

Colorado Supreme Court: Appraisers May Not Advocate for Party Retaining Them

On June 24, 2019, the Colorado Supreme Court issued its opinion in *Owners Ins. Co. v. Dakota Station II Condominium Assoc., Inc.*, Case No. 17SC583, 2019 WL 2571645 (Colo. June 24, 2019), holding that when parties invoke an appraisal clause in an insurance policy, the appraisers must be unbiased, disinterested, and unswayed by personal interests and cannot advocate for the party who retains them. While the opinion is straight-forward, its implementation in practice may create traps for the unwary.

Following wind and hail storms that damaged buildings owned by the Dakota Station II Condominium Association, Inc. (Dakota), Dakota filed two claims with its insurer, Owners Insurance Company (Owners). By mutual assent, the claims were combined into a single insurance claim. When Dakota and Owners were unable to reach agreement about the value of the claim, Dakota invoked the appraisal provision of its policy. The appraisal provision at issue contained typical language, stating (emphasis added):

If [Owners] and [Dakota] disagree on the value of the property or the amount of loss, either may make a written demand for an appraisal of loss. In this event, **each party will select a competent and impartial appraiser**. The two appraisers will select an umpire. If they cannot agree, either may request that selection be made by a judge of a court having jurisdiction. The appraisers will state separately the value of the property and amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding.

The appointed appraisers evaluated the property, but were unable to reach agreement on the value of the loss. They submitted their conflicting estimates to an umpire who adopted Owners' appraiser's estimates in four of the six cost categories at issue and Dakota's appraiser's estimates in the other two, including the "big-ticket" roofing estimate. Owners' appraiser refused to sign the umpire's determination of costs, but Dakota's appraiser and the umpire signed the award. Owners issued payment in accordance with the award.

Months later, Owners filed a petition to vacate the award, arguing that Dakota's appraiser was impermissibly partial and failed to disclose material facts. At an evidentiary hearing, Owners' counsel asked Dakota's appraiser whether she felt that "it's appropriate to be an advocate for an insured when you're acting as an appraiser." The appraiser replied: "I think it's natural. I think you're an advocate for ... Owners."

Ultimately, the trial court concluded that Dakota's appraiser didn't act improperly or unlawfully, rejecting Owners' contention that appraisers must act as impartially like an umpire or arbitrator in every instance. The trial court's decision was affirmed in a split decision at the intermediate Colorado Court of Appeals. The Court of Appeals majority found that appraisers do not violate their commitment to act impartially when they act as advocates for their respective selecting parties because the policy "plainly contemplates that the appraisers will put forth a value on behalf of the party that selects them." On further appeal, the Colorado Supreme Court disagreed:

Based on the plain meaning of the word impartial, we conclude that the policy requires appraisers to be unbiased, disinterested, and unswayed by personal interest. They must not favor one side more than another. This means no advocacy on behalf of either party.

Dakota Station, 2019 WL 2571645 at *5.

In seeking to clarify its holding, the Colorado Supreme Court stated that an appraiser can defend



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his/her choice of methodology or use of certain data, or explain why he/she disagrees with the other appraiser's methodology or selection of data, but cannot simply seek to maximize (or minimize) value for the party that retained him/her:

[W]e acknowledge a distinction between advocating for a party and explaining a position. An appraiser can certainly explain her position without running afoul of the provision's impartiality requirement. An appraiser may, for example, defend her choice of methodology or use of certain data. Conversely, an appraiser may explain why she feels another appraiser's methodology or use of data is wrong. In neither instance would the appraiser necessarily be acting as an advocate on behalf of a party to the dispute. An appraiser advocates for or on behalf of a party when her actions are motivated by a desire to benefit a party. For example, if an appraiser simply seeks top dollar for a client, that is improper. In contrast, explaining a position or defending a choice in methodology can be motivated by a desire to reach an accurate outcome.

Dakota Station, 2019 WL 2571645 at *7 fn. 5.

The Colorado Supreme Court accordingly reversed the Court of Appeals and remanded for further consideration consistent with its opinion.

A secondary dispute was whether contingent-cap fee agreements that tie appraisers' compensation to the ultimate appraisal award render appraisers partial as a matter of law. While "wary of the possible incentives these agreements create," the Colorado Supreme Court declined to hold that they render appraisers partial as a matter of law. In the case at bar, Dakota's appraiser's fees were capped at 5 percent of the total award. However, the actual fees fell far below the cap, so the court found no basis for concluding that the appraisers' impartiality was compromised by the cap.

Summary

The instruction from the Colorado Supreme Court is clear — appraisers must not act as advocates for the party retaining them. On the other hand, appraisers can legitimately defend their positions and/or explain why the positions taken by the other appraiser are, in their view, wrong. An astute observer will note that the line between prohibited conduct and permissible conduct is blurry and may come down to a matter of semantics in the communications between the party retaining the appraiser and in the appraiser's report itself. This may create a number of new disputes between insurers and their insureds during, and after, the appraisal process.

To discuss any questions you may have regarding the issues discussed in this Alert, or how they may apply to your particular circumstances, please contact Christopher S. Clemenson at (720) 479-3894 (cclemenson@cozen.com) or John Daly at (720) 479-3867 (jdaly@cozen.com).