800, 19 CR2d 138, which related to comity between state and federal court, not whether the mandatory arbitration provision applied. In fact, *Caiafa* confirms that "within California courts these *Cumis* fee issues are to be decided in an arbitration forum." Accordingly, the arbitration of the fee dispute is mandatory. However, the bad faith and other claims are outside the scope of §2860(c) and should be adjudicated in the trial court.

Finally, Compulink contends that CC §2860 does not apply because this agreement contains a "different or additional policy provision pertaining to attorneys fees." CC §2860(c). Compulink refers to a provision for payment to the insured for "all reasonable expenses incurred." However, this provision does not take the claim out of §2860(c), because attorneys fees are not expenses. *Gray Cary Ware & Freidenrich v Vigilant Ins. Co.* (2004) 114 CA4th 1185, 8 CR 3d 475. Further, §2860(c) mandates arbitration unless a separate arbitration dispute machinery is set forth in the policy, which is not the case here.

COMMENT: *Compulink* is an important addition to *Cumis* counsel jurisprudence in holding that all disputes relating to independent counsel fees are subject to the mandatory arbitration provisions of CC §2860. This is so even when, as in *Compulink,* the fee dispute arises in the context of a larger dispute that raises other issues as well. Contrary to the court's holding in *Fireman's Fund Ins. Cos. v Younesi, supra,* which the *Compulink* court expressly declines to follow, §2860 does not "limit the scope of arbitrable disputes to those in which only the amount of legal fees or the hourly billing rates are at issue." *Younesi,* 48 CA4th at 459. Rather, disputes as to the amount or rate of *Cumis* counsel fees must be arbitrated, "notwithstanding the inclusion of other non-arbitrable issues" in the complaint. *Compulink,* 169 CA4th at 299. While this may lead to a two-track dispute resolution process—with one set of claims proceeding in arbitration and the rest in trial court—that is the only result that is consistent with the mandatory language of §2860.—*Susan M. Popik*

Duty to Defend

Insurer could not conclusively negate potential for coverage, and thus had no duty to defend.

Food Pro Int'l, Inc. v Farmers Ins. Exch. (2008) 169 CA4th 976, ___ CR3d ___

The insured is a consulting company that prepares and implements plans for food processing and distribution operations. The insured had a contract with Mariani to help that company relocate its food processing operations to a different plant. The contract required the insured to coordinate the general activities of several construction contractors and Mariani's staff. The insured's employee kept a log of his activities at the site. While the insured's employee was at the site, an employee of an electrical contractor fell through a hole, sustaining physical injuries. He sued the insured and others for personal injuries.

The insured had a CGL policy, which contained an exclusion for bodily injury resulting from the insured's professional services ("professional services exclusion"). The insured tendered the defense of the lawsuit to the insurer. The insurer reviewed the insured's employee's log, obtained two legal opinions that the lawsuit fell within the professional services exclusion, and declined to accept the defense. The insured then provided additional information explaining its role at the site and why the injury was not related to its professional services. The insurer again declined the tender. Consequently, the insured defended the lawsuit until it could not afford the expense and defaulted. Judgment of nearly $2 million was entered against it. The insured then sued the insurer for breach of contract. The trial court found in favor of the insurer, and the insured appealed.

The Sixth District Court of Appeal reversed. The duty to defend is broader than the duty to indemnify. *Waller v Truck Ins. Exch., Inc.* (2002) 97 CA4th 704, 44 CR2d 370. In order to prevail on a duty to defend claim, the insured need only present evidence that the claim could be covered under the policy; the insurer, however, must prove that there is no possibility of coverage. *Montrose Chem. Corp. v Superior Court* (1993) 6 C4th 287, 24 CR2d 467. The underlying suit against the insured was for general, not professional, negligence. The insured provided information to the insurer that created a plausible basis of coverage. Absent a trial to resolve the genuine factual dispute as to whether the claim was related to the insured's professional services, the insurer could not conclusively negate the potential for coverage. Thus, it had a duty to defend the insured.

COMMENT: This is an excellent case on duty to defend. The insurance company filed a motion for summary adjudication on the duty to defend, which was denied by the trial court. The case was tried to the court, which made factual determinations that there was no coverage and, thus, no duty to defend. This immediately raises questions because, if the trial court could not rule as a matter of law that there was no coverage, then there automatically is a possibility of coverage and, thus, a duty to defend.

The court of appeal did not rule specifically on that basis, but went on to explain that, even though the trial court determined at trial that all of the insured's activities fell within a policy exclusion, there were facts that suggested otherwise. As a matter of law, there was a possibility of coverage and, thus, a duty to defend. This emphasizes the major point of this case. Even though a trial court can ultimately determine the facts in dispute, that does not permit the court to deny a duty to defend. It only permits the court to hold that there is no coverage and, thus, no duty to indemnify. However, a duty to defend exists whenever there is a possibility of coverage.

The court makes a few other interesting comments. It notes that if the exclusion at issue were applicable, the policy would be "essentially useless." 169 CA4th at 976. This is often a good argument for coverage. On the punitive damage issue, the court found there was insufficient evidence. It relied on the fact that the insurer obtained two opinions from outside counsel, both of which found that there was no coverage, and that "the trial court agreed with Farmers." 169 CA4th at 995. Notably, there was no evidence of how two major law firms could be so far off

the mark. More importantly, the comment about the trial court's ruling is entirely inappropriate. Punitive damages are based on the evidence that existed at the time the conduct occurred. The trial court's ruling obviously did not occur at that time. In this regard, it is important to point out that the court did not hold that this evidence was sufficient to dismiss the bad faith claim, but only the punitive claim.—*Arnold R. Levinson*

COMMENT: Although it would not be difficult to quibble with the court of appeal's conclusion that the trial court erred in determining that Food Pro's activities fell within the policy's "professional services" exclusion, the more significant aspect of the opinion, in my view, is the court's determination that there was no punitive damage liability as a matter of law. Too often, absent a finding of noncoverage, trial courts are generally content to throw the issue of punitive damages into the laps of the jury regardless of the strength of the evidence supporting the punitive damage claim, and appellate courts are generally unwilling to second-guess that determination. In a refreshing change of pace, the Sixth District Court of Appeal in *Food Pro* was willing to review the evidence critically to determine whether the insurer's alleged misconduct, even if proved, could fairly be characterized as oppressive, fraudulent, or malicious and, having determined it could not, upheld summary adjudication for the insurer on this ground. Importantly, this was so even though the court had already held that the carrier had a duty to defend and, thus, was at least potentially liable for bad faith and breach of the covenant of good faith and fair dealing.

As Mr. Levinson points out, in finding in favor of Farmers on the punitive damages issue, the court of appeal observed that Farmers had relied on separate coverage opinions by two outside law firms in denying coverage and that the trial court had agreed with Farmers' position. The latter he dismisses as "entirely inappropriate" because the trial court's ruling did not exist at the time Farmers denied the claim. Mr. Levinson's comment misses the point: The court was not suggesting that Farmers relied on the trial court's ruling but, rather, given the fact that the trial court reached the same conclusion, Farmers' position could not be "deemed so unreasonable as to evidence malice, fraud, or gross negligence." 169 CA4th at 995. Although the court, presumably, was not saying that the trial court's granting of a judgment in an insurer's favor automatically insulates it from punitive damages liability, such evidence should be strong support for such an argument. Thus, in those cases in which the only real issue is the propriety of the insurer's coverage opinion—as contrasted from, *e.g.*, its claims handling activities—appellate counsel for an insurer seeking affirmance of an underlying favorable judgment should be sure to argue that, at a minimum, the carrier cannot be liable for punitive damages.—*Susan M. Popik*

Tort Litigation

Assumption of Risk

Summary judgment based on assumption of risk was improper because triable issue remains as to whether defendant breached his duty as person who set up front yard volleyball court not to increase risks inherent in sport through his placement of net pole line.

Luna v Vela (2008) 169 CA4th 102, 86 CR3d 588

Plaintiff sued defendant for personal injuries he suffered when he tripped over a net pole line and fractured his elbow while participating in a recreational volleyball game in defendant's front yard. The pole line used to hold up the net was the same color and made from the same material as the net itself and was stretched across the sidewalk and anchored by a yellow stake next to a tree. Defendant moved for summary judgment on the ground that any recovery was barred by the doctrine of primary assumption of the risk. The trial court granted the motion, finding that being injured by tripping over a volleyball net pole line is a risk inherent in a front yard volleyball game and that plaintiff failed to proffer evidence to support his argument that defendant increased that inherent risk.

The Second District Court of Appeal reversed. Generally, a defendant has no duty to protect a participant against risks inherent in a sport, but does have a duty not to increase those risks. *Knight v Jewett* (1992) 3 C4th 296, 11 CR2d 2. The question of duty in the sports context depends not only on the nature of the activity but also on the defendant's role in a given case. 3 C4th at 318. Here, the trial court erred in concluding as a matter of law that defendant's arguably negligent use and placement of "nearly invisible" net pole lines did not increase the risks inherent in playing volleyball. Tripping over the net pole tie lines is an inherent risk of volleyball, but there are triable issues of fact as to whether defendant's conduct in negligently placing the tie lines and failing to make the support strings more visible increased plaintiff's risk of tripping beyond that inherent in the sport.

Duty; Negligence; Strict Liability

Name-brand drug manufacturer owes duty of care when labeling product to patients it should reasonably foresee will take generic version of product.

Conte v Wyeth, Inc. (2008) 168 CA4th 89, 85 CR3d 299

Plaintiff developed an irreversible neurological condition that she attributed to her long-term use of a generic drug prescribed by her physician. In her suit against the manufacturer of the name-brand version of the drug, she contended that defendant failed to provide adequate warning regarding the use of its drugs, making it liable for her injuries. The trial court granted defendant summary judgment, determining that a name-brand drug manufacturer owes no duty to those who take only generic ver-