

The Wild, Wild West: Battles in Property Damage Bad Faith and Appraisals



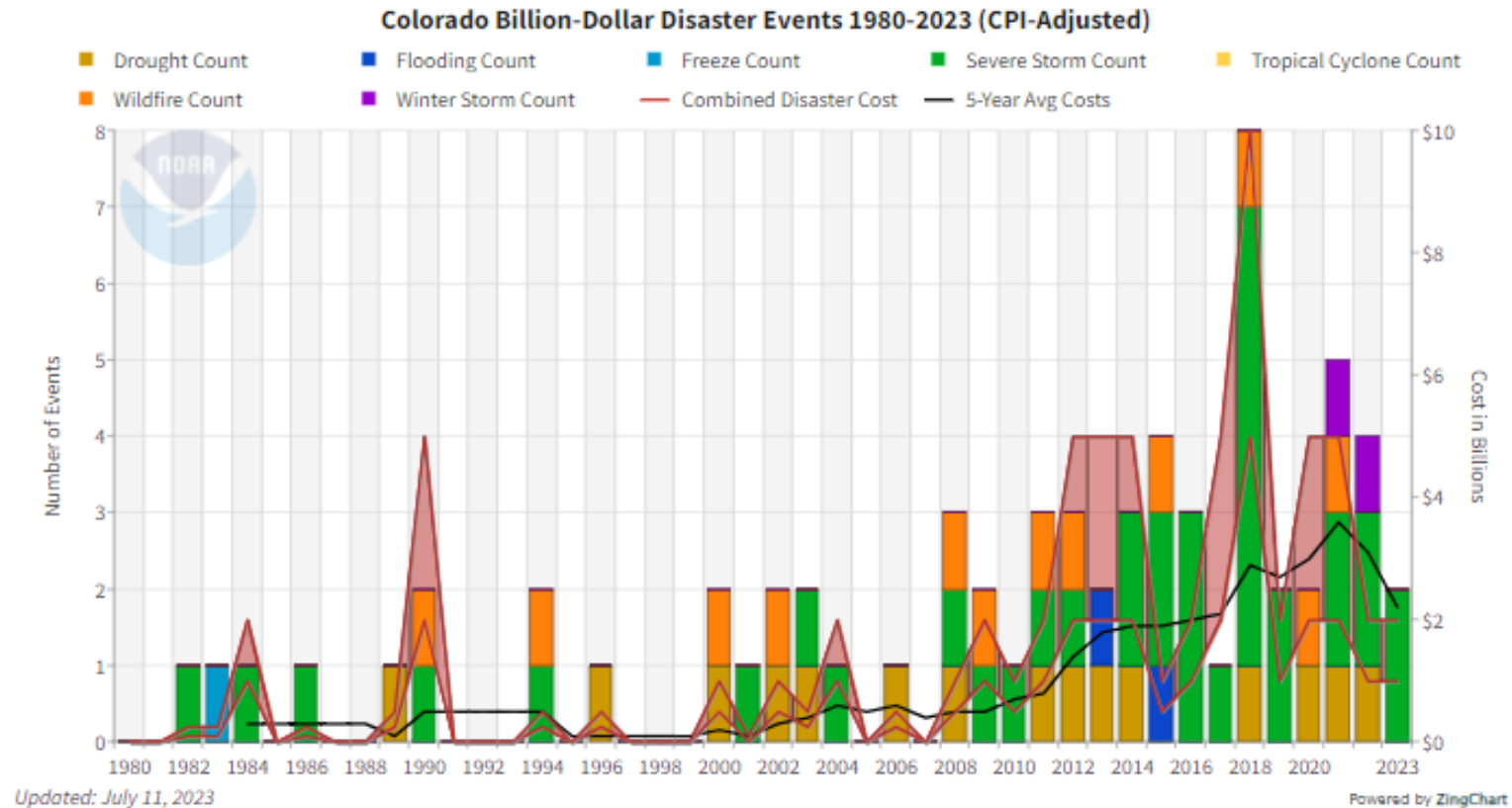
Sandy Eloranto
Lily Nierenberg
Sutton | Booker, P.C.

Landscape of Property Bad Faith Cases - Overview

- Weather statistics
- Case statistics
- Public adjusters
- Bad Faith Set-Up
- Set-up Trends
- Premiums

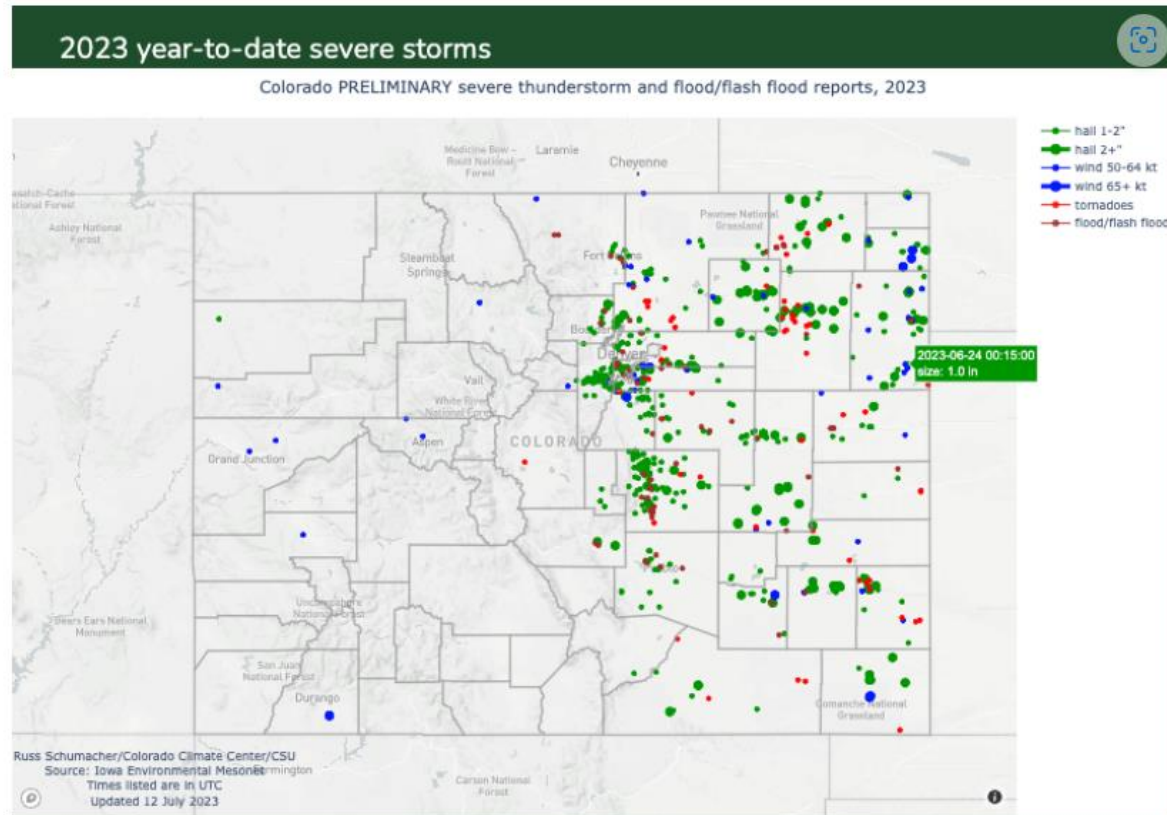


Weather Statistics



Time Series | Billion-Dollar Weather and Climate Disasters | National Centers for Environmental Information (NCEI) (noaa.gov)

Weather Statistics



Tornadoes, hail and drought-busting rain: 4 highlights from Colorado's record-setting June (colostate.edu)

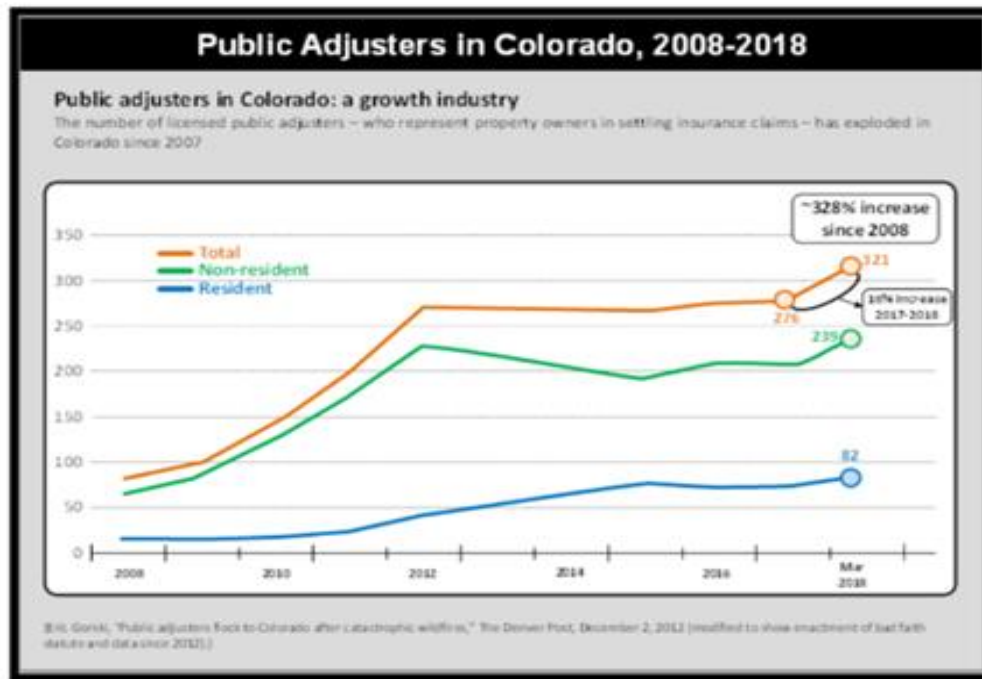


Case Statistics

Figure 14: Most Active Defendants by Case Filings from 2017 to 2021

Party	Cases	Auto	UM/ UIM	Business Liability	Business Interruption	Life	Hurricane	Home- owners	Districts
State Farm Mutual Automobile Insurance Company	2,499	2,430	2,021	25	7	2	12	29	83
State Farm Fire and Casualty Company	2,332	251	173	113	101	2	946	1,786	84
Allstate Insurance Company	1,236	433	327	106	57	1	255	437	73
Safeco Insurance Company (of America)	880	458	361	27	48	0	47	367	66
Scottsdale Insurance Company	855	44	4	153	97	0	369	402	47
Liberty Mutual Insurance Company	831	337	243	130	82	0	75	256	81
Allstate Vehicle and Property Insurance Company	770	165	6	15	88	1	209	717	52
GeoVera Specialty Insurance Company	687	0	0	8	4	0	406	619	10
Allstate Fire and Casualty Insurance Company	682	582	514	8	15	1	14	93	44
Lexington Insurance Company	585	28	4	130	42	1	258	285	50

Public Adjusters



As illustrated in Figure 2, in the last decade Colorado has seen more than a threefold increase in the number of licensed public adjusters. From 2017 to 2018, the historically high number of public adjusters increased another 16%. Approximately one in four public adjusters licensed in Colorado is a resident of the state.

Source: Evan Stephenson and Kayla Scroggins-Uptigrove, *"Just Win, Baby": The Tenth Circuit Rejects the "Anything Goes" Tactics of the Hail-Litigation Gold Rush*, 96 DENV. L. REV. 267 (2019)

Bad Faith Set-Up

- Insurer pays amount it believes it owes
- Public Adjuster – working on a contingency fee – inflates the claim with general conditions
- Insurer refuses to pay inflated claim
- Public Adjuster claims unreasonable, papers file re calls and requests for info
- Appraisal demand / suit filed



Set-Up Trends

- Why it happens:
 - CAT Claims – company resources tapped
 - Contingent interest in inflating
 - Attorney fees and costs create no risk try
- How they do it:
 - Phantom code upgrades
 - Misrepresentations about available repairs
 - Unidentified matching
 - General conditions and overhead and profit
 - HOA and warranty Issues



Code Upgrades

- Are code upgrades real? Was the work actually done?
- Do they apply to areas damaged by the loss event?
- Is the code upgrade occurring because of covered damage or excluded damage?
 - Roof decking so deteriorated nothing could be nailed to it versus roof decking spaced to far apart to meet code.
 - The fact that the dilapidated sheathing was only discovered when the roof repairs arising from hail damage began does not change that the cause for the need for replacement sheathing was its dilapidated condition and not hail. *Roof Rehab LLC v. Travelers Cas. Ins. Co. of Am.*, 2022 WL 17976719, at *6 (D. Colo. Sept. 6, 2022), citing *My Roofer, Inc. v. State Farm Fire and Casualty Company*, No. 16CA1478 (Colo. App. Sept. 14, 2017) (unpublished); *Elite Custom Builders, LLC v. State Farm Fire & Cas. Co.*, No. 2019CA003, at *18–19 (Colo. App. April 30, 2020) (unpublished)



Matching

- Policy: Is there a matching exclusion?
- Is the material really unavailable?
- Is there something that would be a reasonable match?
- How visible is it - is there a limited repair that could be done in a concealed area to free up material for visible areas



General Conditions and Overhead and Profit

What they do

- Include both Overhead and Profit at 10%+
- Include it on residential roofing jobs
- Include it even when the insured also has a PA
- Include project supervision and overhead items too as separate general conditions
- Refuse to provide receipts
- Contrary to construction industry standards

What we do

- Check policy for receipts language
- SDTs to roofer, contractor, subs
- Request log sheets maintained by project supervisors and superintendents
- Request invoices for temporary toilets, fencing, storage
- Hire construction expert familiar with construction industry standard



Premiums

July 2022 – home insurance premiums in Colorado increased average of 17.5% from May 2021 to May 2022.

Third largest annual increase after Arkansas and Washington (out of 25 states surveyed) and fourth highest premiums (out of 25 surveyed).

Colorado one of most expensive states in country for home insurance
(denverpost.com)



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Appraisal Overview

- Legislative/regulatory landscape
- Appraisal trigger
- Compelling appraisal
- Scope of appraisal
- Umpire
- Scope of review
- Appraisal versus arbitration
- Challenging impartiality and qualifications
- Parallel litigation



Legislative/regulatory landscape

- Efforts to Regulate (unsuccessful)
 - HB17-1319
 - HB18-1153
 - Disqualifies any person from serving as an appraiser or umpire if the person has a known, direct, and material interest in the outcome of the appraisal proceeding or a known, direct, and substantial relationship with a party to the proceeding;
 - Requires appraisers and umpires to disclose any prior relationships or interests that might affect their objectivity; and
 - Prohibits *ex parte* communications by/with umpire.



Legislative/regulatory landscape

DORA Bulletin No. B-5.26 - Requirements Related to Disputed Claims Subject to Appraisal

The position of the Division is that insurers, insureds and representatives of the insurer or insured, including adjusters and licensed public adjusters, must comply with the policy language when selecting an appraiser and/or umpire under the appraisal clause.

Appraisers:

- Definition of fair and competent
- No direct material interest
- Disclosure requirements
- Communication rules

Umpires:

- No existing direct or material relationship; must remain neutral
- Disclosure requirements
- Communication rules (no *ex parte*)



Appraisal Trigger

- Typical language: If you and we do not/fail to agree on the amount of loss, either party can demand that the amount of loss be set/determined by appraisal.
- Procedures for selecting the appraisers and/or the umpire.
- Some policies require the party seeking appraisal to provide the other with a “written, itemized documentation of a specific dispute.”
- Some policies include time periods for demanding an appraisal.



Appraisal: Policy Language Example

1. Appraisal

If we and you **disagree on the ... amount of loss**, either may make written demand for an appraisal of the 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 ... amount of loss.** If they fail to agree, they will submit their difference to the umpire. **A decision agreed to by any two will be binding.** Each party will:

- a. Pay its chosen appraiser; and
- b. Bear the other expenses of the appraisal and umpire equally.

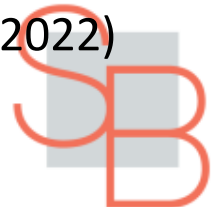
If there is an appraisal, we will still retain our right to deny the claim.

Rooftop Restoration & Exteriors, Inc. v. Nautilus Ins. Co., 2022 WL 4536236, at *2 (D. Colo. Sept. 28, 2022) (emphasis added)



Compelling Appraisal

- “[S]imilar to an arbitration agreement, the court ‘must accord the parties a presumption in favor of appraisal and must resolve all doubts about the scope of the appraisal clause in favor of the appraisal mechanism.’” *Viera v. Amica Mut. Ins. Co.*, 2023 WL 1967142, at *5 (D. Colo. Feb. 13, 2023)
- “Before the appraisal provision can be specifically enforced, CCTC must show that it complied with all of the terms and provisions necessary to invoke the appraisal clause.” *Cherry Creek Townhouse Corp. v. Certain Underwriters at Lloyd's of London*, 2022 WL 17980251, at *3 (D. Colo. Sept. 28, 2022) (not enforcing appraisal demand that was made more than 60 days after proof of loss, where appraisal clause requires appraisal if either the insured or the insurer make a written demand for appraisal “within 60 days after receipt of proof of loss by the insurer”).
- Estimates are sufficient to satisfy pre-appraisal demand conditions. *Deuto v. State Farm Fire & Cas. Co.*, 2022 WL 9393164, at *6 (D. Colo. Oct. 14, 2022)



Scope of Appraisal

“Amount of loss” includes causation, not coverage.

“And because we conclude that the Colorado Supreme Court, if faced with the issue, would recognize that the ordinary meaning of the phrase ‘amount of loss’ encompasses causation issues, the district court properly interpreted the Policy to conclude that the Panel could determine the cause of BonBeck's roof damage.” *BonBeck Parker, LLC v. Travelers Indem. Co. of Am.*, 14 F.4th 1169, 1181 (10th Cir. 2021).

“Lastly, it bears emphasizing that nothing in our decision suggests that the appraiser is authorized to opine on the ultimate question of coverage.” *Fireman's Fund Ins. Co. v. Steele St. Ltd. II*, No. 19-1096, 2022 WL 39392, at *8 (10th Cir. Jan. 5, 2022).

“The question of ‘coverage’ deals with whether an event, such as fire, is covered in the first instance, while the question of amount of loss relates to what damage was done by the covered event and the cost to repair that damage.” *Auto-Owners Ins. Co. v. Summit Park Townhome Ass'n*, 100 F. Supp. 3d 1099, 1103 (D. Colo. 2015).

Scope of Appraisal

Effect of denial: “[t]he denial by an insurer of all liability under a policy is a waiver of the right to an apprais[al].” *Fireman's Fund Ins. Co. v. Steele St. Ltd. II*, 2019 WL 588190, at *3 (D. Colo. Feb. 13, 2019), aff'd, No. 19-1096, 2022 WL 39392 (10th Cir. Jan. 5, 2022) (citing *Ins Co of North Am v Baker*, 268 P. 585 (Colo 1928)).

...But only by the insurer?

Parties can agree to restrict issues from scope of appraisal. *Concept Restaurants, Inc. v. Travelers Indem. Co.*, No. 16-cv-00450-DME-NYW, 2016 WL 8737773, at *3 (D. Colo. Dec. 2, 2016); *Laredo Landing Owners Ass'n v. Sequoia Ins. Co.*, No. 14-cv-01454-RM-KMT, 2015 WL 3619205, at *2 (D. Colo. June 10, 2015)).

...But cannot do so unilaterally?



Appraisal: Policy Language Example

This applies after we confirm that the damage due to a loss is covered. If you and we fail to agree **on the dollar amount of the damage**, either may demand that such amount be set by appraisal. In this event, each party will choose a competent and disinterested appraiser within 20 days after receiving a written request from the other. **Each appraiser will separately set the dollar amount of the damage. Such amounts must be determined according to all terms of this policy including those in Section I - How We Settle Losses.** If both appraisers submit written reports to us of their agreement of the amount, such amount will be the dollar amount of the damage. If they fail to agree within 20 days, they must choose a competent and disinterested umpire. If they cannot agree on the choice within 20 days, you and we must jointly request that the choice of umpire be made by a judge of a court of record in the state where the residence premises is located. **The appraisers will then submit their differences to the umpire. Written agreement signed by any two of these three will set the dollar amount of the damage. The appraisal determination of damage or valuation is binding upon you and us.** This appraisal process and authority granted to appraisers and the Umpire can only be expanded and modified by written mutual consent signed by you and us. We will pay our appraiser. You will pay your appraiser. Other expenses and the compensation of the umpire will be paid equally by you and us. **Appraisal does not waive our rights.**

Pallarito v. Am. Fam. Mut. Ins. Co., No. 1:20-CV-03041-RBJ, 2021 WL 1610176, at *1 (D. Colo. Apr. 26, 2021) (emphasis added).

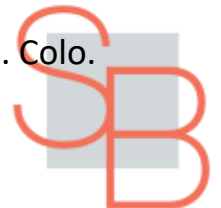


Scope of Appraisal

- Repaired items are included in scope of appraisal. *Cimino v. State Farm Fire & Cas. Co.*, No. 21-CV-01905-CMA-MDB, 2023 WL 3044765, at *4 (D. Colo. Apr. 21, 2023).
- A dispute as to whether the policy required the insurer to pay to replace property that was not damaged in the hailstorm in order to achieve visual consistency is “a clear example of a coverage issue beyond the scope of appraisal.” *Auto-Owners Ins. Co. v. Summit Park Townhome Ass’n*, 100 F. Supp. 3d 1099, 1104 (D. Colo. 2015)
- Appraisal that does not determine causation is not binding.

An appraisal panel that provides only a valuation of several disputed items relating to the property, separate and apart from the issue of causation by the storm, does not determine the “amount of loss.” As such, the Court agrees with State Farm that Plaintiff is not entitled to summary judgment at this juncture on whether the full amount of loss determined by the appraisal panel is binding upon the parties.

Cimino v. State Farm Fire & Cas. Co., No. 21-CV-01905-CMA-MDB, 2023 WL 3044765, at *5 (D. Colo. Apr. 21, 2023).



Scope of Review

“The appraisal award issued under an insurance policy is **binding so long as** the appraisers (including the umpire) have **performed the duties required of them by the policy**. As a general matter, an **appraisal award entered by an umpire may be disregarded only if the award was made without authority or was made as a result of fraud, accident, or mistake**. The burden of demonstrating that the appraised loss amount should be set aside falls on the party challenging it.” *Andres Trucking Co. v. United Fire & Cas. Co.*, 2018 COA 144, ¶ 49 (citations omitted) (emphasis added).

Compare

Edward v. Great N. Ins. Co., No. 18-cv- 1052-WJM-KLM, 2021 WL 307506, at *4-5 (D. Colo. Jan. 29, 2021) (vacating appraisal award where umpire limited his loss analysis to only “the damage caused by the intrusive testing” to the plaintiffs’ home, in direct contravention of the parties’ request that he also appraise “the amount of the water damage claim”).

To

Por Boy Stores, Inc. v. Travelers Cas. Ins. Co. of Am., No. 20-CV-00990-RM-MEH, 2022 WL 2064930, at *5 (D. Colo. June 8, 2022) (holding that argument that panel umpire failed to perform a thorough investigation into the cause of the damage to Plaintiff's property not sufficient to defeat summary judgment for Plaintiff that the award conclusively establishes the amount of loss).



Appraisal vs. Arbitration

- *Auto-Owners Inc. Co. v. Summit Park Townhome Ass'n* (“Summit Park Townhome II”), 129 F. Supp. 3d 1150, 1154 (D. Colo. 2015) (Colorado Uniform Arbitration Act (CUAA) does not apply but does produce certain binding factual determinations).
- *Garcia v. State Farm Mut. Fire & Cas. Co.*, No. 20-cv-02480-PAB-MEH, 2021 WL 4439792, at *2 (D. Colo. Sept 27, 2021) (applying CUAA to extent award is binding as to the amount of loss).
- *Rooftop Restoration & Exteriors, Inc. v. Nautilus Ins. Co.*, No. 20-CV-03158-MDB, 2022 WL 4536236, at *4 (D. Colo. Sept. 28, 2022) (same).



Challenging Impartiality

- “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.” *Owners Ins. Co. v. Dakota Station II Condo. Ass'n, Inc.*, 443 P.3d 47, 51 (Colo. 2019).
- Where an insurance policy's appraisal provision requires the agreement of at least one impartial appraiser for an award to be binding, the lack of impartiality by the only appraiser to agree to the award invalidates it. *Owners Ins. Co. v. Dakota Station II Condo. Ass'n, Inc.*, 2021 COA 114, ¶ 48, 499 P.3d 1069, 1079, cert. denied, No. 21SC722, 2022 WL 1463679 (Colo. May 2, 2022); *Copper Oaks Master Home Owners Ass'n v. Am. Family Mut. Ins. Co.*, No. 15-cv-01828-MSK-MJW, 2018 WL 3536324, at *18 (D. Colo. July 23, 2018).
- Court will permit discovery into possible impropriety in the award after filing of a motion for summary judgment. *Cimino v. State Farm Fire & Cas. Co.*, No. 21-CV-01905-CMA-MDB, 2022 WL 2829908, at *3 (D. Colo. July 19, 2022).



Appraiser Red Flags

- Disclosures of prior business/personal relationships
- Contingency fee agreements



With insured, attorneys, HOA property manager, public adjuster

Trade-group activity, e.g. AAPIA, FAPIA, TAPIA, etc.



Challenging Qualifications

Compare *Rooftop Restoration & Exteriors, Inc. v. Nautilus Ins. Co.*, No. 20-CV-03158-MDB, 2022 WL 4536236, at *6 (D. Colo. Sept. 28, 2022)

“Given that the selection process itself safeguarded against an unqualified umpire, and the umpire's suitability was not challenged during the selection process, the Court sees no reason to disturb the Appraisal Award based on *post hoc* challenges to Mr. Meyrich's lack of qualifications.”

To *Bingman v. Safeco Ins. Co. of Am.*, No. 120CV03125RMRGPG, 2022 WL 2287508, at *3 (D. Colo. Mar. 31, 2022)

“Plaintiffs allege that the appraisal panel erred in its calculations again by determining an amount of loss [for Grand Junction] that is not the prevailing competitive price for Ohio City.... Defendant fails to mention the methodology and economic area that was selected when using Xactimate. ... Plaintiffs have established that they are challenging the competence of the appraisal panel and, therefore, this Court is not bound by the dicta in *Andres Trucking*.”

Other Challenges

- Can misrepresentations of appraiser be imputed to the insured? (Enough to defeat summary judgment). *See Calvary Baptist Church of Denver v. Church Mut. Ins. Co.*, No. 121CV01723CNSMEH, 2023 WL 3005748, at *6 (D. Colo. Apr. 19, 2023).
- Umpire is restricted to deciding between two appraisers' opinions. *Kane v. Travelers Pers. Ins. Co.*, No. 1:22-CV-2811-WJM-MEH, 2023 WL 4408255, at *2 (D. Colo. July 7, 2023).



Appraisal Recap

Know What The Policy Says re:

Competent vs disinterested vs impartial

Amount of loss vs dollar amount of the damage
vs costs to repair

Binding

Umpire appointment

Timing Limitations

Payment of Award



Parallel Litigation

Staying litigation during appraisal

- In this District, we have frequently considered the following factors in determining whether a stay is appropriate: (1) the plaintiff's interests in proceeding expeditiously with the civil action and the potential prejudice to plaintiff of a delay; (2) the burden on the defendants; (3) the convenience to the court; (4) the interests of persons not parties to the civil litigation; and (5) the public interest. *Auto-Owners Ins. Co. v. Summit Park Townhome Ass'n*, 100 F. Supp. 3d 1099, 1104–05 (D. Colo. 2015) (citing cases citing *String Cheese Incident, LLC v. Stylus Shows, Inc.*, 02–CV–01934–LTB–PA, 2006 WL 894955, at *2 (D.Colo. Mar. 30, 2006)).

Requirement to itemize

- *Auto-Owners Ins. Co. v. Summit Park Townhome Ass'n* (“*Summit Park Townhome I*”), 100 F. Supp. 3d 1099, 1104 (D. Colo. 2015) (advising that, during the appraisal process, the parties’ appraisers should each identify and calculate any “disputed costs” so that the court can later “either include or exclude them once it has determined whether the policy provides coverage for them,” thereby enabling the parties “to avoid unnecessary discovery or additional appraisals”).

Late game appraisal demands

Appointment of umpire



Post-Appraisal Reservation

Ok for insurer to refuse to pay items in appraisal award for which it contests coverage.

- “By refusing to pay items in the appraisal award for which it has not conceded liability, State Farm did not unilaterally change or limit the award; it instead acted within its rights under the Policy to contest coverage for the disputed items.”
Cimino v. State Farm Fire & Cas. Co., No. 21-CV-01905-CMA-MDB, 2023 WL 3044765, at *5 (D. Colo. Apr. 21, 2023).
- “As the Tenth Circuit noted in *Fireman's Fund*, an appraisal will only resolve questions of causation and cost, and State Farm “can still exercise its right to deny the claim for a variety of reasons that are not inconsistent with the appraiser's factual findings.” *Deuto v. State Farm Fire & Cas. Co.*, No. 22-CV-00591-RM-MDB, 2022 WL 9393164, at *4 (D. Colo. Oct. 14, 2022).



Effect on Breach of Contract Claims

Does payment of the appraisal award negate a breach of contract claim? Not necessarily.

- “To the extent that Plaintiff could prove that the appraiser was required to consider, and did not consider, the Arapahoe County building codes, and that the necessity of and coverage for the full roof replacement was outside of the scope of the appraisal, the appraisal would not be binding on the Parties with respect to this issue.” *Copper Creek Inc. v. State Farm Fire & Cas. Co.*, No. 21-CV-01603-NYW-MEH, 2022 WL 17454493, at *8 (D. Colo. Dec. 6, 2022).
- *But see Por Boy Stores, Inc. v. Travelers Cas. Ins. Co. of Am.*, No. 20-CV-00990-RM-MEH, 2022 WL 2064930, at *4 (D. Colo. June 8, 2022) (granting MSJ on the breach claim).



Effect on Bad Faith Claims

Does payment of the appraisal award negate a bad faith claim? Not necessarily.

- “As noted by defendant, the fact that an appraisal award may exceed an insurer's damage estimate is not alone evidence of bad faith.” *Carraway v. State Farm Fire & Cas. Ins. Co.*, No. 21-CV-03201-PAB-SKC, 2022 WL 4467035, at *6 (D. Colo. Sept. 26, 2022)
- “The Court also agrees with Plaintiffs that if discovery reveals bad faith conduct on the part of Defendant during the appraisal process, such conduct might violate the insurer's ‘overarching duty of good faith and fair dealing,’ which ‘persists through the course of litigation.’” *Viera v. Amica Mut. Ins. Co.*, No. 1:20-CV-00495-MDB, 2023 WL 1967142, at *6 (D. Colo. Feb. 13, 2023)



Doctrine of Prevention

- “If Gateway can show that a repair or replacement was required by the Aurora Building Department and would have been made by the deadline but for Travelers' wrongful denial of coverage for the repair or replacement, then Travelers would be estopped from relying on Coverage C's two-year deadline as to that repair.” *Gateway Townhomes Ass'n, Inc. v. Travelers Indem. Co.*, No. 15-CV-00395-RBJ, 2016 WL 4092691, at *7 (D. Colo. June 14, 2016).
- “Courts “routinely apply the doctrine of prevention to replacement requirements that leave the insured in a ‘no win’ situation, whereby ‘[t]he insured, in order to recover under the replacement cost coverage he or she purchased, would have to incur the cost of repairs and replacements when there is no guarantee that a future breach of contract action by the insured will be successful.’ ” *Copper Creek Inc. v. State Farm Fire & Cas. Co.*, No. 21-CV-01603-NYW-MEH, 2022 WL 17454493, at *10 (D. Colo. Dec. 6, 2022) (finding the doctrine not applicable because Plaintiff had not raised dispute of fact).
- *But see Carraway v. State Farm Fire & Cas. Ins. Co.*, No. 21-CV-03201-PAB-SKC, 2022 WL 4467035, at *3-4 (D. Colo. Sept. 26, 2022) (on appeal) (rejecting plaintiffs’ argument that it could not begin repairs prior to the completion of the appraisal process); *Bonbeck Parker, LLC v. Travelers Indem. Co. of Am.*, No. 1:14-CV-02059-RM-NRN, 2020 WL 533733, at *8 (D. Colo. Feb. 3, 2020), judgment entered, No. 1:14-CV-02059-RM-NRN, 2020 WL 1955394 (D. Colo. Apr. 23, 2020), and aff’d, 14 F.4th 1169 (10th Cir. 2021).



Questions? Comments?

Sandy Eloranto, Shareholder



Lily Nierenberg, Partner

