

Lawyers Lie to Court About Impartiality of Appraiser Defeats Award

Posted on [April 8, 2016](#) by [Barry Zalma](#)

Counsel's Conduct Impugned the Integrity of The Appraisal Process and the Court

Appraisers in a first party property dispute are supposed to be impartial. Although appointed by a party the appraiser, acting as an arbitrator, must do what is fair not what the party appointing him or her want the award to be.

In *Auto-Owners Insurance Company v. Summit Park Townhome Association*, United States District Court, Colorado, 14-cv-03417-LTB, 2016 WL 1321507 (04/05/2016) the USDC, Colorado, was faced with new information that the insured's appointed appraiser was not unbiased or disinterested.

This insurance coverage dispute by Auto-Owners Insurance Company's ("Auto-Owners") raised an objection to George Keys acting as appraiser based on recently discovered, undisclosed relationships with defendant and its representatives.

FACTS

Auto-Owners sought declaratory relief to determine the extent of coverage under a property insurance policy it issued to Summit Park for damage to buildings on Summit Park's premises from a 2013 hailstorm.

The parties had difficulty starting the appraisal so the court imposed several guidelines to govern the process and appointed an umpire, Robert J. Norton. One of the guidelines the court imposed stated: "An individual who has a known, direct, and material interest in the outcome of the appraisal proceeding or a known, existing, and substantial relationship with a party may not serve as an appraiser." The court also required the appraisers to disclose all of their relationships that might indicate a bias. To put some teeth in his order the court warned that he would sanction any party who failed to comply.

The Parties' Disclosures

On June 15, 2015, counsel for Summit Park, William Harris of the Merlin Law Group ("Merlin"), disclosed in a letter to counsel for Auto-Owners that Keys "does not have any significant prior business relationship with the Merlin Law Group." Mr. Harris added that Keys "has acted as a public adjuster and/or appraiser on behalf of policyholders that the Merlin Law

Group has represented in the past, however, this obviously does not affect his ability to act as an appraiser in this matter.”

Keys disclosed in an email to Auto-Owners’ counsel as follows: “I do not have any substantial business relationship or financial interest in Merlin Law Group. There have been cases where both Merlin Law Group and Keys Claims Consultants [Keys’ business] acted for the same insured but under separate contracts.”

The Appraisal Award

The appraisal panel issued its award. The award is signed by the umpire, Mr. Norton, and Defendant’s appraiser, George Keys, but not by Auto-Owners’ appraiser. Auto Owners paid the actual cash value part of the award and made clear that Auto-Owners is making this payment under a full and complete reservation of all of its rights under the policy and applicable law. Auto-Owners’ counsel further stated that “Auto-Owners does not waive...[its] objection to Keys as an appraiser and any other issues currently pending, or that may be asserted, in [this] action, including any grounds for recoupment of any amounts that have been paid to [Summit Park].” Auto-Owners moved to amend its complaint to assert, *inter alia*, a claim for recoupment of the appraisal award.

The Objection

First, Auto-Owners identified matters in which Summit Park’s counsel, Merlin, or attorneys presently affiliated with Merlin, represented Keys or his company.

Second, Auto-Owners highlights other joint activities undertaken by Keys and Merlin attorneys. For example, Keys and Merlin founder Chip Merlin founded the Florida Association of Public Insurance Adjusters (“FAPIA”), whose stated “number one goal is to protect policyholders and the public adjusting profession.”

Third, Auto-Owners’ reply brief lists 33 cases in which Keys served as either an appraiser or expert witness for the same client Merlin represented. Mr. Pettinato provided a testimonial for Keys’ marketing brochure stating that “Both Keys and his staff have assisted me as well as my firm in resolving an untold number of large multi-million dollar losses to an amicable resolution and settlement to the policyholders’ benefit and satisfaction.”

Fourth, Auto-Owners cites facts that it believes demonstrates that Keys is “completely devoted to policyholders.”

Fifth, Auto-Owners notes that Summit Park initially retained Keys under a contract that fixed his compensation at “\$350 per hour as well as expenses not to exceed 10% of the amounts paid to” Summit Park in this case.

ANALYSIS

The policy does not define the term “impartial.” Neither the parties nor the Court have located any Colorado appellate authority construing the term in the context of an appraisal provision like the one here.

An arbitrator must exercise a high degree of impartiality, without the slightest degree of friendship or favor toward either party. Evident partiality has been found when a reasonable person would have to conclude that an arbitrator would be predisposed to favor one party to the arbitration. Keys, based upon the authorities reviewed, cannot be considered impartial. His relationship with Merlin goes well beyond the mere “retention of an expert on multiple engagements” that the court suggested would be permissible in the disclosure order.

In addition to working on dozens of prior cases in which Keys was retained by the policyholder, Merlin and/or Merlin attorneys have served as Keys’ personal counsel, served as incorporator and registered agent for Keys’ companies, taught with Keys, and donated to a Keys-led group involved in pro-policyholder lobbying. These aspects of the relationship between Keys and Merlin, viewed collectively, make clear that he cannot satisfy any of the standards of impartiality.

While Keys’ relationship with Merlin is sufficient by itself to render him other than impartial, the totality of the circumstances here make this conclusion unavoidable. As noted above, Keys has made numerous comments suggesting a bias in favor of policyholders. The initial fee agreement under which Keys was initially retained in this case—which capped his fees and expenses at 10% of Summit Park’s recovery—raises further concerns. By making the appraiser’s fee contingent upon the amount awarded it caused the appraiser to conclude that the higher his appraisal, the higher the fee. The fact that Keys was operating under a contingent fee agreement is enough, by itself, to render him other than impartial.

Despite the foregoing, the extent of Summit Park’s disclosure to Auto-Owners regarding Keys was that Keys “has acted as a public adjuster and/or appraiser on behalf of policyholders that the Merlin Law Group has represented in the past”; neither Summit Park nor Merlin made any effort to disclose the number of times Merlin attorneys had worked together or the other aspects of their relationship outlined above. Instead of being aboveboard and demonstrating his neutrality, Keys’ nondisclosure only raises suspicions about his impartiality and creates the appearance that he was trying to hide the damaging information.

In this regard, the court found it troubling that one of the Merlin attorneys who has appeared in this case, David Pettinato, provided more detail about Merlin’s relationship with Keys in a brochure for Keys’ business—a brochure in which he is quoted as saying that “[b]oth Keys and his staff have assisted me as well as my firm in resolving an untold number of large multi-million dollar losses to an amicable resolution and settlement to the policyholders’ benefit and satisfaction,” — than he did in his disclosures to Auto-Owners before this Court.

Similarly, Mr. Harris, another Merlin attorney who has appeared in this case, acknowledged at the hearing that Merlin assisted Keys in making the disclosure in which Keys stated that he did “not have any substantial business relationship...[with] Merlin Law Group.”

The disclosure order required a “reasonable” inquiry regarding conflicts of interest, and these facts suggest that Merlin and, specifically, the Merlin attorneys who have appeared in this case, failed to take this duty seriously. Unfortunately, counsel’s conduct has impugned the integrity of not only the appraisal process but also the Court.

Undisputed material facts establish that Keys, who is Summit Park’s appraiser, is not “impartial” as required by the insurance policy in this case. Summit Park’s and Keys’ failure to disclose material information regarding, among other things, Keys’ extensive relationship with Summit Park’s counsel, violated the order requiring disclosure of facts that a reasonable person would consider likely to affect an appraiser’s impartiality.

For the reasons set forth herein, the court sustained the objection, disqualified Keys from serving as an appraiser in this matter, vacated the appraisal award lodged with the Court on December 23, 2015 and instructed counsel to file briefs on the appropriate sanctions to be imposed on the Merlin Law Group.

ZALMA OPINION

Lawyers are under an ethical duty to make honest and fair representations to the court. When this court issued an order requiring counsel and appraisers appointed by counsel, to disclose any potential lack of impartiality. The lawyers in this case drafted the appraiser’s statement of impartiality that they knew was false. One of the Merlin attorneys who appeared provided more detail about Merlin’s relationship with Keys in a brochure for Keys’ business than was disclosed to the court. Sanctions will be imposed and the bad conduct now requires the client to pay for a second appraisal with impartial appraisers and return the money paid by Auto Owners.
