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When Is A Party-Appointed Appraiser 'Disinterested'?

Law360, New York (October 21, 2014, 3:01 PM ET) --

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Most property insurance policies contain a provision that allows either the insurer or the insured to demand appraisal when the parties fail to agree on the amount of a loss. Appraisal provisions generally require each party to select a "competent and disinterested" appraiser, who in turn selects a "competent and disinterested" umpire. Together, the appraisal panel determines the amount of the insured's loss — they do not determine coverage or interpret the policy.

While the party-appointed appraisers must be "disinterested," insurers and insureds may expect that party-appointed appraisers are not necessarily neutral and, in fact, will act as an advocate on their clients' behalf. But even so, there are limits on who parties can appoint as their disinterested appraiser, as illustrated by the recent case of Florida Insurance Guaranty Association v. Branco, No. 5D13-2929, 2014 Fla. App. LEXIS 14602 (Fla. Dist. Ct. App. Sept. 19, 2014). In Branco, the Florida appellate court ruled that the insureds' appointment of one of their attorneys as their appraiser violated the appraisal provision's disinterested requirement.

Background

The Brancos' home sustained alleged sinkhole damage in April 2010. The Brancos reported the loss to their homeowner's insurer, HomeWise Preferred Insurance Company. HomeWise denied the claim on the grounds that a "sinkhole loss" as defined in the policy had not occurred. After the Brancos filed suit, HomeWise was declared insolvent, and the Florida Insurance Guaranty Association stepped in to deal with the claim.

After filing suit, the Brancos demanded appraisal. The Brancos selected one of their attorneys as their appraiser. Their selected attorney was a partner in the law firm representing the Brancos in their lawsuit and who had actually represented the Brancos in the lawsuit. FIGA challenged the insureds' appraiser selection as not being "disinterested." The trial court rejected FIGA's challenge and allowed the appraisal to proceed with the Brancos' appointed appraiser.

The Court's Rationale

On appeal, the Florida District Court of Appeal agreed the Brancos' attorney was not "disinterested." Citing various dictionaries, the court stated that disinterested was defined as "[f]ree from bias, prejudice, or partiality; not having a pecuniary interest <a disinterested witness>," Black's Law Dictionary 536 (9th ed.

2009), and “not having the mind or feelings engaged: not interested ... free from selfish motive or interest: unbiased,” Merriam-Webster’s Collegiate Dictionary 333 (10th ed. 2000).

The court observed that parties are free to contract for the qualifications of their appraisers, and here the appraisal provision “expresses the parties’ clear intention to restrict appraisers to people who are, in fact, disinterested.” But citing the “duty of loyalty owed by an attorney to a client,” the court concluded “that attorneys may not serve as their client’s arbitrators or appraisers when ‘disinterested’ arbitrators or appraisers are bargained for.”

The court rejected the insureds’ reliance on an earlier Florida case, Rios v. Tri-State Insurance Co., 714 So. 2d 547 (Fla. Dist. Ct. App. 1998), where the court found that an appraiser whose compensation was based on a percentage of the eventual appraisal award was “independent.” The court noted that Rios relied on the then-existing version of the Code of Ethics for Arbitrators in Commercial Disputes promulgated by the American Arbitration Association and American Bar Association.

That version of the Code of Ethics did not expressly address the neutrality of arbitrators, but rather simply required disclosure of any direct or indirect financial interest in the outcome of the proceeding. The court noted that the current code establishes a presumption of neutrality for all arbitrators, including party-appointed arbitrators, unless the parties’ agreement provides otherwise. The court found that this change undermined the Rios holding.

Analysis

Appraisal provisions require that each party select a “competent and disinterested” appraiser. Some policy forms use the term impartial instead of disinterested. But courts have found that there is no real difference between these two terms.[1]

Courts have recognized that, in some sense, party-appointed appraisers and arbitrators are not necessarily neutral and will have at least some bias toward the appointing party.[2] Parties too may expect that their appointed appraiser will act as an advocate for their position. Some courts have even recognized that an appraisal provision’s requirement that the two party-appointed appraisers select an umpire “helps to ensure a fair process.”[3]

Even so, and as Branco illustrates, it is inappropriate for parties to appoint their own attorney as an appraiser. A party’s attorney is not disinterested because the attorney owes a duty of loyalty to his or her client. In Branco, the court found that a party’s attorney handling the insurance claim at issue was not disinterested. But even a party’s attorney who was representing that party in a completely unrelated matter has been found not to be impartial.[4]

In addition to a party’s attorney, other types of relationships may fail to meet the disinterestedness requirement. For example, individuals with a substantial business relationship with a party may not be considered disinterested appraisers. In one case, a court found that a contractor who was employed more than 1,800 times to prepare estimates or make appraisals by the insurer, which represented 79 percent of the contractor’s total income, was not disinterested.[5]

But an accountant who had previously served as a party-appointed appraiser for the insurer and whose partners performed work for the insurer was found to be disinterested.[6] Similarly, an accountant from the same accounting firm that prepared the insured’s loss calculation was found to be disinterested.[7] And an accountant that had been retained by insurance companies more than 200 times in the past year and a half

to provide various insurance-related services was held to be disinterested.[8]

Furthermore, individuals with a financial interest in the outcome of an appraisal may not be disinterested. For instance, a court found that the insured's public adjuster, who was entitled to a percentage of the measured loss, was not disinterested.[9] But the insured's public adjuster, whose contract calling for a percentage of the recovery had been canceled before being appointed, was considered disinterested.[10]

Finally, the law on appraisal varies by jurisdiction as does the requirements on what is a disinterested or impartial appraiser. Thus, practitioners should review the applicable governing law for guidance on these issues.

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[1] See, e.g., UrbCamCom/WSU I LLC v. Lexington Ins. Co., No. 12-CV-15686, 2014 U.S. Dist. LEXIS 98484, at *10 n.1 (E.D. Mich. July 21, 2014).

[2] See, e.g., Heller v. Heller, 636 A.2d 599, 605 (N.J. Super. Ct. 1993) (noting that "an appraiser chosen by a party 'is supposed and expected, in a restricted sense, to represent the party appointing him and within reasonable limits to see to it that no legitimate consideration favorable to the party so appointing him is overlooked by the other appraiser'" (quoting in part Am. Cent. Ins. Co. v. Landau, 49 A.738 (N.J. Ch. 1901)); Hozlock v. Donegal Cos., 745 A.2d 1261, 1265 (Pa. Super. Ct. 2000) ("in most cases, an appraiser will have at least some bias toward his appointing party. ..."); Cent. Life Ins. Co. v. Aetna Cas. & Sur. Co., 466 N.W.2d 257, 261 (Iowa 1991) (recognizing that party-appointed appraisers act "as advocates for their respective selecting parties.").

[3] Shifrin v. Liberty Mut. Ins., 991 F. Supp. 2d 1022, 1041 (S.D. Ind. 2014).

[4] Donegal Ins. Co. v. Longo, 610 A.2d 466 (Pa. Super. Ct. 1992).

[5] Sterling Spinning & Stamping Works v. Knickerbocker Ins. Co., 242 N.Y.S. 201, 203-04 (N.Y. App. Div. 1930).

[6] Michael v. Aetna Life & Cas. Co., 106 Cal. Rptr. 2d 240, 251-53 (Cal. Ct. App. 2001).

[7] Tiger Fibers LLC v. Aspen Specialty Ins. Co., 571 F. Supp. 2d 712, 718 (E.D. Va. 2008).

[8] Id. at 715, 717-18.

[9] Cent. Life Ins. Co. v. Aetna Cas. & Sur. Co., 466 N.W.2d 257, 261 (Iowa 1991).

[10] Linformd Lounge Inc. v. Mich. Basic Prop. Ins. Ass'n, 259 N.W.2d 201, 202-03 (Mich. Ct. App. 1