

## Motion to Vacate Appraisal Award Denied Credit to McCormick and Barstow, Bakersfield, CA

**James Dickey, Inc. v. Alterra America Ins. Co. (C.D Cal. 2017) 2017 U.S. Dist. LEXIS 109811, Case No. 5:15-cv-00963-0DW (DTB).**

*Federal Arbitration Act governed plaintiff's motion to vacate appraisal award arising out of an insurance policy involving interstate commerce.*

### UNDERLYING FACTS

After Plaintiff's Snap-On brand tools were stolen, it made a claim under its inland marine insurance policy issued by Alterra. The parties could not agree on a value for the tools so Alterra successfully moved to compel an appraisal under the policy. Pursuant to the appraisal clause, each party may nominate an appraiser and the two chosen appraisers in turn may agree on an impartial umpire. The two appraisers appraise the loss and if they do not agree their differences are submitted to the umpire. Once the umpire and another appraiser agree on the amount of loss, that amount becomes the appraisal award. Plaintiff nominated Twarowski as a party appraiser and Alterra nominated Smith as a party appraiser. The party appraisers agreed on McCarthy as the umpire. McCarthy provided a disclosure statement indicating that he had worked with Twarowski on an insurance appraisal 5 years earlier in a case in which Twarowski was the insured's public adjuster and McCarthy served as the appraiser for the insurer.

The party appraisers could not agree on a value for the tools and therefore involved McCarthy. During a conference call, McCarthy proposed an in-person meeting to review and discuss the evidence and contested issues. Twarowski later sent an email to the other appraisal panel members suggesting dates for a meeting and indicating he may bring a witness. McCarthy responded with an email stating that he expected the parties to put on witnesses and bring to the meeting documents supporting their position. Alterra's counsel subsequently sent a letter to Twarowski, Smith, McCarthy and Plaintiff's counsel asking that Plaintiff identify any witnesses it intended to present and details regarding the witness's testimony. Twarowski responded by stating he did not intend to call any witnesses.

The appraisers met to discuss the appraisal. Smith argued that depreciation should be applied while Twarowski argued it should not. McCarthy agreed that some measure of depreciation was warranted. Twarowski then requested that the meeting be continued to allow him time to gather evidence about the rise in value of Snap-On tools over the years. This request was denied by McCarthy and he determined that the tools should be depreciated at the rate of two percent per year for a total of fourteen percent depreciation. McCarthy and Smith signed an "Appraisal of Insurance Claim Award Form" ("award") finalizing an award in the amount of \$27,237.28. A copy of the award was provided to the plaintiff on November 28, 2016 and Alterra satisfied the award on December 7, 2016.

Plaintiff filed a motion to vacate the award on June 2, 2017, contending that McCarthy failed to disclose his previous relationship with the law firm representing Alterra. Plaintiff further claimed that this relationship resulted in McCarthy favoring Alterra as evidenced by his refusal to allow Twarowski to present witnesses and by his refusal to allow a continuance. The relationship referenced was a prior appraisal case with respect to which McCarthy disclosed that he was designated by the insurer as a party appraiser but did not disclose the fact that the same law firm representing Alterra in the current matter represented the insurer in the prior appraisal case. Continued on page 4

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### CAIIA Newsletter

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**President's Message**

Narwhals Facts

Narwhals are a toothed whale that reside in the Northern arctic waters near Greenland, Russia, and Canada. Though medium-sized, narwhals are arguably the most magnificent of all whales.

Narwhals have an interesting quality that makes them often misunderstood to be make-believe. The left canine tooth of a male narwhal grows through the lip of the mammal in a left-handed helix fashion, creating a "unicorn" horn. They are, quite literally, the unicorn of the ocean; the main difference between narwhals and unicorns is that the former truly exists. In fact, the idea of unicorns came into existence because, in medieval times, people would cut off the teeth of narwhals and sell them as unicorn horns.

The use of this tooth has been speculated consistently and is not yet fully understood, however, we do know some things to be true and some to be myth. One large misconception of the narwhal's tooth is that it is used to "tusk" other narwhals, which is an action that resembles sword fighting or jousting. This myth was mostly disproven when it was discovered that the tooth is an innervated sensory organ that helps the narwhal detect information from seawater. It has been found that narwhals rub each other's teeth together to relay information from seawater that each respective narwhal has traveled in. They use this information to determine where they should and should not travel. It has also been found that narwhals use their tooth to stun fish, making them easier to catch.

Narwhals are capable of some of the most incredible dives by a marine mammal. A small dive for a narwhal is around 2,500 feet while a deep dive can be up to 5,000 feet. These dives last upwards of 25 minutes, and their frequency is astounding. Narwhals can perform these dives over fifteen times a day.

Narwhals have a life span of about 50 years and do not face many predators. Predators for this medium sized whale include polar bears, Greenland sharks, packs of orcas, walrus, and humans. An issue in the survival of narwhals is sea ice entrapment. This is when a narwhal swims underwater and cannot reach the surface because thick bodies of ice prevent them from surfacing.

Narwhals are one of the most unique marine mammals and are often overlooked because people dismiss them as make-believe. The mystery that surrounds them makes them seem as mythical as they are made out to be.



Steve Washington  
CAIIA President

**Steve Washington**

**CAIIA President 2016-2017**

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NEWS FROM AND FOR OUR MEMBERS

SAVE THE DATE

The CAIIA is proud to be exhibiting at or sponsoring the following upcoming events:

- September 13-15, 2017      Claims Conference of Northern California, Sacramento, CA (see page 8)
- September 28, 2017      CAIIA Annual Meeting, San Diego, CA (see page 7)
- October 17, 2017      CPCU Educational Event, Studio City, CA
- March 6-7, 2018      Combined Claims Conference, Garden Grove, CA

Editor's Note: We thought you would like to know that the CAIIA's support is appreciated.



CALIFORNIA STATE UNIVERSITY, FULLERTON

Murray College of Business and Economics  
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July 20, 2017

Steve Washington, President  
CA Association Independent Insurance Adjustors  
PO Box 168  
Burbank, CA 91503-0168

Dear Steve:

On behalf of the **Center for Insurance Studies** at CSU Fullerton, I wish to sincerely thank you for your support for the Center.

With your generous scholarship gift in the 2016-17 Academic Year, the Center was able to serve 1,500 students with an annual course enrollment of 1,292. We also awarded more than \$61,000 in scholarships to 54 students this spring. We are proud of the 144 students placed in insurance and actuarial science career positions this year. It truly takes a village to have these successes! Thank you for your continued leadership in serving the next generation of insurance professionals.

I am pleased to report that we are preparing for another record year with increased student enrollment and industry placements in the 2017-18 Academic Year! Again, thank you.

Sincerely,

Weili Lu, Director  
Center for Insurance Studies

Continued from page 1

### **DISTRICT COURT'S RULING**

The district court first addressed the issue of whether California law or the Federal Arbitration Act (FAA) governed the motion. In finding that the FAA controlled, the district court first noted that the FAA governs arbitration clauses in contracts involving interstate commerce and that the insurance policy at issue in this matter involved interstate commerce.

Second, the district court discussed whether an appraisal clause qualifies as an arbitration clause. Citing *Wasyl v. First Boston Corp.* (9<sup>th</sup> Cir. 1987) 813 F.2d 1579), the district court noted that it must first look to California law to determine whether an appraisal is the functional equivalent of an arbitration. The *Wasyl* court answered this question in the affirmative, noting that appraisals are expressly included in the definition of an arbitration agreement under California Code of Civil Procedure section 1280. Since *Wasyl* remains good law in the 9<sup>th</sup> Circuit, the district court concluded that the FAA should be applied to rule on the motion.

The district court next discussed whether the motion was timely. Under the FAA, notice of a motion to vacate an award must be served within three months after the award is filed or delivered. Because the award in the present case was delivered to plaintiff on November 28, 2016 and the motion to vacate was not served until June 2, 2017, it was not timely. In addition, the district court found no grounds for tolling the period as there was no evidence the plaintiff was prevented from filing a timely motion due to inequitable circumstances. In addition, Twarowski stated in his declaration that he discovered the nondisclosure months before the deadline.

Finally, the district court addressed the merits of the motion. In ruling against the plaintiff, the court determined there was no impression of bias as “the connection alleged is too distant, too attenuated, and too insubstantial to create the necessary ‘impression of bias.’ (Citation.)” Furthermore, there was no showing of actual bias based on McCarthy’s refusal to allow a continuance. First, the plaintiff had voluntarily withdrawn its witness before the meeting. In addition, the parties had been litigating the case for over a year and Twarowski’s declaration showed that he knew the issue of depreciation would be discussed at the meeting. McCarthy’s refusal to deny the continuance was reasonable and did not constitute bias. For these reasons, the district court denied the plaintiff’s motion to vacate.

### **EFFECT OF THE COURT'S RULING**

The decision reaffirms the notion that inland marine policies involve interstate commerce, a condition to establishing jurisdiction under the FAA. This case is also significant in that it reaffirms an older 9<sup>th</sup> Circuit case finding that the FAA governs proceedings related to appraisals under insurance policies if the appraisal clause is considered an arbitration agreement under state law.

Parties should take note of the potential for an appraisal proceeding to be subject to the FAA, rather than California law, in the event the applicable insurance policy involves interstate commerce.

The district court also specifically noted in a footnote that the result would have been the same under California law which requires that motions to vacate appraisals be filed within 100 days of the date of service of the award. (Cal. Code. Civ. Pro. Sections 1280 and 1288.) Even this longer filing period would not have saved the plaintiff’s motion. The takeaway is the importance of filing a motion to vacate or correct an award within the relevant statutory time period (within 90 days of delivery or filing of an award under the FAA or within 100 days of the date of service of the award under California law).

### **“New” CAIIA Executive Director Appointed**

As many of you know Sterrett Harper of Harper Claims Service, Inc, Burbank, CA, has been the de facto executive director of the CAIIA for many years. Finally Sterrett has agreed to be the official Executive Director. The CAIIA has a two year contract with Sterrett. He has agreed to continue at his current salary of the whopping sum of \$0.00 per year. (This actually doubles his current salary.) His duties continue to be the same as they have been since about 2002. The CAIIA thanks Sterrett and looks forward to his continued stewardship.

**Wrongful Death Suit****Credit to Haight, Brown and Bonesteel, Los Angeles, CA**

In *Energy Ins. Mutual Ltd. v. Ace American Ins. Co.* (No. A140656, filed 7/11/17, ord. Pub. 8/10/17), a California appeals court found that a professional services exclusion barred coverage for wrongful death and other claims blamed on pipeline inspectors' failure to identify and properly mark a gas pipeline that was ruptured during construction of another pipeline, resulting in an explosion and fire.

In *Energy Ins. Mutual*, a pipeline owner hired two temporary construction inspectors through a staffing company. The inspectors had to ensure compliance with engineering and safety standards, practices and procedures for pipeline construction, and understand construction drawings and blueprints. They worked together with one of the owner's employees to perform daily surveillance to ensure the integrity of the pipeline and avoid third party damage.

An excavator operated by a subcontractor punctured a high-pressure petroleum line releasing gasoline into the pipe trench that was ignited by another contractor's welding. The resulting explosion and fire killed five employees, seriously injured four others and caused extensive property damage. A Cal/OSHA investigation concluded that failure to properly mark the petroleum pipeline was the primary cause. Wrongful death and other lawsuits followed.

The settlements reached into the owner's excess insurance, with a second layer excess insurer paying out \$30 million of its \$100 million limit that was excess to \$35 million in first layer excess coverage. The second layer excess insurer then sued the excess/umbrella insurer for the temporary staffing company, seeking reimbursement of that insurer's \$25 million in coverage on a theory that the owner was an additional insured of that insurer, and that the umbrella carrier was first layer excess for the owner, which therefore should have paid ahead of the second layer insurer.

The staffing company's umbrella insurer argued among other things that its professional services exclusion barred coverage, and the trial court granted summary judgment on that ground.

On appeal, the owner's insurer argued that application of the professional services exclusion rendered the umbrella carrier's insurance illusory, but the appeals court disagreed. While noting that "professional services" is broader than "profession," and encompasses services performed for remuneration, the court said that "it is the type of activity, rather than actual compensation, that controls whether the professional services exclusion applies."

The *Energy Ins. Mutual* court distinguished *North Counties Engineering, Inc. v. State Farm General Ins. Co.* (2014) 224 Cal.App.4th 902, saying that in *North Counties* there was evidence that the insured also performed some ordinary labor and construction work in addition to the professional engineering services, while also pointing out that *North Counties* had involved a narrower definition of professional services. Plus, the loss in *North Counties* had occurred after the work had been completed, not during the insured's actual operations.

The *Energy Ins. Mutual* court also distinguished *Food Pro Internat., Inc. v. Farmers Ins. Exchange* (2008) 169 Cal.App.4th 976 and *Tradewinds Escrow, Inc. v. Truck Ins. Exchange* (2002) 97 Cal.App.4th 704, as not involving sufficient causal connection between the injury and the provision of professional services, saying that by contrast, the allegations of the complaint before it were "inseparably intertwined" with excluded conduct. The court cited *Ubrich v. State Farm Fire & Casualty Co.* (2003) 109 Cal.App.4th 598, *Medill v. Westport Ins. Corp.* (2006) 143 Cal.App.4th 819 and *Southgate Recreation & Park Dist. v. California Assn. for Park & Recreation Ins.* (2003) 106 Cal.App.4th 29, saying that:

"[H]ere, the claims of 'ordinary, common law negligence' and the so-called 'other actionable claims' ... are 'inseparably intertwined' with the non-covered conduct.... [A]lthough the underlying cases also allege ordinary negligent acts and other causes of action, the gravamen of the actions is that Comforce and Kinder Morgan failed to mark the pipeline, the very thing they were required to perform at the site. It is Comforce's and Kinder Morgan's failure to render professional services that comprises the basis of the underlying lawsuits. Accordingly, the basic occurrence that caused the injuries (failure to mark the pipeline) was excluded from coverage by the CGL umbrella policy."

The *Energy Ins. Mutual* court went on to reject an argument that the presence of a "separation of insureds" provision somehow changed the analysis, saying that both the staffing company and the owner had been sued for the employees' failure to properly mark the pipeline, and the nature of the basic occurrence supporting liability was the same for both the named and additional insureds.

Finally, the *Energy Ins. Mutual* court disagreed that application of the professional services exclusion rendered coverage illusory, pointing out that the umbrella policy was a general liability form, not a professional errors and omissions policy. Therefore, "the professional liability exclusion did not withdraw virtually all of the coverage extended by the insuring agreement that defined [the] liability coverage."

**DOI Press Releases****State Supreme Court affirms homeowner reimbursement protections supported by Jones**

**SACRAMENTO, CA** - The State Supreme Court Wednesday ended a long legal battle between a Richmond homeowner and her homeowner insurance company when the court refused to consider the insurance industry's petition to overturn a lower court's precedent setting decision that insurers must pay to repair a home even if repair costs exceed the home's market value.

The case stems from a house fire in October 2011. Richmond homeowner Marlene Garnes submitted a claim for \$320,549 to her insurer, California FAIR Plan Association, for the cost to repair her damaged home, less depreciation.

Although Garnes' FAIR fire insurance policy had a limit of \$425,000, the insurer denied her claim and only paid \$75,000, which it determined was the fair market value of her property in 2011 during the mortgage-driven recession. The conflict over the claim between FAIR and Garnes led to legal challenges.

"This is an important win for homeowners who should have confidence their insurer will deliver on its promises regardless of housing value fluctuations," said Insurance Commissioner Dave Jones.

The First District Court of Appeal in San Francisco ruled in May that a 2004 state law allows homeowners to recover their repair costs even if the policy contained more restrictive payout provisions.

Coverage is limited to fair-market value only if a home has been destroyed or damaged beyond repair, the court said. Garnes' home was badly damaged by the fire, but was not destroyed.

Jones filed an amicus brief supporting Garnes' argument, pointing out that the Insurance Code entitled her to be reimbursed for the cost of repairing her home even if it exceeded the fair market value of the home. The lower court relied on Commissioner Jones' interpretation of the Insurance Code when it ruled in favor of Ms. Garnes.

The Insurance Commissioner appeared as an amicus curiae or friend of the court, based on his vital interest in protecting consumers and ensuring the proper interpretation and enforcement of the provisions in the Insurance Code, United Policyholders (UP), a national consumer organization, also filed an amicus brief supporting Garnes' claim.

**Nine Valley residents sentenced in \$500,000 auto insurance fraud ring**

Key suspect, Dwon Maurice Ross was in court 8/15, 8:30 a.m. Dept 63 Sac County Court

**SACRAMENTO, Calif.** – In one of the larger auto insurance fraud cases in the Sacramento region, Michael Charles Young, 30, of Sacramento, the leader of a large auto insurance fraud ring was sentenced recently to more than 10 years in state prison for bilking insurance companies out of an estimated \$500,000 by filing fraudulent insurance claims.

Detectives are seeking three at-large suspects with outstanding warrants and asking for the public's help finding them—Jazlyn Ladana Burrell, 20, of Vallejo; Lavina Louise Nunally, 26, and Desiree Patricia Vasquez, 22, both of Sacramento.

"California is ground zero for auto insurance fraud and every policyholder pays for these crimes through higher auto insurance rates," says Insurance Commissioner Dave Jones. "This organized crime ring was brought down by the hard work of our detectives and the California Highway Patrol. Our investigative partnerships with law enforcement partners and district attorneys are critical to eradicating insurance fraud."

An investigation by detectives with the California Department of Insurance and the California Highway Patrol (CHP) uncovered evidence Young and several co-conspirators filed multiple insurance claims totaling an estimated half a million dollars after crashing cars into each other or filing claims on vehicles with existing damage—known as paper collisions. The case is being prosecuted by the Sacramento County District Attorney's Office.

According to detectives, Young's ring operated in the Sacramento area between 2014 and early 2016 filing dozens of claims ranging between \$5,000 and \$40,000 with a number of insurance companies.

"I am proud of the hard work by our investigators to help bring these criminals to justice," CHP Commissioner Joe Farrow said. "However, with some suspects still at large, we ask the public's help to find and arrest them and conclude the case."

In most cases, false identities were used to register and insure the vehicles used to file claims and accomplices were provided scripts to use when communicating with insurers. Some defendants allowed their identities to be used for compensation and then cashed checks issued in their names. The ring grew as friends and family members were recruited.

Young was arrested in April 2016, and charged with numerous felonies, including insurance fraud, possession of stolen vehicles, identity theft, and possession of firearms by a convicted felon.

**CAIIA REGISTRATION FORM**  
**California Association of Independent Insurance Adjusters**  
**Annual Convention—September 28-29, 2017**

Wyndham San Diego Bayside, 1355 N. Harbor Dr, San Diego, CA 92101 Phone: (619) 232-3861



Call above number for Reservations must be made by **Tuesday, August 28, 2016** for the CAIIA group rate of \$165.00 by going to [CAIIA @ Wyndham](#) to reserve online. For an upgraded bay view @ \$179, call 619-358-6015. Prevailing rates may apply after this date or when the group rooms are sold out, whichever occurs first. Rooms are subject to availability.

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<b>MEMBER CONVENTION Package (*)</b> (Includes reception, breakfast, CE Class/lunch/dinner)	\$150.00	# _____	\$ _____
<b>Spouse/Guest fee (***)</b> Name _____	\$100.00	# _____	\$ _____
<b>Non-Member (***) Convention Package</b> (Includes reception, breakfast, CE Class/lunch/dinner)	\$175.00	# _____	\$ _____
<b>3 Hour CE Class</b> (Includes, breakfast, presentation, lunch)	\$100.00	# _____	\$ _____
<b>President's Gala Dinner/Reception/Harbor Cruise</b>	\$100.00	# _____	\$ _____
<b>Grand Total payable</b>			\$ _____

**SCHEDULED EVENTS**

Please specify which events you and/or your spouse/guest will attend by placing a check mark in the box next to the event. **Please make your checks payable to CAIIA or pay by credit card.**  
 Complete a separate form for each registrant and additional guest. **Mail Registration Form & payment to:**

		<u>You</u>	<u>Spouse/Guest</u>
09/28 – 6:00 pm to 9:00 pm	Welcome Reception	[ ]	[ ]
09/29 --7:00 am to 8:00 am	Registration/Breakfast	[ ]	[ ]
09/29 – 8:00 am to 12 pm	Seminar (3 ce credits ##.)	[ ]	[ ]
09/29 – 12:00 pm to 1:00 pm	Lunch	[ ]	[ ]
09/29 – 1:30 pm to 4:30 pm	Business Meeting	[ ]	[ ]
09/29 -- 5:45 pm to 9:00 pm	Gala Dinner on the Newport Hornblower ( <a href="#">Grape St Pier</a> )	[ ]	[ ]

[Patricia Bobbs](#)  
**Claims Review & Consulting Services, Inc.**  
 PO Box 28148  
 Anaheim, CA 92809



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**## : Class by Kevin Hansen, McCormick Barstow—“Documenting Property Claim Files: Best Practices and Pitfalls”**



**CCNC 2017 SCHEDULE OF EVENTS  
SEPTEMBER 13 – 15, 2017  
McClellan Conference Center, McClellan Park**

**September 13 | Wednesday**

**2PM – 5PM | Exhibitor Set Up**

**6PM – 9PM | Welcome Reception | BLACK & WHITE GALA**

**September 14 | Thursday**

**7:30AM – 8:30AM | BREAKFAST in the Exhibit Hall with Exhibitors**

**8:30AM – 9:30AM | KEYNOTE Presentation | HOW TO MASTER CATASTROPHE LOGISTICS | Jerry Bialick, USAA CLAIMS SERVICE DIRECTOR, LARGE LOSS OPERATIONS | Center Stage in the Exhibit Hall**

As Hurricane Ike hit Houston, Texas in 2008, Jerry Bialick was chosen as USAA's first Catastrophe Logistics Director and has served in that role several times since for other catastrophes. In total, he has been deployed to 15 catastrophes around the United States. His current responsibilities are nationwide over a large team dispersed to all areas of the United States. He also serves as the Fire Chief of a large suburban fire department in San Antonio, Texas providing fire and EMS services to over 62,000 residents and \$8.2B in property assets.

**9:30 – NOON | CATASTROPHE STAGING EXPERIENCE**

**10AM – NOON | CE Presentations**

**NOON – 1PM | LUNCH BREAK in the Exhibit Hall with Exhibitors**

**1PM – 5:15PM | CE Presentations**

**6PM – 10PM | CARNIVAL NIGHT with FOOD TRUCKS**

**September 15 | Friday**

**8AM -9AM | BREAKFAST in the Exhibit Hall with Exhibitors**

**9AM – NOON | CE Presentations**

**NOON – 1PM | LUNCH BREAK in the Exhibit Hall with Exhibitors**

**1PM – 4PM | CE Presentations**

**4PM | CONFERENCE ADJOURNS**

To register, go to: <http://claimsconference.org/attend-2017/>

*On the Lighter Side...*

“The trouble with quotes on the internet is that you never know if they are genuine.” Abraham Lincoln

### History of Labor Day (according to Wikipedia)

**Labor Day** in the [United States](#) is a [public holiday](#) celebrated on the first Monday in September. It honors the [American labor movement](#) and the contributions that workers have made to the strength, prosperity, [laws](#) and well-being of the country. It is the Monday of the [long weekend](#) known as **Labor Day Weekend** and it is considered the unofficial end of summer in the United States. The holiday is also a [federal holiday](#).

Beginning in the late 19th century, as the [trade union](#) and [labor movements](#) grew, trade unionists proposed that a day be set aside to celebrate labor. "Labor Day" was promoted by the [Central Labor Union](#) and the [Knights of Labor](#), which organized the first parade in [New York City](#). In 1887, [Oregon](#) was the first state of the United States to make it an official [public holiday](#). By the time it became an official [federal holiday](#) in 1894, thirty [U.S. states](#) officially celebrated Labor Day.<sup>[1]</sup>

Canada's [Labour Day](#) is also celebrated on the first Monday of September. More than 80 countries celebrate [International Workers' Day](#) on May 1 – the ancient European holiday of [May Day](#) – and several countries have chosen their own dates for [Labour Day](#).

