Aguilars, HJC demonstrated precisely the type of ethical responsibility expected of Nevada attorneys. Again, as discussed above, in a post-*Yellow Cab* world, if there is a conflict between an insurer and the insured, then defense counsel retained by the insurer represents only the insured. At all times, HJC acted accordingly (i.e., as if the Aguilars were HJC's sole clients). This is best illustrated by HJC's repeated recommendations to State Farm to accept Plaintiffs' settlement demands, ***even though the demands exceeded the policy limits and necessarily included non-covered claims***. (App. at 985, 988 and 994.)[52]

In sum, the conduct of HJC in this case demonstrates precisely why *Cumis* counsel is unnecessary in Nevada.

E. The Legislature should make the determination as to whether the arguable benefits of any independent counsel requirement would outweigh the costs of this new law.

This Court has long demonstrated a history of judicial restraint with respect to issues implicating financial and public policy concerns, reasoning that such issues should be resolved by the legislature after it has conducted appropriate hearings and investigations regarding the implications of various alternatives. *See, e.g., Blanton v. North Las Vegas Mun. Ct.*, 103 Nev. 623, 636, 748 P.2d 494 (1987); *see also County of Clark v. Upchurch*, 114 Nev. 749, 759, 961 P.2d 754 (1998) (noting "this court's custom of practicing judicial restraint.").

One example of this judicial restraint is illustrated by this Court's treatment of dram shop liability, where this Court has determined, notwithstanding its power to establish a new type of regulation or liability, that the legislature is best suited to

[52] Likewise, State Farm recognized the scope of HJC's role by retaining separate coverage counsel (the law firm of Selman Breitman) to represent its own interests. Furthermore, when Plaintiffs' settlement demands created a potential conflict between Brad and Ernest, State Farm retained separate counsel, at its own cost, to advise Brad and Ernest with respect to the settlement demands. (App. at 892.)

1 assess whether a civil remedy is warranted. *See Hamm v. Carson City Nugget*, 85
2 Nev. 99, 450 P.2d 358 (1969) (the establishment of civil liability of tavern owner is
3 a public policy decision best made by legislature); *Hinegardner v. Marcor Resorts*,
4 108 Nev. 1091, 1096, 844 P.2d 800 (1992) (again rejecting to impose common law
5 dram shop liability, reasoning that legislative procedures and safeguards are more
6 suitably equipped to address issues involving competing societal, economic and
7 policy considerations).

8 As this Court explained: "Whatever choice we make for Nevada is
9 supportable by case authority elsewhere. In the final analysis the controlling
10 consideration is public policy and whether the court or the legislature should declare
11 it." *Hamm*, *supra*, 85 Nev. at 100. "[I]f civil liability is to be imposed, it should be
12 accomplished by legislative act after appropriate surveys, hearings, and
13 investigations to ascertain the need for it and the expected consequences to follow.
14 We prefer this point of view. Judicial restraint is a worthwhile practice when the
15 proposed new doctrine may have implications far beyond the perception of the court
16 asked to declare it." *Id*.

17 These well-established Nevada principles of judicial restraint dictate that the
18 legislature may very well be better suited to fully assess whether an independent
19 counsel remedy is needed. Again, as detailed above:

20 - There is a notable lack of judicial consensus nationally as to the
21 need for an independent counsel remedy and, if so, the
22 circumstances under which it should be conferred.
23 - Due in large part to the lack of any judicial consensus as to
24 independent counsel parameters, there is a very real probability
25 that the establishment of this new 'right' in Nevada will lead to
26 increased litigation, in both the district courts and in this Court,
27 as to when independent counsel should have been provided, and
28

the related, unsettled consequences of any failure to provide "*Cumis*" counsel.

- An insurer's "right to defend" is an important contractual right, and impairing this right is likely to have adverse economic effects on the insurance industry.[53]

The legislature is well-equipped to investigate, conduct hearings and ultimately make a policy decision on this issue based on a comprehensive weighing of the potential benefits and costs.

F. <u>If a right to independent counsel were to be recognized, it should only apply *prospectively*.</u>

"In Nevada, as in other jurisdictions, statutes operate prospectively, unless the Legislature clearly manifests an intent to apply the statute retroactively, or 'it clearly, strongly, and imperatively appears from the act itself' that the Legislature's intent cannot be implemented in any other fashion." *Public Employees' Benefits Program v. LVMPD*, 124 Nev. 138, 154-55, 179 P.3d 542 (2008) (quoting from *Matter of Estate of Thomas*, 116 Nev. 492, 495-496, 998 P.2d 560 (2000).

"Generally, as recognized by the U.S. Supreme Court, courts must take a 'commonsense, functional' approach in determining if a new statute operates retroactively because it imposes new legal consequences on events completed before its enactment." *Public Employees, supra*, 124 Nev. at 155 (citing I*NS v. St. Cyr*, 533 U.S. 289, 321, 121 S. Ct. 2271, 150 L. Ed. 2d 347 (2001)). "[J]ust because a statute draws upon past facts does not mean that it operates 'retrospectively.' Instead, '[a] statute has retroactive effect when it 'takes away or impairs vested rights acquired under existing laws, or creates a new obligation, [or] imposes a new duty . . . in respect to transactions or considerations already past.' That is, even though a statute operates only from the time of its enactment, it is retroactive if it impairs 'vested

[53] See, e.g., *Mizuo, supra*, footnote 44 (recognizing potential for abuse of *Cumis* counsel requirements and related increases in insurance premiums).

rights and past transactions.' In deciding whether a statute has retroactive application, courts are guided by fundamental notions of 'fair notice, reasonable reliance, and settled expectations.'" *Id*. (citations omitted).[54]

Though these general principles of developed in the context of statutes passed by the legislature, they apply with equal force to new laws or interpretations by courts. *See State v. Weddell*, 118 Nev. 206, 215, 43 P.3d 987 (2002) (Justice Rose, in concurring and dissenting opinion, explaining that, when this Court announces a new rule, the new rule should not be applied retroactively); *see also Bouie v. City of Columbia*, 378 U.S. 347, 352-55, 84 S. Ct. 1697 (1964) (judicial enlargement of law, applied retroactively, operates precisely like an unconstitutional *ex post facto* law); *In re Baert*, 252 Cal. Rptr. 418, 420 (Cal. App. 1988) (just as the state legislature may not pass ex post facto laws as a matter of due process, a state's highest court is similarly barred from retroactively applying a new judicial interpretation or law).

In this case, it would be *manifestly unjust* to impose liability on State Farm Auto based on a newly-created duty to offer independent counsel. There is no mandate from this Court or the legislature that insurers in Nevada provide independent counsel pursuant to *Cumis*, Cal. Civil Code § 2860 or any other law, and there certainly was no such requirement when State Farm first began handling the defense of the subject Tort Action *nearly 10 years ago in 2005* (which was nearly two years before *Yellow Cab* was even decided). Absent notice of such a requirement, creating even the possibility that State Farm could somehow be liable for not providing independent counsel in this case would constitute the civil equivalent of an *ex post facto* law.

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[54] Notably, the federal court in California has held that California Civil Code § 2860 (the *Cumis* statute) did *not* apply retroactively. *See Diamond Walnut Growers v. American Motorists Ins. Co*., 1991 U.S. Dist. Lexis 7317 at *6-*11 (N.D. Cal. 1991).

In addition to fundamental due process, the factual particulars in this case further show why any new independent counsel right in Nevada should not be applied retroactively against State Farm. As detailed above, other than the independent counsel issue, the federal court has concluded that none of Respondent's other allegations of misconduct constituted a breach of the Auto Policy, and that no coverage is available under the Homeowners Policy. (App. at 546-555, 889-907, 909-926.) Moreover, Respondent did not even allege in his complaint that State Farm Auto wrongfully or improperly failed to appoint independent counsel, or that State Farm somehow breached the Auto Policy by failing to do so.[55] (App. at 16-28.)

Thus, if and to the extent this Court intends to create a new legal duty in these proceedings, due process and fundamental fairness mandate that this new duty apply prospectively only, and not to any defense handling in this case.

VII. CONCLUSION

Based on the foregoing, appellant State Farm Mutual Automobile Insurance Company respectfully requests that this Court recognize that Nevada law does not require an insurer to provide independent counsel for its insured when a conflict of interest arises. Such conflicts are simply too fact-specific and nuanced to be amenable to a 'one-size fits all rule,' and the existing Rules of Professional Conduct, as well as legal malpractice and insurance bad faith laws, provide sufficient guidance and deterrence for such situations. Additionally, the determination as to whether any such right is necessary and appropriate for Nevada is best left to the legislature, which has the means of assessing whether there is even a problem that requires a fix.

[55] A plaintiff may not raise new *Cumis* counsel arguments or theories to defeat summary judgment. *See Sovereign Gen. Ins. Servs. v. Nat'l Cas. Co.*, 2008 U.S. Dist. Lexis 11601 at *19 (E.D. Cal. 2008), *aff'd*, 359 Fed. Appx. 705 (9th Cir. 2009); *Coleman v. Quaker Oats*, 232 F.3d 1271, 1294 (9th Cir. 2000) (allowing a plaintiff to raise new theories of liability on summary judgment is inherently prejudicial to the defendant).

Finally, if this Court should ultimately determine that Nevada hereby does recognize an independent counsel right, it certainly should not be triggered by an insurer's mere reservation of rights. The overwhelming majority of states do not adhere to such a draconian rule. Moreover, any such newly created duty certainly should not apply retroactively to State Farm's handling of the defense of the Tort Action in this case.

Dated this 3rd day of September, 2014.

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1 Dated this 3rd day of September, 2014.

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I hereby certify that I am an employee of LEWIS BRISBOIS BISGAARD & SMITH LLP and, pursuant to NRCP 5(b), that on the 3rd day of September, 2014, I deposited for first class United States mailing, postage prepaid, at Las Vegas, Nevada, a true and correct copy of the foregoing **APPELLANT'S OPENING BRIEF** addressed as follows:

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