



Admitted Liability Credit to Tyson and Mendes, La Jolla, CA

Witness credibility can make or break a case. This is especially true in an admitted liability, damages only lawsuit. The Court of Appeal's recent opinion in *Christ v. Schwartz*, 2016 WL 4255012, demonstrates the worst case scenario for a Plaintiff in an admitted liability case where Plaintiff loses all credibility in the eyes of the jury.

Facts: Susan Christ and her husband, Jon Christ, filed a personal injury action against Dwayne Schwartz, following an automobile collision. Ms. Christ sought damages for alleged neck injuries and fibromyalgia. Mr. Christ sought damages for loss of consortium. Mr. Schwartz admitted total liability for the automobile collision. He was traveling at a speed of 10 miles per hour when he sideswiped Ms. Christ's vehicle in an attempt to pass a bus. Ms. Christ did not hit anything during impact, but claimed to have immediate pain in her neck, shoulder, and back. By the time Plaintiffs filed their lawsuit, Ms. Christ was alleging whiplash. Sometime after the lawsuit ensued, Plaintiff alleged she also developed fibromyalgia from the accident. Medical tests revealed no objective proof of either injury.

Plaintiffs' case for damages relied solely upon subject evidence, i.e., Ms. Christ's testimony. Ms. Christ testified she could no longer perform any household services as a result of her injuries, and could not lift more than five pounds. She also claimed she could not wash her face or brush her teeth without first doing yoga. Mr. Christ testified his wife's injuries negatively affected their relationship because such injuries prevented them from participating in activities they enjoyed doing together. He also testified he could not touch areas of Ms. Christ's neck, back, and shoulders without causing her pain. During the course of trial, a variety of interesting facts came to light that directly impeached Ms. Christ's credibility. The defense presented sub rosa video that showed Ms. Christ carrying a full-size garbage can, picking up dogs, and holding a hefty purse. It also showed Mr. Christ touching Ms. Christ's back without the slightest reaction from her.

The jury heard medical expert testimony, which confirmed there was no objective evidence to corroborate Plaintiff's claimed injuries. The defense also introduced evidence of Plaintiff's pre-incident neck injuries and complaints of pain which mirrored her current neck complaints. Plaintiff's postincident medical treatment proved to be spotty and her diagnoses questionable. Furthermore, the jury learned Plaintiff did not follow her doctors' treatment orders. While the jury entered a verdict in favor of Plaintiffs, it did not award Plaintiffs even \$1 in damages. Plaintiffs moved for a new trial on the grounds the Court erred in admitting (a) photographs of automobile damages without the foundation of a biomechanical expert, and (b) evidence of Mr. Christ's past infidelity. Plaintiffs also argued a new trial was proper because the jury erred in failing to award any damages. The motion was denied and Plaintiffs appealed.

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President's Message

It was early morning and I was on my way to the fitness educational center. Due to construction, I was following a walking detour to the building. Not being fully awake, I saw a sign on a piece of equipment and knew I would have to share it with you. It reminds me that in our effort to provide warnings and caution, sometimes the message is lost if it is industry specific or contradictory.



Paul Camacho
CAIIA President

One of my favorite warning signs is on Highway 50 east as you approach Carson City, Nevada, installed by the Department of Transportation. As this is a downgrade, there is a runaway truck ramp and there is lots of notice directing you to this area if you have lost your brakes driving your big rig. But, as you pass the ramp, which has the emergency exit signs, there is a row of signs in the ramp lane that state "No stopping anytime".

So back to my early morning walk at the college, on my return, when I was awake, here is what I saw:



but as I looked closer, it got better:



How well was this message delivered? From now on, I will make sure not to take any picnic utensils near that area, because if I trip and fall, my fork may cause me some trouble. I got nothing on the latter.

So it runs full circle and this is my last President's message to you. It has been fun, believe it or not, to sit down and compose a monthly message. If there has been a theme, I hope it was that communication and continuing education is vital to our industry in providing claim service. I am passing the baton to Steve Washington, who will be sworn in as our next President of the CAIIA at our Annual Convention to be held in Long Beach on the Queen Mary. Hope to see you there.

Paul R. Camacho, ARM, RPA

CAIIA President 2015-2016

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NEWS OF AND FOR MEMBERS**IMPORTANT FOR ALL CAIIA MEMBERS:****NOMINATING COMMITTEE NOMINATES OFFICERS AND DIRECTORS**

The CAIIA Nominating Committee has submitted the following candidates for the upcoming board vacancies.

President - Steve Washington -Washington and Finnegan - Chatsworth

Vice President – Patricia Bobbs – Claims Review and Consulting Services, Inc. – San Diego

Secretary/Treasurer – John Ratto – Reliant Claims Service, Inc. – Oakland

Two Year Director – Neal Thornhill – Thornhill & Associates, Inc. – Chatsworth

Two Year Director – Eric Sieber – E.J. Sieber and Company – Rancho Cucamonga

As the above changes require a simple plurality of voting members by mail or in attendance at a scheduled meeting, please cast your vote by mail or in person at the October 7th business meeting.

DOI Announcement:**Public adjuster arrested for ripping off Southland fire victims**

Adjuster victimized homeowners a second time by allegedly stealing more than \$400K in insurance proceeds, hiring unlicensed contractors, and leaving victims without repaired homes

LOS ANGELES, Calif. - Jose Manuel Villa, 60, of San Clemente, a former licensed public adjuster, was arrested today at his home in San Clemente on multiple felony counts of embezzlement, grand theft, and forgery after allegedly cashing claim checks with counterfeit endorsement seals and stealing a total of \$400,000 from fire victims in the Los Angeles area.

After receiving multiple complaints from consumers, the California Department of Insurance Investigation Division launched an investigation. Evidence revealed Villa, doing business as Statewide Claims Advisors, allegedly cashed and deposited multiple claims checks with counterfeit endorsement seals that were issued by insurance companies to fire victims to repair and rebuild their damaged properties.

"These consumers were victimized twice," said Commissioner Jones. "Once when their home was damaged by fire and then again when Villa allegedly forged endorsements on their insurance payments and stole the money intended to rebuild their homes."

Villa solicited fire victims to sign public adjuster contracts allowing him to handle their claims, but instead of forwarding these checks to lenders for endorsements and proper handling, Villa deposited the checks into his business accounts and diverted the funds for his personal use.

Villa refused to release claim funds to many victims who desperately needed to rebuild their homes. Villa released some funds to contractors, using forged endorsements, and in one case, hired an unlicensed contractor whose work was substandard, which led to a second fire in the home which further victimized the homeowners.

Investigators are concerned there are more victims and are asking anyone who hired Villa to contact the Department of Insurance Investigations Division.

Villa was booked into the Orange County Men's Central Jail in Santa Ana and bail was set at \$250,000. This case is being prosecuted by the Los Angeles County District Attorney's office. Villa surrendered his public adjuster license to the department.

Double Trouble: Protect Medicare Advantage Plans or Else
Credit to: Mark S Hall Esq.

Mark is Of Counsel to the California Association of Independent Insurance Adjusters, Inc. and is principal of the Hall Law Firm.

A recent decision out of the 11th Circuit Court will have a dramatic impact on liability and workers compensation claims and will have a significant effect on insurers, self-insureds, public entities and third-party administrators to proactively ascertain the Medicare status of the claimant before approaching any settlement.

The federal Medicare program basically consists of four parts. Part A addresses the individual's inpatient hospitalization benefits. Part B provides for outpatient services. Part C is commonly referred to as the Medicare Advantage Organizations (MAO's), Medicare Advantage Plans (MAP's) or MA Plans. Part D includes pharmacy benefits. Part A, B and C are often intertwined and can result in confusion. Medicare Advantage Plans are provided by private healthcare companies that contract with Medicare supplement traditional plans. An individual must be entitled to receive Medicare part A and B before they can enroll in part C Medicare Advantage Plan. An individual who participates in Part C MAP will have Part A and Part B services covered through the Part C plan. This often creates a situation where Medicare is not always getting billed for services.

There's been a steady rise in participation in Medicare Advantage Plans with the most recent figures finding that at least 31% of the total population, almost one in three Medicare beneficiaries, participate in a MAP. (*Medicare Advantage Enrollees as a Percent of Total Medicare Population*, Henry J. Kaiser Family Foundation).

This brings us to the 11th Circuit US Court of Appeals affirming the District Court's decision in the *Humana Medical Plan Inc. v. Western Heritage Insurance Company*, Case, No: 15-11436, on August 8, 2016. In this appeal, Western, sought a reversal of the lower court's summary judgment in favor of Humana's claim for double damages under the Medicare Secondary Payer's Act's (MSP) private cause of action provision under 42 U.S.C. Section 1395y(b)(3)(A). In the underlying case, Humana's claims stem from Western's \$115,000 settlement with a Humana enrollee Mary Reale from a slip and fall lawsuit. Medicare had not made any conditional payments under parts A or B, with Reale's injury related medical treatment having been paid by Humana's Medicare Advantage Plan under Part C.

Western became aware of Humana's lien rights after the settlement agreement was reached, but before payment was made. Western attempted to add Humana as a payee on the settlement draft, however, the state court judge ordered Western to tender for payment without the lien holder on the check. The state court judge also ordered Reale's counsel to withhold sufficient funds in a trust account to resolve all of the medical liens. Humana's conditional payments amounted to \$19,155.41. Western issued full payment of the settlement under the terms of the state court judge's order with the understanding that Reale and her attorney would reimburse Humana. Reale disputed the amount of reimbursement to Humana and filed suit against them in Circuit Court, circumventing Humana's administrative appeal process. While this litigation was pending, Humana filed suit against Western to recover its conditional payments.

The District Court in Humana's action against Western granted Humana's motion for summary judgment finding that Western's settlement with Reale supported a finding that Humana was a "primary plan" under the Medicare Secondary Payer Act. Furthermore, the court found that the MSP private cause of action is available to an MAO and that Humana was entitled to double damages, or \$38,310.82. The district court entered judgment in favor of Humana and Western appealed.

The Court of Appeals recognized that this was a case of first impression. The issue to be decided was whether the MSP private cause of action allows a Medicare Advantage Organization to sue a primary payer for its refusal to reimburse the MAO for its secondary payment. In rejecting Western's argument that it lacked constructive knowledge that Medicare had made payment, the Court of Appeals noted that this was contradicted by Western's attempt to include Humana as a payee on the settlement check to Reale. In addition, the Court noted that Western had the ability to discover the nature of Reale's health insurance coverage during the litigation process. Western argued that it provided for reimbursement to Humana placing \$19,155.41 into trust while the issue between Reale and Humana was being litigated. However, Western ignored the fact that Medicare requires reimbursement of the secondary payment within 60 days of receiving, or in Western's case, of tendering the settlement. 42 C.F.R. Section 411.24(i)(1). Finally, Western argued to the court that Humana was only entitled to \$19,155.41 as provided for in Humana's Organization Determination letter to Reale. The court rejected this argument in light of the plain language of the private cause of action statute which states that damages "shall" be in an amount double to the amount otherwise provided. 42 U.S.C. 1395y(b)(3)(A).

In light of this decision, as well as the gravitation of Medicare recipients to MAO and MAP, attorneys, claims adjusters, and insurers must undertake a comprehensive investigation into the coverage and injury related payments under Medicare Advantage Part C and Part D plans during the litigation process. Once a secondary payer is identified, it would be wise to negotiate the conditional payment reimbursement with the secondary payer prior to the settlement funds being paid out. Insurance carriers should also consider withholding the settlement funds to ensure proper reimbursement and resolution of conditional payments as opposed to leaving the obligation to the plaintiff and their attorney. Ignoring these warnings, could spell double trouble.

Contractual Indemnification

Credit to: *Low, Ball & Lynch, San Francisco, CA*

Aluma Systems Concrete Construction of California v. Nibbi Bros. Inc., et al.

Court of Appeal, First Appellate District (August 16, 2016)

This case considered the applicability of a contract's indemnification clause where there was no alleged negligence by the indemnifying party in an underlying action.

Aluma Systems Concrete Construction of California, Inc. ("Aluma") was sued by employees of respondents Nibbi Bros. Inc., and Nibbi Bros. Associates, Inc. dba Nibbi Concrete ("Nibbi"), for injuries sustained on the job. In March, 2011, Aluma entered into an agreement with Nibbi to design and supply the materials for wall formwork and deck shoring at Nibbi's construction project ("Contract"). The terms of the contract included an indemnification provision. Part of it required Nibbi to indemnify and hold harmless Aluma against any and all claims arising from or in connection with the contract, except to the extent such claims are caused by the acts or omissions of Aluma, or anyone directly or indirectly employed by Aluma, or anyone for whose acts Aluma may be liable.

Subsequently, two lawsuits were filed by Nibbi's employees ("Employee Lawsuits") against Aluma alleging that in August, 2011, the employees were injured after a shoring system designed by Aluma collapsed. They alleged the collapse was due to Aluma's negligence.

Aluma's answers alleged as affirmative defenses that the employees' injuries were proximately caused by the negligence of Nibbi and unnamed others. Aluma tendered the Employee Lawsuits to Nibbi for defense and indemnification, but received no response.

Aluma then filed the instant action against Nibbi for breach of contract, express indemnification, and declaratory relief. Nibbi demurred to the complaint. The demurrer argued the contractual indemnification provision did not apply because the Employee Lawsuits alleged Aluma alone, not Nibbi, was negligent. The trial court sustained the demurrer without leave to amend. Aluma appealed.

The Court of Appeal reversed the trial court's ruling. Nibbi's primary argument was that the Employee Lawsuits alleged only Aluma's negligence, which was expressly excluded from the indemnification provision. Nibbi contended the application of the indemnity provision turned on whether the Employee Lawsuits alleged the negligence of any party other than Aluma, rather than on what a factfinder ultimately determined about the parties' respective negligence.

The Court disagreed and first looked at the language of the contract. Nibbi noted the indemnification provision applied to "claims" and argued that this indicated the allegations of the Employee Lawsuits controlled the provision's application. Assuming this is an appropriate construction of the word "claims," the provision also requires indemnification for Aluma's "damages" and "losses." The Court saw no basis to restrict the damages and losses so indemnified to the allegations of the Employee Lawsuits, rather than to the damages Aluma was ultimately found liable for. Even if Nibbi's construction of the Contract were possible, the Court noted it must accept Aluma's reasonable interpretation for purposes of the demurrer. *Marzec v. Public Employees' Retirement System* (2015) 236 Cal.App.4th 889, 909.

Nibbi pointed to cases in which the application of indemnification provisions turned on the allegations of the third party's complaint. However, the Court found that those cases all involved the duty to defend. The duty to indemnify is distinct from the duty to defend: the former "require[s] one party to indemnify the other, under specified circumstances, for moneys paid or expenses incurred . . . as a result of" a third party claim, while the latter "assign[s] one party . . . responsibility for the other's legal defense when a third party claim is made." (*Crawford v. Weather Shield Mfg., Inc.* (2008) 44 Cal.4th 541, 551 (*Crawford*)). Depending on the contractual language, a duty to defend may exist even if no duty to indemnify is ultimately found. The duty to defend "necessarily arises as soon as [the specified] claims are made against the promisee." (*Crawford, supra*, 44 Cal.4th at p. 554.) Therefore, the duty to defend may depend on the framing of the third party's complaint. Unlike the duty to defend, however, the duty to indemnify does not arise until liability is proven.

Aluma's complaint alleged Nibbi owed a duty to both defend and indemnify. Nibbi's demurrer argued the entire indemnification provision did not apply to the Employee Lawsuits, and the parties made no distinction between Nibbi's duty to defend and its duty to indemnify. Therefore, the Court found that it need not decide whether the complaint sufficiently stated a claim with respect to the duty to defend. If it stated a claim with respect to the duty to indemnify, Nibbi's demurrer failed.

The Court noted also, as Aluma argued, that the employees had no reason to allege Nibbi was liable, as they could not recover damages from Nibbi due to workers compensation. (*DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 598.) Indeed, the employees had reason not to make such allegations, because their damages from Aluma may be reduced by workers' compensation benefits attributable to Nibbi's fault. Consequently, the Court saw no basis in the contract language to limit the indemnification provision (at the demurrer stage) to the allegations of the employees' complaints.

The judgment was reversed.

COMMENT

The importance of this case is that an employer sued by a party with whom it has an indemnity agreement is probably not going to get out of a case on demurrer, even if the plaintiff-employees make no allegation of employer negligence. The employer will only be able to successfully defend the cross-complaint by ultimately showing a lack of negligence on its part.

DOI ANNOUNCEMENT:**Consumer protection improved with Governor Brown's approval of public adjuster reform bill**

SACRAMENTO, Calif. - Senate Bill 488, authored by Senator Marty Block (D-San Diego), was signed into law Thursday by Governor Brown. Sponsored by Insurance Commissioner Dave Jones, the bill establishes fair practices standards for public insurance adjusters (PAs) and enhances consumer protections.

After filing a claim, homeowners have the option of working with their insurance company's adjuster or hiring their own public adjuster. PAs are customarily compensated by receiving a percentage of the settled claim amount.

SB 488 clarifies several provisions in the PA statutes, most of which came directly from cases and complaints handled by California Department of Insurance investigators. Three significant issues that were revealed through these investigations demonstrated that some public adjusters were unfairly charging consumers when taking over partially settled claims, entering disaster areas prematurely to solicit work from homeowners, and inappropriately using high-pressure tactics to coerce distraught consumers to enter into contracts.

"I'd like to thank Governor Brown for signing this consumer protection measure," Commissioner Jones stated. "These reforms enhance public protection so consumers using a public adjuster can feel confident that their best interests will be protected and that fair practices will be adhered to. We have worked on some recent cases that highlighted the need for additional protections. I'd also like to thank Senator Block for authoring this bill in his last year in the Legislature."

In order to address these issues and provide further protection to these often vulnerable consumers, SB 488 has an added value provision that would prohibit public adjusters from charging a fee that would result in the consumer receiving anything less than the amount previously paid to them by the insurer prior to the involvement of the public adjuster.

In addition, in responding to complaints regarding unlawful practices by public adjusters, CDI determined that consumers devastated by California wildfires were contacted by either an unlicensed individual working for a licensed PA or by an attorney to solicit a PA contract. Some consumers discovered, weeks after signing a contract, that the public adjusters were unlicensed, were providing inaccurate information, and were not handling claims in a satisfactory or timely manner. These practices resulted in multiple consumer and insurer complaints to CDI.

One [recent case](#) involved a public adjuster, Jose Manuel Villa, of San Clemente. Villa is a formerly licensed public adjuster who allegedly forged claim checks from insurers and stole the proceeds, meant to rebuild fire victims' homes, from several homeowners and pocketed the money for his own use. One of Villa's victims was left homeless and living in a trailer while they struggled to rebuild their home.

SB 488 also increases consumer protections by:

- * Requiring public adjuster license applicants to complete pre-licensing education, pass a qualifying examination, and pass a fingerprint-based background review.
- * Allowing California to be reciprocal with other states by streamlining the process for non-residents to obtain public adjuster licenses.
- * Prohibiting a public adjuster from contacting or soliciting a consumer during a disaster if:
 - (a) the emergency is still present;
 - (b) emergency responders are still present and/or
 - (c) an evacuation order is still in effect.

Continued from page 1

Holding: Affirmed. The Court of Appeal concluded the trial court did not abuse its discretion in admitting the evidence in question because, among other reasons, there was no reasonable probability the outcome of the case would have changed with the exclusion of such evidence. The trial court record provided an abundance of examples where Plaintiffs' credibility was impeached by the defense. In consideration of this evidence the Court determined there was an ample basis for the jury to conclude Plaintiffs were not telling the truth. Accordingly, the jury's refusal to award damages was deemed justified. **The Take-Away:** Whether you stipulate to liability or not, be sure to explore all avenues toward possible impeachment of the Plaintiff's credibility. In cases where there is no objective proof of Plaintiff's alleged injuries, issues of credibility become all the more important because Plaintiff must convince the jury to award damages based on subjective evidence alone. In those instances, Plaintiff's credibility can be the deciding factor between an award of damages and no recovery.

CAIIA REGISTRATION FORM
California Association of Independent Insurance Adjusters
ANNUAL FALL CONVENTION- October 6 & 7, 2016



1126 Queens Highway, Long Beach, CA 90802-6390 Phone: (877) 342-0742

Call above number for Reservations must be made by Tuesday, September 6, 2016 for the CAIIA group rate of \$149.00 for King or \$179.00 for Family/2 Queens (plus taxes and other fees). Prevailing rates may apply after this date or when the group rooms are sold out, whichever occurs first. Rooms are subject to availability. Self-parking discounted rate of \$15.00.

Your Name _____ Spouse/Guest _____
 Company _____
 Address _____
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EVENT	COST	#TICKETS	TOTAL PRICE
MEMBER CONVENTION Package (*) (Includes reception, breakfast, CE Class/lunch/dinner)	\$150.00	# _____	\$ _____
Spouse/Guest fee (***) Name _____	\$100.00	# _____	\$ _____
Non-Member (***) Convention Package (Includes reception, breakfast, CE Class/lunch/dinner)	\$175.00	# _____	\$ _____
3 Hour CE Class (Includes, breakfast, presentation, lunch)	\$100.00	# _____	\$ _____
President's Gala Dinner/Reception	\$100.00	# _____	\$ _____
Grand Total payable			\$ _____

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. Mail Registration Form & payment to:**
Complete a separate form for each registrant and additional guest.

	You	Spouse/Guest
10/06 - 6:30 P.M. Welcome Reception	[]	[]
10/07 - 8:00 A.M. Registration/Breakfast	[]	[]
10/07 - 9:00 A.M. Seminar (3 ce credits - TBA)	[]	[]
10/07 - 12:00 P.M. Lunch	[]	[]
10/07 - 1:30 P.M. Business Meeting	[]	[]
10/07 - 6:30 P.M. Reception/cocktail Hour	[]	[]
10/07 - 7:30 P.M. President's Inaugural Dinner	[]	[]

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(*) **Members only.**
 (**) **We welcome the attendance and participation of insurance company and risk management claims personnel and attorneys at the President's Gala Dinner Event, the Educational Seminars, and Luncheon following seminars.**
 (***) **Spouse/Guest fee includes alternative activity, breakfast and dinner on Friday. (Possible Thunderbird Lodge / Whitell Mansion Tour)**

On the Lighter Side...

They're Back! Those wonderful Church Bulletins! These sentences actually appeared in church bulletins or were announced at church services:

The Fasting & Prayer conference includes meals.

The sermon this morning: 'Jesus Walks on the Water.' The sermon tonight: 'Searching for Jesus.'

Ladies, don't forget the rummage sale. It's a chance to get rid of those things not worth keeping around the house. Bring your husbands.

Don't let worry kill you off - let the Church help.

Miss Charlene Mason sang 'I will not pass this way again,' giving obvious pleasure to the congregation.

For those of you who have children and don't know it, we have a nursery downstairs.

Next Thursday there will be try-outs for the choir. They need all the help they can get.

Irving Benson and Jessie Carter were married on October 24 in the church. So ends a friendship that began in their school days.

At the evening service tonight, the sermon topic will be 'What Is Hell?' Come early and listen to our choir practice.

Eight new choir robes are currently needed due to the addition of several new members and to the deterioration of some older ones.

Please place your donation in the envelope along with the deceased person you want remembered..

The church will host an evening of fine dining, super entertainment and gracious hostility.

Pot-luck supper Sunday at 5:00 PM - prayer and medication to follow.

The ladies of the Church have cast off clothing of every kind. They may be seen in the basement on Friday afternoon.

The pastor would appreciate it if the ladies of the Congregation would lend him their electric girdles for the pancake breakfast next Sunday.

Low Self Esteem Support Group will meet Thursday at 7 PM . Please use the back door.

Weight Watchers will meet at 7 PM at the First Presbyterian Church. Please use large double door at the side entrance.

And this one just about sums them all up

The Associate Minister unveiled the church's new campaign slogan last Sunday:

'I Upped My Pledge - Up Yours'.

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