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Insurer-insured Conflicts: Can Insurer-retained Counsel be True to the Insured?

*Rebecca White Berch**

I. INTRODUCTION

Trustworthy & Reliable, a local law firm, practices personal injury law. The firm has a lucrative contract to represent those insured by Insuranceco, the state's largest automobile liability insurer. Pursuant to contract, Insuranceco asks Trustworthy to represent Fictitious Client, who was involved in a car accident.

When Trustworthy reviews the accident report, the accident seems a serious but routine intersection collision. When interviewing Fictitious, however, the scenario changes. Fictitious reveals that shortly before the collision, he and his passenger were smoking marijuana at a party. The police officer at the accident scene, suspecting that Fictitious was under the influence of alcohol, gave Fictitious a blood alcohol test. The results of that test, however, showed that Fictitious had a blood alcohol level of only .05%, well under the presumptive level for intoxication. As a result of that test, the officer did not cite Fictitious for any malfeasance in connection with the accident.

Fictitious' policy with Insuranceco contains an alcohol exclusion. Although not expressed, Trustworthy believes that the policy impliedly excludes coverage when the insured drives under the influence of drugs. Trustworthy agrees to defend Client in the civil lawsuit, as required by the policy; Insuranceco, however, sends Client a "reservation of rights"[1]

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1. Wyoming recognizes the use of the reservation of rights letter or notice as a device by which the insurer notifies the insured that it will defend the main action on the insured's behalf, but does not thereby waive its right later to assert noncoverage. *See* Tadday v. Nat'l Aviation Underwriters, 660 P.2d 1148, 1151 (Wyo. 1983).

letter, purporting to preserve its right to litigate the coverage question at a later date. The letter reads as follows:

> Because of the nature of the case and the present lack of factual information relative to the allegations of the plaintiffs, it is necessary for us to reserve our right to disclaim coverage on the ground that the actions complained of by the plaintiffs are not covered by your automobile liability policy. We deny coverage for damages arising from any accident occurring while you were under the influence of drugs or intoxicating liquor.
>
> On behalf of the company, we will investigate this case and provide a defense for you under a full reservation of rights. In addition, if we settle the above-mentioned legal action, we reserve the right to seek reimbursement from you for such settlement amount if noncoverage is subsequently established. Investigation, defense, or settlement shall not prejudice our rights to disclaim coverage at a later date.
>
> Although we are not now denying coverage, we are sending this reservation of rights letter to you so that we may proceed to investigate the case, defend you, or arrange settlement of this suit pending a decision whether the actions complained of by the plaintiffs are covered by your liability policy. In the meantime, your rights and interests are being protected as though coverage does extend to the fact situation involved.[2]

What are Client's rights under the policy? Must he allow Trustworthy and Reliable, the firm the insurer selected, to represent him in the civil case? What are Trustworthy and Reliable's responsibilities to Client? To Insuranceco? May Client hire his own attorney at Insuranceco's expense?[3]

This article examines these and other issues stemming from the tripartite relationship of insured, counsel, and insurer. In particular, it focuses upon certain devices[4] that Wyoming and other jurisdictions employ in their efforts to alleviate conflicts of interest between insurers and insureds. After reviewing the applicable rules of ethics,[5] the article analyzes some of these conflict-mitigation devices, such as: (1) creating exceptions to the compulsory counterclaim rule;[6] (2) breaking down collateral estoppel consequences in subsequent litigation between the insured and the plaintiff in the main action when the insurer has controlled the defense of the main

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2. This letter is based on the one submitted in San Diego Navy Fed. Credit Union v. Cumis Ins. Soc'y, Inc., 162 Cal. App. 3d 358, 362 n.2, 208 Cal. Rptr. 494, 496 n.2 (1984). *See infra* notes 45-46 and accompanying text.

3. *See infra* note 77.

4. For issues not discussed in this article, *see infra* note 77. The subjects examined in this article are set forth at text accompanying notes 6-9, *infra*.

5. MODEL RULES OF PROFESSIONAL CONDUCT (1983); WYO. RULES OF PROFESSIONAL CONDUCT (1986). *See infra* notes 26-40 and accompanying text.

6. WYO. R. CIV. P. 13(a); FED. R. CIV. P. 13(a). *See infra* notes 78-114 and accompanying text.

action;[7] (3) exempting insurers from rules precluding the relitigation of issues against insureds with whom they have conflicting interests;[8] and (4) creating liability for insurers for "excess" judgments against insureds.[9] This article also analyzes *San Diego Navy Federal Credit Union v. Cumis Insurance Society, Inc.*,[10] in which one California court fashioned a broad rule to alleviate conflicts of interests between insurers and insureds. The article concludes that Wyoming is searching for a solution to insurer-insured conflicts.[11] It is ready to, and *should*, adopt a rule like the one set forth in *Cumis*.

II. BACKGROUND

Every jurisdiction has enacted rules to govern the attorney-client relationship.[12] Wyoming and many other states have recently adopted the Model Rules of Professional Conduct[13] to supplant the Model Code of Professional Responsibility.[14] With respect to the treatment of conflicts of interest between attorney and client, the provisions remain basically the same.[15] The overriding goal is to assure complete loyalty to the insured.

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7. *See infra* notes 115-30 and accompanying text.

8. *See generally* RESTATEMENT (SECOND) OF JUDGMENTS § 58 (1982); *see infra* notes 124-30 and accompanying text.

9. *E.g.*, Crisci v. Security Ins. Co., 66 Cal. 2d 425, 426 P.2d 173, 58 Cal. Rptr. 13 (1967); *see infra* notes 131-47 and accompanying text.

10. 162 Cal. App. 3d 358, 208 Cal. Rptr. 494 (1984); *see infra* notes 41-76 and accompanying text.

11. *See* Suchta v. Robinett, 596 P.2d 1380 (Wyo. 1979); WYO. RULES OF PROFESSIONAL CONDUCT Rule 1.7 comment 9 (1986).

12. *See, e.g.*, WYO. RULES OF PROFESSIONAL CONDUCT Rule 1.1-1.16 (1986).

13. MODEL RULES OF PROFESSIONAL CONDUCT (1983). Wyoming adopted the Model Rules in 1986. *See* WYO. RULES OF PROFESSIONAL CONDUCT (1986); *see also* ARIZ. RULES OF PROFESSIONAL CONDUCT (1986), *contained in* ARIZ. SUP. CT. R. 42, 17A ARIZ. REV. STAT. ANN. (1986).

14. MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1981).

15. The conflicts-of-interest sections in the Model Rules and the Wyoming Rules provide:

> (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
>
> (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
>
> (2) each client consents after consultation.
>
> (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
>
> (1) the lawyer reasonably believes the representation will not be adversely affected; and
>
> (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1983); WYO. RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1986).

It is not entirely clear whether subsection (a) applies to certain insured-insurer conflicts. Assuming that the clients' interests are not directly adverse, within the meaning of subsection (a), subsection (b) may still apply. An attorney cannot satisfy Rule 1.7(b)(1) unless he reasonably believes that his representation of the insured will not be adversely affected by his responsibilities to the insurer or to his own interests—that is, the pecuniary and economic pressures to assist the insurer to the insured's disadvantage. Obtaining the insured's con-

The few exceptions to this requirement of loyalty are very narrowly tailored.[16]

For many years, courts, commentators, and the insurance industry have recognized the conflict-of-interest potential inherent in liability insurance policies that grant insurers the right to choose counsel to represent their insureds.[17] Although the insurer-insured relationship often works without complication, more and more courts are reviewing cases in which insureds allege that their interests have not been or will not be adequately protected by the attorney selected by the insurer.[18] These cases are but the tip of the iceberg of a much more pervasive conflict situation that will never surface because insureds lack sophistication regarding their rights in conflict-of-interest cases.

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sent, however, should be most difficult. The comments to Rule 1.7 state that the lawyer cannot properly ask for consent or provide representation based on such consent "when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 comment (1983); WYO. RULES OF PROFESSIONAL CONDUCT Rule 1.7 comment 4 (1986). For further discussion, *see infra* notes 26-40 and accompanying text.

The supplanted Model Code contained ethical considerations, which were aspirational, and disciplinary rules, which provided the minimum level of behavior below which lawyers could not fall without subjecting themselves to discipline. EC 5-17, one of the ethical considerations dealing with conflicts, expressly recognized the insurer-insured cases as "[t]ypically recurring situations involving potentially differing interests." MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-17 (1981). The corresponding disciplinary rule governing conflicts closely parallels the Wyoming and Model Rules for conflict situations. Both the Code and the Rules require client consent, after full disclosure, if an attorney's judgment on behalf of his client may be affected by his personal or financial interests. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101(A) (1981); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1983); WYO. RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1986).

Underlying both the code and the rules is the attempt to ensure that the attorney who undertakes to represent an insured "owes to his client, the assured, an undeviating and single allegiance." MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-17 n.23 (1981) (quoting American Employers Ins. Co. v. Goble Aircraft Specialties, 205 Misc. 1066, 1075, 131 N.Y.S.2d 393, 401 (1954), *motion to withdraw appeal granted*, 1 App. Div. 2d 1008, 154 N.Y.S.2d 835 (1956)).

16. *See, e.g.*, MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 (1983) (requiring candor toward the tribunal); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b) (1983) (requiring disclosure of client confidences to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm). *Cf.* Nix v. Whiteside, 475 U.S. 157 (1986) (attorney's obligation of loyalty to the client does not extend to assisting the client in presenting perjury).

17. *E.g.*, R. KEETON, BASIC TEXT ON INSURANCE LAW §§ 7.7 *et. seq.* (1971).

Cf. Ronald E. Mallen, who denies that any conflict need exist. His position is that conflicts of interest have both objective and subjective components. He believes that if the attorney represents the insured on only the liability issues and does not consider the coverage questions, he would never face a conflict. R. MALLEN, LEGAL MALPRACTICE (3d ed.), *reprinted in* Bad Faith Litigation and Insurer Disputes, 1987 at 199, 225. However, courts faced with this reasoning find that it flies in the face of the reality of insurance defense work. *See, e.g., Cumis*, 162 Cal. App. 3d at 368, 208 Cal. Rptr. at 498 (citing the trial court opinion, quoted *infra* note 55). *See also* United States Fidelity & Guar. Co. v. Louis A. Roser Co., 585 F.2d 932, 938 n.5 (8th Cir. 1978) ("Even the most optimistic view of human nature requires us to realize that an attorney employed by an insurance company will slant his efforts, perhaps unconsciously, in the interest of his real client—the one who is paying his fee and from whom he hopes to receive future business—the insurance company."). Mallen's solution also ignores his own objective/subjective analysis, for it fails to satisfy the subjective element—that is, the insured's fear that insurer-retained counsel will not protect his interests.

18. *E.g.*, Parsons v. Continental Nat'l Am. Group., 113 Ariz. 223, 550 P.2d 94 (1976).

Over thirty years ago, the New York Court of Appeals announced that, when conflicts of interest arise between the insured and the insurer, the insured should have the right to select her attorney, and the insurer should pay the reasonable fees of the insured's counsel.[19] Other courts followed New York's lead.[20] For example, in *San Diego Navy Federal Credit Union v. Cumis Insurance Society, Inc.*,[21] the California Court of Appeals acted decisively to dam the flow of conflicts of interest between insureds and their counsel. The *Cumis* court shocked the insurance industry by broadly stating that the insured has the right to select independent counsel at the insurer's expense whenever the insurer reserves its right to later contest coverage in the underlying lawsuit.[22]

Reaction to *Cumis* was immediate and mainly hostile.[23] Some viewed the case as Armageddon, precipitating either the fall of the insurance in-

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19. Prashker v. United States Guar. Co., 1 N.Y.2d 584, 136 N.E.2d 871, 876, 154 N.Y.S.2d 910, 917 (1956). In *Prashker*, the insurer denied coverage. In the insured's declaratory judgment action to determine coverage, the *insurer* claimed that any attorney it selected to represent the insured would face a conflict of interest. In that situation, the court of appeals held that the insured has the right to select counsel to represent its interests, and that the insurer should pay counsel's fees. *Id.*

The court in *Prashker* required the insurer to pay the *reasonable* fees of the insured's attorney. The cases are now being litigated and articles are now appearing discussing what constitutes a reasonable fee. *See, e.g.*, Lower, *The Cumis Triangle*, CAL. LAW., May 1986 at 44.

20. *See, e.g.*, Previews, Inc. v. California Union Ins. Co., 640 F.2d 1026, 1028 (9th Cir. 1981) (California law); Maryland Casualty Co. v. Peppers, 64 Ill. 2d 187, 355 N.E.2d 24, 31 (1976); Satterwhite v. Stolz, 79 N.M. 320, 442 P.2d 810, 814 (1968); Public Serv. Mut. Ins. Co. v. Goldfarb, 53 N.Y.2d 392, 425 N.E.2d 810, 815, 442 N.Y.S.2d 422, 426 (1981).

21. 162 Cal. App. 3d 358, 208 Cal. Rptr. 494 (1984).

22. *Id.*

23. *See, e.g.*, Comment, *Reexamining Conflicts of Interest: When is Private Counsel Necessary?*, 17 PAC. L.J. 1421, 1422 (1986); Note, *The Cumis Decision - What has it Done to Insurance Policies?*, 23 CAL. W.L. REV. 125, 148 (1986); Berg, *After Cumis: Regaining Control of the Defense*, FOR THE DEFENSE, August, 1985, at 13. One article criticizes *Cumis* for creating a test based upon the insured's "subjective loss of confidence" in the loyalty of the attorney selected for him by his insurer. Lower, *The Cumis Triangle*, CAL. LAW., May 1986 at 44.

The California legislature has already acted to mitigate the effects of *Cumis* on the insurance industry. In January, 1987, Assemblyman Willie L. Brown, Jr. and Senator Bill Lockyer introduced the Civil Liability Reform Act of 1987, purporting (1) to define when conflicts of interest require independent counsel for the insured, (2) to define minimum standards of competence for independent counsel, and (3) to provide fee standards for independent counsel. Act of Jan. 1, 1988, ch. 1498, 1987 Cal. Legis. Serv. 846 (West) (to be codified at CAL. CIVIL CODE § 2860). The act notes that a conflict "may" occur when an insurer reserves its right to later contest coverage *and* the outcome on the coverage issue "can be controlled by counsel" retained by the insurer. *Id.* at § 2860(b). The Act states that no conflict of interest exists simply because the plaintiff requests punitive damages, which, for public policy reasons, may not be covered by insurance (Ford Motor Co. v. Home Ins. Co., 116 Cal. App. 3d 374, 172 Cal. Rptr. 59 (1981)), or sues for an amount that exceeds policy limits. CAL. CIVIL CODE § 2860(b).

The Act further requires independent counsel to disclose "all information concerning the action except privileged materials relevant to coverage disputes, and timely to inform and consult with the insurer on all matters relating to the action." *Id.* at § 2860(d). This section seems to require disclosure of information required to be held in confidence by the rules of ethics. *See, e.g.*, MODEL CODE OF PROFESSIONAL RESPONSIBILITY ECs 4-1 to 4-6, DR 4-101 (1981) (Preservation of Confidences and Secrets of a Client). It is not at all clear whether the ethical provisions permitting disclosure "required by law" anticipated this move by the California Legislature. *See also* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983).

The Act also provides that the insured may waive his right to select independent counsel

dustry or its refusal to write certain types of liability insurance.[24] Others welcomed *Cumis,* viewing it as simply the logical extension of earlier cases.[25]

Whether or not welcome, *Cumis* is best analyzed against the background of the rules of professional conduct that govern conflicts. A brief examination of the relevant ethical rules follows.

III. ETHICAL RESPONSIBILITIES OF COUNSEL FOR THE INSURED

The attorney chosen by the insurer to represent its insured owes undeviating allegiance to the insured and may not, indeed must not, act in any way to prejudice the insured.[26] The ethical concern that generated the *Cumis* rule is that once the insurer sends a reservation of rights, it no longer shares a commonality of interests[27] with the insured. Rather, at that point, its interests may actually be antagonistic to the insured's. The lawyer then faces the ethical dilemma of representing multiple clients with conflicting interests. The danger, of course, is that the attorney will not be able to exercise the independent judgment required by the rules on behalf of both clients.[28]

The Ethical Considerations of the Model Code of Professional Responsibility,[29] the forerunner of the Model Rules of Professional Conduct,[30] provide aspirational guidelines for attorneys representing multiple clients, such as insurers and insureds. These guidelines caution lawyers against representing clients with conflicting interests; lawyers should decline cases in which they question whether a conflict exists.[31] The ethical considera-

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by signing a form waiver. CAL. CIVIL CODE § 2860(e). Courts undoubtedly will soon hear cases litigating the effectiveness of such a waiver of rights.

Finally, the Act provides that when the insured selects independent counsel, both the counsel provided by the insurer *and* independent counsel "*shall* be allowed to participate in all aspects of the litigation." *Id.* at § 2860(f) (emphasis added). Whether courts and plaintiffs' counsel will permit the insured two attorneys to present her case is not at all clear. It should be interesting to see how this section is implemented.

24. *See* Comment, *supra* note 23, at 1422-23. But, of course, these consequences have not followed.

25. *E.g.,* Berch & Berch, *Will the Real Counsel for the Insured Please Rise?,* 19 ARIZ. ST. L.J. 27 (1987). Although perhaps not welcoming the decision, others recognized that it broke no new ground in the conflicts area. *See, e.g.,* Lower, *supra* note 23, at 45.

26. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-17 comment 23 (1981).

27. *Cumis,* 162 Cal. App. 3d at 358, 208 Cal. Rptr. at 494.

28. MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.7 (Conflict of Interest: General Rule), 1.8 (Conflict of Interest: Prohibited Transactions) (1983); WYO. RULES OF PROFESSIONAL CONDUCT Rules 1.7, 1.8 (1986). *See also* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101 (1981).

29. MODEL CODE OF PROFESSIONAL RESPONSIBILITY "ECS" 5-14 through 5-20 (1981).

30. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1983). Wyoming adopted the Model Rules in 1986. WYO. RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1986).

31. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-17 n.23 (1981), provides:

> When counsel, although paid by the casualty company, undertakes to represent the policyholder and files his notice of appearance, he owes to his client, the assured, an undeviating and single allegiance. His fealty embraces the requirement to produce in court all witnesses, fact and expert, who are available and necessary for the proper protection of the rights of his client. . . .
>
> . . . The Canons of Professional Ethics make it pellucid that there are not two standards, one applying to counsel privately retained by a client, and the

tions further inform that there are few litigation situations in which counsel would be justified in representing multiple clients whose interests even *potentially* differ.[32]

The foregoing ethical considerations appear to allow an attorney to represent an insurer and its insured in a few situations in which the conflicts between them are only potential and not actual. A closer reading of the rules and ethical considerations, however, leads to the conclusion that these circumstances are limited to cases in which the attorney can fully protect the insured's interests. If there is any question of conflict, the attorney owes undivided allegiance to the insured.[33]

Rule 1.7 in both the Model and Wyoming Rules of Professional Conduct provides that the lawyer shall not represent clients with conflicting interests unless she reasonably believes that she can represent each client without adversely affecting the other, and each client consents after consultation.[34] The rule requires that this consultation include explanation of the advantages and risks of common representation.[35] It is difficult to

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other to counsel paid by an insurance carrier." American Employers Ins. Co. v. Goble Aircraft Specialties, 205 Misc. 1066, 1075, 131 N.Y.S.2d 393, 401 (1954), *motion to withdraw appeal granted,* 1 App. Div. 2d 1008, 154 N.Y.S.2d 835 (1956).

> [C]ounsel, selected by State Farm to defend Dorothy Walker's suit for $50,000 damages, was apprised by Walker that his earlier version of the accident was untrue and that actually the accident occurred because he lost control of his car in passing a Cadillac just ahead. At that point, Walker's counsel should have refused to participate further in view of the conflict of interest between Walker and State Farm. . . . Instead he participated in the ensuing deposition of the Walkers, even took an *ex parte* sworn statement from Mr. Walker in order to advise State Farm what action it should take, and later used the statement against Walker in the District Court. This action appears to contravene an Indiana attorney's duty 'at every peril to himself, to preserve the secrets of his client'. . . ." State Farm Mut. Auto Ins. Co. v. Walker, 382 F.2d 548, 552 ([7th Cir.] 1967), *cert. denied,* 389 U.S. 1045, 19 L. Ed. 2d 837, 88 S. Ct. 789 (1968).

See also MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1983); WYOMING RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1986) (full text quoted *supra* note 15).

32. The considerations clearly state that a lawyer should never represent in litigation multiple clients whose interests actually differ. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-14 (1981). They then state that there are few situations in which a lawyer may represent multiple clients whose interests may *potentially* conflict. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-15 (1981).

33. WYOMING RULES OF PROFESSIONAL CONDUCT Rule 1.7 comment 1 (1986); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-17 (1981). The insurance industry created its own set of rules to govern conflicts between insurers and insureds. Its solution proposed that once the attorney ascertained a conflict, he should notify the insurer and the insured in writing, and the insurer or the attorney should invite the insured, *at his own expense,* to obtain counsel. ABA NATIONAL CONFERENCE OF LAWYERS AND LIABILITY INSURERS, GUIDING PRINCIPLES, Paragraph IV (emphasis added), *quoted in* T. MORGAN & R. ROTUNDA, PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY 76 (3d ed. 1984). Insureds rarely took advantage of the opportunity to retain and pay for counsel, so under this proposal, insurers remained in control of the defense. The ABA House of Delegates rescinded the GUIDING PRINCIPLES in August, 1980.

34. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1983); WYO. RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1986).

35. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b)(2) (1983); WYO. RULES OF PROFESSIONAL CONDUCT Rule 1.7 (b)(2) (1986). Comment 4 to the Wyoming Rules indicates the strength of the commentators' views regarding conflicts of interests. The comment provides

imagine that any attorney truly acting on the insured's behalf could counsel the insured to accept representation by insurer-selected counsel once any potential conflict of interests has been identified. Regrettably, however, members of the legal profession do not always fully disclose the risks of common representation, nor do they bestow absolute loyalty upon clients.[36] Adopting the *Cumis* rule should alleviate many of the problems that inhere when insurer-retained attorneys attempt to represent both insurers and insureds,[37] for under *Cumis,* the insured would select counsel whom he trusted, and counsel would give full loyalty to the insured.

The rules recognize that conflicts inhere whenever one party pays for legal services for another.[38] Moreover, the comments to the Wyoming and Model Rules note that an attorney may not accept a payment from a source other than the client unless the arrangement assures the attorney's loyalty to the client.[39] The comments suggest that when the interests of the insurer and the insured conflict, the insurer must "provide special counsel" for the insured, and the arrangement should "assure special counsel's independence."[40] Although the comments fail to specify who pays for the special counsel, the implication is that the insurer will bear this expense. In effect, then, by adopting the Model Rules, Wyoming has laid the groundwork for accepting *Cumis.*

IV. *Cumis*

A. THE FACTS

Magdaline Eisenmann sued San Diego Navy Federal Credit Union (Credit Union) and others, seeking $750,000 in compensatory damages and $6.5 million in punitive damages for wrongful discharge and breaches of several contractual obligations.[41] Pursuant to policy terms, the Credit Union requested that its insurer, Cumis Insurance Society (Cumis), defend the lawsuit.[42] In-house counsel for Cumis concluded that Cumis had a duty to defend its policyholders[43] and retained a law firm (G & M) to

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that counsel may not even attempt to obtain client consent to represent conflicting interests if a "disinterested lawyer would conclude that the client should not agree to the representation under the circumstances." WYO. RULES OF PROFESSIONAL CONDUCT Rule 1.7 comment 4 (1986). A truly disinterested lawyer probably would never advise a client to accept representation from an attorney who may hold paramount the insurer's interests.

36. *See, e.g.,* Parsons v. Continental Nat'l Am. Group, 113 Ariz. 223, 550 P.2d 94 (1976), in which the insured's counsel revealed privileged information to the insurer, who later used the information to the insured's detriment.

37. The ethical rules do not require the adoption of *Cumis.* There are other ways to foster counsel's loyalty to the insured. Adopting *Cumis,* however, serves the salutary goals of the Wyoming and Model Rules of Professional Conduct and is the most direct way to assure loyalty to the insured.

38. WYO. RULES OF PROFESSIONAL CONDUCT Rule 1.7 comment 9 (1986); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 comment (1983).

39. WYO. RULES OF PROFESSIONAL CONDUCT Rule 1.7 comment 9 (1986); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 comment (1983).

40. WYO. RULES OF PROFESSIONAL CONDUCT Rule 1.7 comment 9 (1986); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 comment (1983).

41. *Cumis,* 162 Cal. App. 3d at 361, 208 Cal. Rptr. at 496.

42. *Id.*

43. *Id.*

represent the insureds on all claims.[44] House counsel sent G & M copies of the insurance policies and forwarded the insureds letters agreeing to defend the lawsuit, but reserving Cumis' right to later contest coverage.[45] The reservation-of-rights letters specifically disclaimed responsibility for punitive damages or for compensatory damages resulting from willful conduct by the insureds.[46]

Fearing that G & M might not adequately protect its interests, the Credit Union retained independent co-counsel (SA & B).[47] Cumis paid two of SA & B's invoices for services performed for the Credit Union before questioning whether the Credit Union's interests so conflicted with Cumis' interests as to entitle the Credit Union to separate counsel at Cumis' expense.[48] Upon receiving G & M's opinion that no such conflict existed,[49] Cumis notified SA & B that it would make no further payments.[50]

At a settlement conference, Ms. Eisenmann offered to settle within the policy limits.[51] Cumis authorized G & M to counteroffer.[52] The case did not settle. Neither Cumis nor G & M notified the Credit Union about the settlement negotiations until after the conference.[53] When later notified of the settlement negotiations, the Credit Union wrote G & M expressing its strong desire to settle the lawsuit without trial.[54]

B. ANALYSIS OF *Cumis*

In *Cumis,* the court of appeals framed and resolved the issue as:

> whether an insurer is required to pay for independent counsel for an insured when the insurer provides its own counsel but reserves its right to assert noncoverage at a later date. We conclude under these circumstances there is a conflict of interest between the insurer and the insured, and therefore the insured has a right to independent counsel paid for by the insurer.[55]

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44. *Id.* at 361-62, 208 Cal. Rptr. at 496.

45. *Id.* at 362, 208 Cal. Rptr. at 496; *see supra* text accompanying note 2 (paraphrasing the *Cumis* letter).

46. *Cumis,* 162 Cal. App. 3d at 362 n.2, 208 Cal. Rptr. at 496-97 n.2; *see supra* text accompanying note 2 (paraphrasing the *Cumis* letter).

47. *Cumis,* 162 Cal. App. 3d at 362, 208 Cal. Rptr. at 497.

48. *Id.* at 363, 208 Cal. Rptr. at 497.

49. *Id.*

50. It is difficult to imagine an attorney *for the insured* advising the insurer that it did not see a conflict of interest. Undivided loyalty to the client should militate against such cavalier treatment. Obviously, G & M was acting as the insurer's attorney both in rendering this opinion and in handling the settlement negotiations. *See infra* text accompanying notes 51-54 (discussing the settlement negotiations).

51. *Cumis,* 162 Cal. App. 3d at 363, 208 Cal. Rptr. at 497.

52. *Id.*

53. *Id.*

54. *Id.* at 365, 208 Cal. Rptr. at 497.

55. *Id.* at 362, 208 Cal. Rptr. at 496. The *trial* court did not mince words in ruling that the insurer must pay for independent counsel for the insured:

> The Carrier is required to hire independent counsel because an attorney in actual trial would be tempted to develop the facts to help his real client, the Carrier Company, as opposed to the Insured, for whom he will never likely work again. In such a case as this, the Insured is placed in an impossible position;

Cumis shocked the insurance industry with its broad assertion that *any* reservation of rights by an insurer triggers a conflict of interest with its insured, thereby giving the insured the right to select an attorney at the insurer's expense.[56] Although perhaps shocking, the court followed traditional paths to arrive at this result. For example, the court started with the long-accepted proposition that an attorney retained by an insurer to represent an insured owes absolute allegiance to the insured.[57] The court then reaffirmed the general rule that the insurer's interest in controlling the defense is subordinate to its duty to defend its insured.[58] Therefore, when the interests of the insurer and the insured conflict, the insurer may not insist upon controlling the defense of the action against the insured. From these premises, the *Cumis* court reasoned that in a conflict-of-interest situation, the insured should have the right to select independent counsel at the insurer's expense.[59] The court viewed the insurer's obligation to pay the insured's counsel as simply an extension of its duty to defend the insured.[60]

The *Cumis* court also followed accepted notions regarding the tripartite relationship among the insured, insurer, and retained counsel.[61] The court noted that in the usual case, in which the insurer and insured share a single, common interest, "[d]ual representation by counsel is beneficial since the shared goal of minimizing or eliminating liability to a third party is the same."[62] The court then distinguished the usual case from the situation in which some or all of the allegations in the complaint fall outside the coverage of the policy.[63] It found that sending a reservation of rights letter indicates that the interests of the insurer and the insured differ.[64] Although both the insured and insurer still desire a defense verdict, their interests will diverge should the factfinder render a plaintiff's verdict. Each wants the judgment supported by opposing grounds: The insured wants grounds covered by the policy; the insurer, excludable grounds.[65]

> on the one hand the Carrier says it will happily defend him and on the other it says it may dispute paying any judgment, but trust us .... Insurance companies hire relatively few lawyers and concentrate their business. A lawyer who does not look out for the Carrier's best interest might soon find himself out of work.

Id. at 365, 208 Cal. Rptr. at 497-98.

56. Although some commentators claim that this is the holding of *Cumis* (*see* Note, *infra note* 68, 17 PAC. L.J. at 1422; Note, *infra* note 68, 23 CAL. W.L. REV. at 125; *see also* McGee v. Superior Court, 176 Cal. App. 3d 221, 221 Cal. Rptr. 421 (1985) (criticizing the "language in the rather wordy *Cumis* opinion.")), the facts of the case probably limit the holding to cases in which the reservation relates to the insured's conduct in causing the underlying claim. *Cumis,* 162 Cal. App. 3d at 370, 208 Cal. Rptr. at 502. *See infra* text accompanying notes 70-74.

57. *Cumis,* 162 Cal. App. 3d at 374, 208 Cal. Rptr. at 505 (citing Betts v. Allstate Ins. Co., 154 Cal. App. 3d 688, 715-16, 201 Cal. Rptr. 528 (1984)).

58. *Cumis,* 162 Cal. App. 3d at 371, 208 Cal. Rptr. 503 (citing Executive Aviation, Inc. v. National Ins. Underwriters, 16 Cal. App. 3d 799, 810, 94 Cal. Rptr. 347, 354 (1971)).

59. *Cumis,* 162 Cal. App. 3d at 369, 208 Cal. Rptr. at 501-02.

60. *Id.* 162 at 369, 208 Cal. Rptr. at 501.

61. *Id.* 162 at 365, 208 Cal. Rptr. at 498.

62. *Id.*

63. *Id.*

64. *Id.*

65. *See infra* notes 124-30 and accompanying text.

The court then attempted to provide predictability in the volatile conflicts area by defining when a conflict exists. It concluded that a conflict arises once the insurer takes the position that a coverage issue is present,[66] reasoning that once the insurer sends a reservation of rights, it no longer shares a commonality of interest with the insured. The court, however, limited its definition of conflicts to those occasions on which the insurer reserves its right to later contest coverage.[67]

Thus, although shocking to the insurance industry, *Cumis* does not represent a radical departure from established law in the area of insurer-insured conflicts.[68] Rather, it extends settled notions of when insureds should be able to select their own attorneys at the insurers' expense.[69]

Not only is *Cumis* merely an extension of established reasoning in conflict-of-interest cases, the decision may not be as all-encompassing as some paint it.[70] Two factors narrow the apparent breadth of the *Cumis* decision regarding the insurer's duty to pay for independent counsel. First, Cumis sent its insureds a reservation of rights letter disclaiming any responsibility for punitive damages and reserving the right to assert that the policy did not cover willful conduct by the insured.[71] In other words, an *actual* conflict between the insurer and its insured existed over the punitive damages claim; a *potential* conflict existed over other claims. The court noted, however, that whether actual or potential, conflicts must be identified early in the proceedings so that the insured's interests may be adequately protected.[72] The court then found that the reservation of rights letter did identify the conflict by putting the insured on notice that (1) the insurer reserved its right to contest coverage, and (2) the reservation related to conduct by the insured that gave rise to the underlying lawsuit—conduct that the policy would not cover if found to be intentional.

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66. *Cumis*, 162 Cal. App. 3d at 370, 208 Cal. Rptr. at 502.

67. *Id.* at 375, 208 Cal. Rptr. at 506.

68. For a contrary view, *see* Comment, *supra* note 23, at 1421; Note, *supra* note 23, at 125.

69. *Cf.* R. KEETON, INSURANCE LAW § 7.7(a) (1971) (citing O'Morrow v. Borad, 27 Cal. 2d 794, 167 P.2d 483 (1946)).

70. Nor are insurers as powerless to respond to *Cumis* as some suggest. In New York State Urban Dev. Corp. v. VSL Corp., 738 F.2d 61 (2d Cir. 1984), the Second Circuit affirmed a district court opinion permitting an insurer to participate in selecting counsel once a conflict arises, where the policy provided for such participation. New York State Urban Dev. Corp. v. VSL Corp., 563 F. Supp. 187, 190 (S.D.N.Y. 1983). The district court stated that the insurer is "under a duty to provide an impartial defense—not to sacrifice its own interest." *Id.* at 190 n.1; *see also* Employers' Fire Ins. Co. v. Beals, 103 R.I. 623, 240 A.2d 397, 404 (1968). Thus, amending policy language is one way insurers may mitigate any perceived burden of *Cumis*-type rules.

For other ways insurers might respond to a *Cumis*-type rule, see Berch & Berch, *supra* note 25, at 41-44; Lower, *supra* note 23, at 46-47, 63. *See supra* note 23 (setting forth the response of the California legislature).

Contrary to most insurers' reactions to *Cumis*, it is my position that the industry should welcome the opportunity and impetus to draft policy language that will benefit the insurance industry and its insureds and alleviate many conflicts of interest that have plagued the profession.

71. *Cumis*, 162 Cal. App. 3d at 363, 208 Cal. Rptr. at 496. *See supra* notes 45-46 and accompanying text. The Civil Liability Reform Act of 1987 rejects this aspect of *Cumis*. *See supra* note 23.

72. *Cumis*, 162 Cal. App. 3d at 372 n.7, 208 Cal. Rptr. at 503 n.7.

Second, Cumis initially believed it had a duty to pay the Credit Union's independent counsel and, in fact, paid two of SA & B's invoices before questioning its obligation to make these payments.[73] Although G & M later opined that no conflict of interest required Cumis to pay independent counsel, G & M seemed throughout the case to act on Cumis' behalf—often in clear violation of its duties to the insured. For example, G & M did not inform the insureds of the settlement negotiations until after the conference;[74] nor did G & M appear to have any knowledge of the insured's wishes regarding settlement until after the conference. Judicial opinions rarely report clearer violations of counsel's duties to his client. These facts restrict the *Cumis* decision so that, contrary to the fears of the insurance industry, not every reservation of rights triggers the right to independent counsel at the insurer's expense.

Admittedly, *Cumis* may be interpreted several ways.[75] Narrowly interpreted, *Cumis* holds that, absent policy provisions to the contrary, the insurer may not insist on choosing the insured's attorney if (1) the insurer reserves its right to dispute coverage, and (2) premises that reservation on actually or potentially non-covered conduct by the insured. In such circumstances, the insured may select its own counsel, to be paid by the insurer. So restricted, the decision confirms and extends settled legal principles. But *Cumis* may also be read more broadly as mandating independent counsel at the insurer's expense *whenever* the insurer sends a reservation of rights letter or notice.[76] Most broadly, *Cumis* could be interpreted to require independent counsel every time an insurer is called upon to provide counsel for its insured, to alleviate the inherent conflict of interest in the insurer-insured relationship. This reading would upset traditional views on insurer-insured conflicts.

V. EFFECTS OF *Cumis* on Certain Aspects of Existing Law[77]

A. EFFECT OF FAILING TO PLEAD A COMPULSORY COUNTERCLAIM

Failing to plead a compulsory counterclaim bars a party from seeking relief on that claim in a subsequent independent action.[78] Because most liability policies require insurers to *defend* claims, not to initiate them,[79]

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73. *See supra* text accompanying notes 47-50.

74. *Cumis*, 162 Cal. App. 3d at 364, 208 Cal. Rptr. at 497.

75. *See supra* note 56 and accompanying text.

76. *Cumis*, 162 Cal. App. 3d at 364, 208 Cal. Rptr. at 497.

77. Conflicts of interest arise in several other areas of the insurer-insured relationship. For example, must an insurer file a mandatory appeal on behalf of a nonvictorious insured? Must counsel advise the insured about the appellate process? If the underlying occurrence or transaction may result in both civil and criminal liability for the insured, must counsel paid by the insurer represent the insured in both? May he? May or must he advise the insured with respect to the criminal charge? Must he consider the effects of discovery on the insured's fifth amendment rights? Must he disclose those effects to the insured? Although these and other conflicts exceed the scope of this article, they undoubtedly will spawn additional legal commentary.

78. FED. R. CIV. P. 13a; WYO. R. CIV. P. 13a. Wyoming follows the Federal Rules of Civil Procedure. *E.g.*, Tadday v. National Aviation Underwriters, 660 P.2d 1148, 1152 (Wyo. 1983).

79. *See* Lower, *supra* note 19, at 47.

some insurer-retained attorneys fail to adequately stress to insureds that they have potential counterclaims and may need to retain independent counsel to pursue them.

A few courts have attempted to protect from the harsh effects of Rule 13 those defendants, such as insureds, who have not knowingly refrained from asserting their counterclaims.[80] These jurisdictions deviate from the rigid res judicata, merger, and bar justifications for the compulsory counterclaim rule and allow insureds to bring independent actions arising out of the same set of facts.[81] These courts reason that the bar against such claims is akin to an estoppel, and, like an estoppel, should be based upon culpable conduct by insureds in failing to assert their counterclaims. Wright and Miller approve the estoppel approach to omitted counterclaims in insurer-insured cases, stating that, in many ways, it provides a better approach to the problem of omitted counterclaims than does the doctrine of res judicata.[82] They note that a safety valve permitting insureds to litigate counterclaims in independent suits may be particularly important when an insurance company has controlled the defense of the first action and the actual defendant, the insured, has not had a realistic opportunity to assert his claim.[83]

The Wyoming Supreme Court addressed the omitted-counterclaim problem in *Suchta v. Robinett.*[84] Suchta, driving a vehicle owned by Robinett and insured by Fidelity and Casualty Company (Fidelity), hit a vehicle driven by Parsley.[85] Suchta carried liability insurance with Allstate.[86] Fidelity employed for Suchta an attorney who filed an answer and settled the Parsley-Suchta action,[87] incorporating the settlement into a stipulation of dismissal with prejudice and a release of Parsley's claims.[88]

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80. *E.g.,* Suchta v. Robinett, 596 P.2d 1380 (Wyo. 1979); LaFollette v. Herron, 211 F. Supp. 919 (E.D. Tenn. 1962); Reynolds Hartford Accident & Indemnity Co., 278 F. Supp. 331 (S.D.N.Y. 1967); Landers v. Smith, 379 S.W.2d 884 (Mo. App. 1964) (dictum); Perry v. Faulkner, 98 N.H. 474, 102 A.2d 908 (1954); Isaacson v. Boswell, 18 N.J. Super. 95, 86 A.2d 695 (App. Div. 1952). *See also* 6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1417 (1977 and Supp. 1987).

81. *E.g.,* House v. Hanson, 245 Minn. 466, 72 N.W.2d 874, 877 (1955) (interpreting rules almost identical to the federal and Wyoming rules).

82. 6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1417 (1977).

83. *Id.* To support this proposition, Wright and Miller cite Reynolds v. Hartford Accident & Indem. Co., 278 F. Supp. 331 (C.D.N.Y. 1967), in which the court refused to order an insurer-retained attorney to file a counterclaim on behalf of an insured, because the interests of the insurer and insured conflicted. The court held that under these circumstances, the insured could not then be estopped from filing a separate suit to enforce his claim:

> The rigidity present in the "merger" or "res judicata" views of Rule 13a clearly manifests itself when the insurance company's interests are adverse to its assured. If a counterclaim is considered part and parcel of the original claim, any dismissal with prejudice or other adverse determination of the claim before interposition of the counterclaim can forever bar an injured assured from bringing an action for injuries he might have sustained.

Id. at 333.

84. 596 P.2d 1380 (Wyo. 1979).

85. *Id.* at 1381.

86. *Id.* at 1382.

87. *Id.*

88. *Id.*

The attorney hired by Fidelity filed no counterclaim for Suchta,[89] and the record is not clear whether counsel advised Suchta that he might have an uninsured motorist claim arising from coverage in the Fidelity Policy. Suchta then sued Parsley, who filed a motion to dismiss, asserting that Suchta's claim was a compulsory counterclaim. The court agreed and granted Parsley's motion. Suchta did not appeal the dismissal.[90] Instead, Suchta brought an independent action against Allstate, his liability carrier; Robinett, the owner of the vehicle Suchta was driving at the time of the accident; Fidelity and Casualty Company, Robinett's insurer; and Underwriters Adjusting Company, claims managers for Fidelity,[91] alleging breaches of tort and contractual duties to protect his right to counterclaim against Parsley.

In deciding the appeal from the trial court's dismissal of Suchta's suit, the Wyoming Supreme Court recognized that it could go to the extreme of finding either (1) that insurer-retained counsel must advise the insureds to assert their counterclaims and must warn them of the consequences of dismissing causes of action,[92] or (2) that insurers have the absolute right to settle claims against their insureds even though the settlements may bar the insureds' counterclaims.[93] The court, however, opted to take the middle ground. It relied upon *Woodstock v. Evanoff*[94] for the proposition that an insurer's settlement of a claim against its insured without the insured's consent or against his protests of nonliability does not ordinarily bar a subsequent action by the insured on transactionally related claims.[95] Quoting Wright and Miller,[96] the Wyoming Court approved the estoppel approach to omitted counterclaims.[97]

Had the Wyoming Supreme Court required counsel to advise insureds of the need to assert compulsory counterclaims and to avoid settlements requiring the release of claims, it would have reaffirmed Rule 13a. Then, all claims either would be heard in one lawsuit or would be barred. If this were the rule, the duty of loyalty to the insured would weigh heavily upon counsel retained by the insurer, for to serve the insurer, counsel would wish to settle the case. To faithfully represent the insured, however, counsel could not, in good faith, advise the insured to forego her counterclaim. If the insured refuses to sacrifice her counterclaim, settlement becomes less feasible. Had the Wyoming Supreme Court imposed upon insurer-retained counsel a duty to protect the insured's counterclaim, then adopting a *Cumis*-type rule would help eliminate any doubts regard-

89. *Id.*
90. *Id.*
91. *Id.* at 1382-83.
92. *Id.* at 1383-84 (citing Rothtrock v. Ohio Farmers Ins. Co., 233 Cal. App. 2d 616, 43 Cal. Rptr. 716 (1965)).
93. *Suchta*, 596 P.2d at 1384 (citing Long v. Union Indemnity Co., 277 Mass. 428, 178 N.E. 737, 79 A.L.R. 1161 (1931)).
94. 550 P.2d 1132 (Wyo. 1976).
95. *Suchta*, 596 P.2d at 1384 (citing Woodstock v. Evanoff, 550 P.2d 1132 (Wyo. 1976)).
96. *Suchta*, 596 P.2d at 1384 (citing 6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1417 (1971)). *See supra* notes 82-83 and accompanying text.
97. *Suchta*, 596 P.2d at 1384-85.

ing counsel's loyalty to the insured.[98] *Cumis* requires an attorney to protect the insured's interests. This obligation could only be fulfilled by advising her of the need to assert and to prevent inadvertent dismissal of transactionally related claims.

Had the court gone to the opposite extreme and permitted insurer-retained counsel to settle claims against insureds regardless of the consequences to the insured, then the insured's counterclaim would have been barred. The Wyoming Supreme Court rejected this alternative. Indeed, the court could not have resolved the case in this manner consistent with the rules of professional responsibility requiring loyalty to the insured.

By adopting the middle ground, *Suchta* requires a case-by-case determination whether the insured has "knowingly refrained from asserting this [counter]claim"[99] or whether she "has had a realistic opportunity to assert [her] claim."[100] This resolution lacks the predictability of a *Cumis*-rule solution.

In *Suchta*, the Wyoming Supreme Court made two assumptions: First, it assumed that the insurance company has the right to control the defense;[101] second, it assumed that the lawyer employed by the insurance company could fulfill his obligation to the company without compromising his ethical obligation to his client, the insured.[102] But the court appended this important qualification to these assumptions:

> We add, however, a caveat that this obviously is a sensitive area in attorney-client relationships, and any events which would invoke the compromise and settlement as a waiver by or estoppel against the insured require a complete explanation of the potential result to the insured, including the opportunity for him *to seek independent advice from other counsel.*[103] This would be particularly true in an instance such as this where, because of the uninsured motorist provisions the reciprocal claim ultimately must be satisfied by the insured's own insurance company.[104]

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98. *Cf.* Strauss v. Fost, 209 N.J. Super. 490, 507 A.2d 1189 (1986) (finding that an insurer-retained attorney committed legal malpractice when he failed either to pursue the insured's claim for property damages or to withdraw as attorney of record in that claim). If attorneys fail to adequately protect insureds in jurisdictions adopting the first option, insureds may have recourse to malpractice actions against their attorneys. Indeed, some resourceful insureds may even allege that the insurers negligently hired counsel who did not protect their interests.

99. *Suchta*, 596 P.2d at 1384 (citing 6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1417 (1971)).

100. *Suchta*, 596 P.2d at 1384.

101. *Id.* at 1385.

102. *Id.*

103. *Id.* (emphasis added.) Suchta was, in fact, represented by an attorney of his own choosing in the criminal matters arising out of the car accident. *Id.* at 1382. This attorney sent a letter on Suchta's behalf stating that Suchta would assert a claim under the uninsured motorist provision of the Robinett policy. *Id.* He therefore obviously advised Suchta with respect to uninsured motorist claims, and, for aught that appears to the contrary, about the settlement in the Parsley case. Suchta did sue Parsley, but he failed to appeal the trial court's dismissal, on Rule 13 grounds, of that suit.

104. *Id.* at 1385.

The result in *Suchta* is defensible, given the correctness of the assumptions that the insurer has the right to choose counsel and to control the destiny of the underlying proceeding. The case, however, requires an unnecessary exception to the well-established compulsory counterclaim rule. *Cumis* provides a cleaner solution.

By refusing to impose on insurers a duty to protect insureds' counterclaims, the court extricates insureds from the rigors of the compulsory counterclaim rule. But consider what effect the decision will have on future Parsleys and upon the court system itself. If the reason for the compulsory counterclaim rule is to rid the system of seriatim suits stemming from the same transaction or incident,[105] has it not been undermined by permitting subsequent suits on counterclaims? Is it fair to subject the Parsleys of the world to subsequent suits when part of the consideration for settling might have been the anticipation of the termination of all disputes between them and the defendants they sue? And if the Parsleys insist upon cross releases from the Suchtas, is not the insurer-selected attorney's ethical dilemma exacerbated? To serve the insurer's goal of settling cases, the attorney may encourage insureds to sign releases of claims by deemphasizing or minimizing the value of counterclaims. Any attorney truly representing the insured could not simultaneously agree to the release of claims and fulfill his duty of loyalty to the insured.

In *Suchta* the Wyoming Supreme Court affirmed the ethical obligation of counsel to the insured and recognized that in some cases the insured should have independent counsel.[106] It sidestepped, though, the question who should pay for these services, a monster that *Cumis* wrestled and defeated.

Rather than perpetuating exceptions to the compulsory counterclaim rule, the *Cumis* rule would facilitate the speedy and just resolution of the entire case, while better accommodating the interests of the insured, the insurer, the plaintiff in the main case, and the court system.[107] A rule requiring independent counsel for the insured ensures that the attorney truly represents only the insured. Such a rule would also guarantee that the insured would be fully apprised by his attorney of the need to file mandatory counterclaims and of the risks of settlement.[108] In short, by adopting the *Cumis* rule, Wyoming would no longer need to adopt exceptions to well-established rules like the compulsory counterclaim rule to alleviate conflicts of interest between insurers and insureds.

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105. *E.g.*, 3 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 13.13, at 13-64 (1987) and cases cited therein.

106. *Suchta*, 596 P.2d at 1385. *See also* WYO. RULES OF PROFESSIONAL CONDUCT Rule 1.7 comment 9 (1986).

107. New Jersey has developed the "entire controversy doctrine," which requires that all facets of a dispute be determined in one action. Strauss v. Fost, 209 N.J. Super. 490, 507 A.2d 1189 (1986). The purpose of this doctrine and the compulsory counterclaim rule is to avoid the expense and delay of multiple suits determining the same issues. *Id.*

108. In jurisdictions adopting *Cumis*-type rules requiring independent counsel for insureds, the insureds who then fail to counterclaim may be barred from later asserting them. Thus, *Cumis* does, in some cases, work against the insureds. In the long run, however, it serves the salutary goal of protecting the insureds' interests.

Wyoming[109] and most other jurisdictions[110] have enacted comparative negligence statutes. If a comparative negligence lawsuit comes to trial, a court may follow either of two routes: (1) It may deem all negligence issues before the court whether or not plead.[111] If this happens, the insured may be precluded from relitigating the negligence issues in an independent action. It would then be critical that the insured have the right to choose counsel to represent her interests, as she will never again have the opportunity to raise her claims. (2) The court may follow the Wyoming Supreme Court's path in *Suchta* and permit independent suits to enforce counterclaims. Problems of unfairness to first-party plaintiffs, burden on the court system, and delay caused by the independent lawsuit[112] inhere in following this latter path. And, of course, if the insurer-retained attorney has no duty to protect the counterclaim, he may inadvertently compromise the insured's rights by not shaping the case to help the insured in her counterclaim.[113] Regardless which response the courts select, jurisdictions should adopt uniform measures to ensure that insureds' rights are protected when conflicts of interest arise.[114] *Cumis* provides such a measure. Creating piecemeal exceptions to otherwise stable and useful rules simply compounds confusion in an already-difficult area of the law.

B. COLLATERAL ESTOPPEL EFFECTS OF FINDINGS OF FACT

1. *Between the First-Party Plaintiff and Insured*

Whether Wyoming should adopt a *Cumis*-type rule depends, in part, upon whether Wyoming courts will collaterally estop the parties to the original lawsuit from relitigating negligence issues. Parties to the initial litigation may invoke issue preclusion—that is, collateral estoppel—when the fact or issue in question was (a) actually litigated, (b) determined by

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109. *See* WYO. STAT. § 1-1-109 (1977 & Cum. Supp. 1987).

110. At last count, all but six states had enacted comparative negligence statutes. Greenlee & Rochelle, *Comparative Negligence and Strict Tort Liability—The Marriage Revisited*, 22 LAND & WATER L. REV. 463, 464 (1987).

111. *Cf.* Horton v. Liberty Mutual Ins. Co., 367 U.S. 348 (1961) (suit for $1,000 meets $10,000 jurisdictional minimum because it necessarily implicates a prospective $15,000 counterclaim).

112. *See supra* text accompanying note 105.

113. *See* United States Fidelity & Guar. Co. v. Louis A. Roser Co., 585 F. 2d 932, 938 n.5 (8th Cir. 1978) (quoted *supra* note 17).

114. One could devote an entire book to developing the notion that we perhaps ought to reject the compulsory counterclaim rule altogether. Perhaps every time a case is filed, the court should be able to hear all of it, and plaintiffs and defendants should submit to all the equities—a notion of automatic jurisdiction, of sorts, to hear counterclaims, whether or not plead. Various rules could be cited in support of such a notion. *See, e.g.*, Rule 15, FED. R. CIV. P., which permits liberal amendment of pleadings; Rules 608 and 609, FED. R. EVID., which provide that a party "opening the door" is subject to counter offers of proof.

Such a notion would obviate the need for compulsory counterclaim rules, as every counterclaim would already be subject to the court's jurisdiction. Before considering such a radical departure from established rules, one would need to consider the policies underlying the present and proposed rules. Those policies include fairness to the parties, the system's desire for the efficient and just resolution of disputes, and notice, among others. Such an inquiry, although fascinating, is beyond the scope of this article. *See supra* note 107.

the tribunal, and (c) necessary to the result.[115] For the doctrine of collateral estoppel to apply, the party to be bound must have had adequate opportunity and incentive to obtain a full and fair adjudication in the initial action.[116]

Assume that the original Suchta case proceeds to trial. Under Wyoming's comparative negligence statute,[117] the court directs the jury to return separate special verdicts determining the amount of Parsley's damages and the percentages of fault attributable to Parsley and Suchta. If the jury finds that Suchta is 55% and Parsley 45% at fault, the court would enter judgment for Parsley for 55% of his damages.

In a subsequent suit against Parsley, is Suchta bound by the earlier jury's finding that he was 55% at fault? If so, because Wyoming is not a pure comparative negligence state,[118] Suchta could not recover.[119]

In this hypothetical, did Suchta have a full and fair opportunity to defend? Did the attorney chosen by the insurer vigorously defend Suchta's interests? Would the answer be the same if the insurer provided counsel but reserved its right to later assert noncoverage because the insured failed to pay his premium? What if the insurer provided counsel but reserved its right to later assert noncoverage because the insured's conduct giving rise to the first-party action was arguably non-covered? Under current Wyoming law, these questions cannot be answered with certainty. Adopting a *Cumis*-type rule to protect the insured's interests would eliminate this uncertainty.

Recall, however, that Wyoming does not permit a party whose negligence exceeds 50% to recover.[120] Therefore, if the jury reversed the special verdicts above, finding Parsley 55% and Suchta 45% at fault in the initial action, the court would have entered judgment in favor of Suchta.[121] If Suchta, in a subsequent suit, asserted against Parsley the finding of 55% negligence, the finding would bind Parsley. Suppose Suchta instead

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115. *E.g.*, 1B J. MOORE, W. TAGGERT & J. WICKER, MOORE'S FEDERAL PRACTICE ¶ 0.441[1], at 718 (2d ed. 1984) (citing Irving Nat'l Bank v. Law, 10 F.2d 721, 724 (2d Cir. 1926) (L. Hand, J.)).

116. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 328 (1969) (citing Blonder-Tongue Laboratories, Inc. v. University of Ill. Found., 402 U.S. 313, 329 (1971)); 1B J. MOORE, W. TAGGERT & J. WICKER, MOORE'S FEDERAL PRACTICE ¶ 0.441[2], at 725 (2d ed. 1984)).

117. Wyoming's comparative negligence statute provides that any party may recover damages for the negligent acts of others if the claimant was not more than 50% negligent in causing her injuries. Any party may request special verdicts to determine the percentage of fault of each party. The court then reduces the amount of damages in proportion to the percentage of fault attributed to the prevailing party. WYO. STAT. § 1-1-109 (1977 & Cum. Supp. 1987).

118. WYO. STAT. § 1-1-109(a) (1977 & Cum. Supp. 1987); Danculovich v. Brown, 593 P.2d 187 (Wyo. 1979); Greenlee & Rochelle, *supra* note 110, at 465.

119. WYO. STAT. § 1-1-109(a) (1977 & Cum. Supp. 1987) bars recovery for any party whose negligence exceeds 50%.

120. Danculovich v. Brown, 593 P.2d 187 (Wyo. 1979). One whose negligence exceeds 50% of the total fault may not recover. WYO. STAT. § 1-1-109 (1977 & Cum. Supp. 1987). Undoubtedly, other articles will discuss *Cumis*' effects upon collateral estoppel consequences between the parties in pure comparative jurisdictions and in other types of cases as well.

121. WYO. STAT. § 1-1-109(a) (1977 & Cum. Supp. 1987).

decided not to rely on the finding of 55% fault and attempted to establish that Parsley's negligence was even greater.[122] Such a refinement of the breakdown of mutuality of estoppel, even in those jurisdictions that have allowed the breakdown,[123] seems ludicrous. The solution to the breakdown of mutuality in negligence cases lies in adopting a *Cumis*-type rule. Let the insured choose his own counsel in the initial litigation. Then let collateral estoppel bind both parties to the facts actually litigated and determined in, and necessary to, the resolution of the controversy.

2. *Between the Insurer and the Insured*

Collateral estoppel affects not only subsequent actions between parties to the main action, but also actions between the insurer and the insured. Generally, collateral estoppel precludes parties who have had a full opportunity to litigate issues from relitigating issues already decided.[124] Although the rule ordinarily applies only to parties to the initial litigation, it also binds those who are in privity with the parties, such as insurers who control litigation on behalf of one of the parties.[125]

When an insurer defends its insured under a reservation of rights, the insurer may be put in the anomalous position of advancing a position in the main trial that is contrary to its own interests. For example, suppose a complaint against the insured alleges covered negligent conduct and non-covered intentional conduct. The insurer defending under a reservation of rights would want to establish that the insured's actions were intentional, and therefore non-covered. Adequate protection of the insured, however, demands that the insurer attempt to prove that the insured's conduct was at most negligent, and therefore covered by his insurance policy—a position contrary to the insurer's best interest.

In a subsequent action between the insurer and the insured to determine coverage, the general rule of collateral estoppel would bind the insurer to its allegation at the main trial that the insured's conduct was merely negligent. To prevent this unfair result, courts[126] and commentators[127] have devised an exception to the rule that applies in insurer-insured conflict-of-interest cases.

The exception, set forth in section 58 of the Restatement (Second) of Judgments, binds insurers and insureds to the basic facts of the existence and extent of the insured's liability to the first-party plaintiff, but does

122. *See Parklane Hosiery*, 439 U.S. at 322. This conclusion depends, of course, upon whether the finding of 55% negligence was necessary to the first adjudication. *See supra* notes 117-18 and accompanying text.

123. *See generally* 18 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS § 4463, at 561 n.4 (1981 and Supp. 1983) (noting that all but 13 jurisdictions have reaffirmed the breakdown of mutuality of estoppel).

124. *See* M. (the other) Berch, *A Proposal to Permit Collateral Estoppel of Nonparties Seeking Affirmative Relief*, 1979 ARIZ. ST. L.J. 511; 1B J. MOORE, W. TAGGERT & J. WICKER, MOORE'S FEDERAL PRACTICE ¶ 0.441[3], at 731 (2d ed. 1984).

125. 1B J. MOORE, W. TAGGERT & J. WICKER, MOORE'S FEDERAL PRACTICE ¶ 0.441[3], at 731 (2d ed. 1984).

126. *E.g.*, Farmers Ins. Co. v. Vagnozzi, 138 Ariz. 443, 675 P.2d 703 (1983).

127. *E.g.*, RESTATEMENT (SECOND) OF JUDGMENTS § 58 (1982).

not preclude the insurer and insured from relitigating any issue with respect to which their interests conflicted.[128]

Thus, where conflicts exist, section 58 does not bind the insurer to positions it has taken in defending the insured. Section 58 and cases countenancing the release of collateral estoppel consequences in conflict-of-interest cases are attempts to accommodate the tension between an established rule and the injustice that follows from its application in insurer-insured conflict-of-interest cases. Insurers are contractually bound to defend insureds. In many insurance cases, however, the interests of the insurer and the insured will conflict. Rules like section 58 of the Restatement (Second) of Judgments are merely devices to alleviate some of the problems that the system recognizes *must* occur whenever one entity with economic needs and goals represents another whose needs and goals may differ.[129]

If the insured selects his own attorney, as *Cumis* requires in conflict situations, the insurer will not be bound by findings of fact in the principal action.[130] The *Cumis* rule thus provides a more sensible solution to the conflicts problem than does the continued proliferation of causes of action and exceptions to well-established rules.

C. BREAKING THE POLICY LIMITS: EXCESS LIABILITY

Most liability insurance contracts contain policy limits—negotiated contractual monetary ceilings. For several years, courts[131] and commentators[132] have recognized that potential conflicts between insurer and insured exist whenever the insurer has the opportunity to settle an action within policy limits but refuses to do so.[133] Within the past generation, insureds have filed legions of lawsuits against insurers who have failed to settle within policy limits.[134] These cases hold that when the insurer breaches its contractual duty to defend the insured or to enter into good-faith settlements, it can incur liability that exceeds the policy limits ("ex-

128. *Id.* The section then defines conflicts of interest as occurring whenever the first-party plaintiff's claim could be sustained on alternate grounds, one of which is covered by the policy and another of which is not. *Id.*

129. *See* WYO. RULES OF PROF. CONDUCT Rule 1.7 comment 9 (1986); *supra* notes 26-40 and accompanying text.

130. If the insured has independent counsel, he will—and should—be bound by adverse findings of fact.

131. *E.g.* Comunale v. Traders & Gen. Ins. Co., 50 Cal. 2d 654, 328 P.2d 198 (1958).

132. *See generally* R. KEETON, BASIC TEXT ON INSURANCE LAW § 7.8 (1971).

133. Some states, like Wyoming, are so conscious of the inherent conflict in refusal-to-settle and delay-in-settling cases that they have enacted statutes *requiring* insurers to settle within specified time periods. *See, e.g.*, WYO. STAT. § 26-1-103 (1977, Rev. 1983). The policy underlying such statutes is to encourage claims settlement and to "chill any tendencies upon the part or insurance companies to unreasonably reject claims." State Surety Co. v. Lamb Constr. Co., 625 P.2d 184, 188 (Wyo. 1981) (citing Heis v. Allstate Ins. Co., 248 Or. 636, 436 P.2d 550, 553 (1968)). These policies will be well served by the adoption of a *Cumis*-type rule.

134. *E.g., Comunale*, 50 Cal. 2d at 654, 328 P.2d at 198. These cases have created a new body of law identified as "insurance excess liability" law. W. YOUNG & E. HOLMES, CASES AND MATERIALS ON INSURANCE 375 (2d ed. 1985).

cess" liability).[135] By refusing to settle within policy limits, the insurer gambles with the insured's money to further its own interests, thereby placing its interests above the insured's.[136] Insurers should not be permitted to risk the insured's interests without bearing responsibility for the resulting judgment and consequential damages against the insured, even if the judgment and damages exceed the policy limits.[137]

The conduct of insured's counsel often plays a key role in determining whether the insurer should be held responsible for excess liability or whether it can escape its responsibility to its insured. Although counsel has the opportunity to shape the case to protect the insurer from exposure for excess liability, counsel's preeminent duty is to represent the insured.[138] The *Cumis* rule assures that counsel will devote his talents and time to protecting the insured's interests, rather than to making a record to protect the insurer who pays his fee.

Crisci v. Security Insurance Co.[139] is the foundational case imposing excess liability for failure to settle within policy limits. In the lawsuit underlying *Crisci*, a tenant sued Mrs. Crisci, the owner of an apartment complex, for negligently maintaining the premises.[140] The tenant, who had fallen through an opening in the stairwell, sought $400,000 for physical and mental injuries.[141] Security Insurance Company, the defendant's insurer, refused either to settle for $10,000, the policy limit, or to settle for $11,500 of which the insured agreed to pay $2,500.[142] After trial, the jury awarded the tenant $101,000. The insurer paid the $10,000 policy limit, leaving Mrs. Crisci to pay the balance. The indigent Mrs. Crisci then sued her insurer for causing her mental distress. The court held the insurer liable for the full $91,000 balance on the tenant's judgment and awarded Mrs. Crisci $25,000 for her suffering.[143]

In *Crisci*, the court found that Security's claims manager and the attorney chosen by Security to defend the insured both believed that the jury would probably return a verdict of at least $100,000.[144] It reasoned that with a $10,000 policy, the insurer and counsel were gambling with

135. W. YOUNG & E. HOLMES, CASES AND MATERIALS ON INSURANCE 375 (2d ed. 1985); *see also Comunale*, 50 Cal. 2d at 654, 328 P.2d at 198.

136. *E.g.*, Crisci v. Security Ins. Co., 66 Cal. 2d 425, 431-32, 426 P.2d 173, 178, 58 Cal. Rptr. 13, 18 (1967).

137. *E.g., Comunale*, 50 Cal. 2d at 654, 328 P.2d at 198; *Crisci*, 66 Cal. 2d at 430, 426 P.2d at 177, 58 Cal. Rptr. at 17. Some attorneys mistakenly believe that they can represent both the insurer and the insured in settlement negotiations because they represent the "situation" and, in the capacity as attorneys for the situation, they can give objective advice to all regarding the feasibility and advisability of settlement. *Cf.* MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.2 (1983) (permitting lawyers to act as intermediaries in limited circumstances). Such a position erodes the principles of loyalty to the insured and creates a dangerous precedent that should be rejected by the courts.

138. *See supra* notes 26-40 and accompanying text.

139. 66 Cal. 2d 425, 426 P.2d 173, 58 Cal. Rptr. 13 (1967).

140. *Id.* at 427, 426 P.2d at 175, 58 Cal. Rptr. at 15.

141. *Id.*

142. *Id.* at 429-30, 426 P.2d at 175-76, 58 Cal. Rptr. at 15-16.

143. *Id.* at 432, 426 P.2d at 178, 58 Cal. Rptr. at 18.

144. *Id.* at 428, 426 P.2d at 175, 58 Cal. Rptr. at 15.

$90,000 of the insured's money. Because the court felt that counsel failed to protect Mrs. Crisci's interests, it referred to the insured's attorney as "Security's attorney" and gave more credence than perhaps it should have to his opinion that the judgment would likely exceed policy limits.[145]

Adopting a *Cumis*-type rule alleviates this type of disloyalty to the insured in potential excess liability cases and thereby ensures full protection for both insurer and insured. Under *Cumis,* the insured selects her own attorney to represent her. Thus, the system would be assured that the insured's counsel was truly protecting the insured's interests; the court would no longer need to question whether counsel was placing the insurer's interests above the insured's. In a *Cumis*-rule jurisdiction, the assertions of the insured's counsel would not, and indeed should not, bind the insurer, as did Security's attorney's statements in *Crisci,* because counsel would not then be suspected of representing the insurer's interests.

If courts fail to adopt *Cumis*-type rules and insurers continue to select counsel to represent insureds, those attorneys selected by insurers to represent insureds will, as a practical matter, walk tightropes. They will need to make paper records that they fully protected the insureds' rights, should their integrity ever be questioned in future excess liability claims. Such a system is cumbersome and unseemly.[146] Perhaps some would argue that counsel chosen by insureds are similarly burdened by the record-protecting responsibility. The answer to this record-protecting issue for insured's counsel is twofold: First, the advocate's duty is to put his client in the best possible position; second, insured's counsel's statements will not *bind* the insurer as they did in *Crisci.*[147]

Of course, there is a countervailing consideration. A position maintained or a statement made by an attorney chosen by the insured will not prejudice the insurer to the same extent as the same position or statement by insurer-chosen counsel, because insured-selected counsel will not be deemed an agent of the insurer. To this extent, having chosen his attorney may worsen the insured's position. But this price in an individual case is well worth paying to achieve a systemic solution to a serious conflicts problem.

The exploding field of excess liability is simply another area in which courts are attempting to fashion rules to govern conflicts of interest between insurers and insureds. Adopting a *Cumis* rule ensures counsel's loyalty to the insured and alleviates the conflict.

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145. Under the law, the attorney chosen by the insurer to represent the insured is the insured's counsel, and the courts should recognize this position for all purposes.

146. At the present time, some attorneys representing insureds bend over the other way in their attempts to protect their clients by having them stipulate that their conduct in causing the underlying course of action was negligent, in order to maneuver the insurer into having to pay the judgment. At least one court has condemned such tactics as "sharp practices." Farmers Ins. Co. v. Vagnozzi, 138 Ariz. 443, 447, 675 P.2d 703, 707 (1983). These tactics, too, are cumbersome and unseemly. *Cumis,* however, does not address collusion between the insured and the attorney he selected.

147. Recall the court's characterization of counsel chosen by the insurer to represent the insured as "Security's" counsel. *Crisci,* 66 Cal. 2d at 432, 426 P.2d at 177, 58 Cal. Rptr. at 17.

V. CONCLUSION

Wyoming caselaw and its Rules of Professional Conduct are in accord that an attorney's obligation to his client supersedes his self-interest in helping the insurer. Both the caselaw and the rules provide that when a conflict of interest arises between an insurer and its insured, the attorney's paramount responsibility is to the insured. Wyoming, however, does not provide guidelines to assure this loyalty. To achieve the goal of loyalty to the insured, the attorney must inform her of any conflicting interests and the insured must have the right to select an attorney at the insurer's expense.[148] The Wyoming courts or legislature should adopt this solution to the thorny conflicts-of-interest problem. Indeed, one could argue that the Wyoming Rules of Professional Conduct already require adopting a predictable rule for handling conflicts of interest between insurers and their insureds.[149]

Although *Suchta* appears to militate against adopting a *Cumis*-type rule by taking a piecemeal rather than a comprehensive approach to insurer-insured conflicts, the court's dicta that the insurance company may control the defense should not be permitted to sweep too broadly, for the court resoundingly *rejected* a Massachusetts case giving an insurer the absolute right to settle an action against its insured without considering the insured's interests. In effect, *Suchta* holds only that, having been defended by an insurer-selected attorney, Suchta will not be deprived of his counterclaim.

The Wyoming Supreme Court attempted to protect Wyoming insureds by noting that any events that would prejudice the insured require "a complete explanation of the potential result to the insured, including the opportunity for the insured to seek independent advice from other counsel."[150] This language, together with the court's protection of the interests of the Wyoming insured, the requirements of the Wyoming Rules of Professional Conduct, the Wyoming "Settlement Statute,"[151] and sound policy reasons militate in favor of a comprehensive conflict-of-interest rule for Wyoming. The Wyoming courts and legislature are sensitive to insurer-insured conflicts. They need a predictable rule for protecting insureds against the results of those conflicts. *Cumis* provides such a rule.

Courts and commentators throughout the nation are wrestling with devices and methods with which to battle conflicts of interest between insurers and insureds. The result has been a proliferation of piecemeal rules, and exceptions to well-established rules such as the compulsory counterclaim and collateral estoppel rules. Rather than continuing to

148. *See* Berch & Berch, *supra* note 25, at 49.
149. *See* WYO. RULES OF PROFESSIONAL CONDUCT Rule 1.7 comment 9 (1986).
150. *Suchta*, 596 P.2d at 1385.
151. WYO. STAT. § 26-1-103 (1977, Rev. 1983) (requiring insurers to settle certain actions within specified time periods).

spawn piecemeal solutions, Wyoming should adopt a *Cumis*-type rule. Only then will the insured be assured that his rights will be fully protected.

Return to the hypothetical posed at the beginning of this article. Now, however, the jurisdiction has adopted a *Cumis*-type rule. Insuranceco agrees to defend Client under a reservation of rights. Now what are Client's rights? Must he accept Trustworthy and Reliable as his attorneys? No. Under *Cumis,* Client has the right to select counsel whom he thinks will adequately protect his interests. Client's attorney's ethical and practical responsibilities then are to represent him alone.