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Just Win, Baby: The Tenth Circuit Rejects the Anything Goes Tactics of the Hail-Litigation Gold Rush

“JUST WIN, BABY”: THE TENTH CIRCUIT REJECTS THE
“ANYTHING GOES” TACTICS OF THE
HAIL-LITIGATION GOLD RUSH

EVAN STEPHENSON[†] & KAYLA SCROGGINS-UPTIGROVE^{††}

ABSTRACT

In Colorado, the federal courts are experiencing a legal gold rush arising from hail and other storm damage insurance lawsuits. Entrepreneurial plaintiffs’ lawyers, public adjusters, insurance appraisers, and others have developed aggressive techniques for maximizing the value of hail-damage claims. These tactics drew a sharp rebuke from the U.S. Court of Appeals for the Tenth Circuit in two published opinions, both in appeals captioned *Auto-Owners Insurance Co. v. Summit Park Townhome Ass’n (Summit Park)*. The court affirmed an order that vacated a \$10,870,090.96 hail-damage appraisal award, sanctioned the policyholder’s attorneys for misconduct, entered a default judgment against the policyholder as a sanction, and required the policyholder’s lawyers to pay the insurance company’s attorney fees. *Summit Park* rejects various claim practices of wide import that have taken root in other jurisdictions.

These practices frequently arise in the context of insurance appraisal, a relatively informal method of alternative dispute resolution that in most cases depends on the parties to an insurance valuation dispute each appointing an impartial appraiser to determine the amount of the property loss. The policyholder in *Summit Park* obtained an approximate \$10 million appraisal award by appointing a partisan appraiser with whom its law firm had undisclosed and extensive fiduciary, personal, and financial connections. The appraiser had initially entered into an undisclosed engagement agreement giving him an interest in the outcome of the appraisal. In implementing these practices, the policyholder’s law firm carried out its philosophy—published on the internet—of doing whatever it takes to “*Just win, baby.*” The Tenth Circuit’s decisions in *Summit Park* vindicate district courts’ authority to prohibit such tactics. The Tenth Circuit’s opinions may have the effect of discouraging parties and attorneys from adopting a win-at-all-costs approach to appraisal and litigation.

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I. HAIL CLAIMS AND LITIGATION: A LEGAL GOLD RUSH

A. Hail Claims and Lawsuits, Premiums, Hail-Claim Payouts, and Public Adjusters Are All Increasing Substantially

Regions of the United States in which hailstorms regularly occur have experienced a surge in the number of claims and lawsuits seeking insurance payments for hail damage.¹ In the United States, hail claims increased 84% between 2010 and 2013 according to the National Insurance Crime Bureau.² Nationwide losses from convective storm events³ (including hailstorms) have markedly increased by billions of dollars since 2008, as shown by data released by Munich Re in 2017 and charted in Figure 1 below.⁴

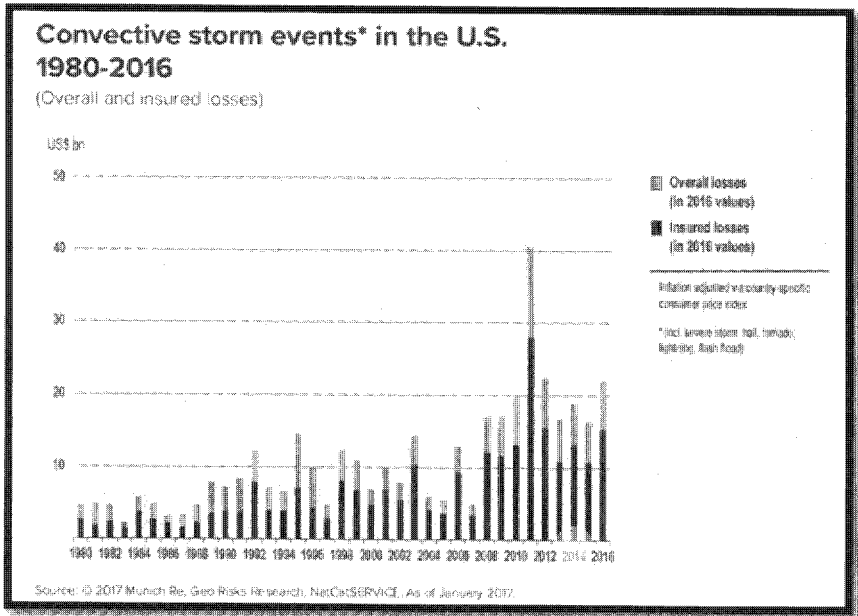
1. Des Toups, *Hail Claims up 84% Since 2010, NICB Says*, NASDAQ (July 18, 2013, 5:08 PM), <https://www.nasdaq.com/article/hail-claims-up-84-since-2010-nicb-says-cm259263>.

2. *Id.*

3. “Commonly known as thunderstorms, convective storms are the atmospheric phenomenon responsible for weather hazards such as lightning, heavy rain, hail, and tornadoes.” Dep’t of Atmospheric Sci., *Convective Storms*, U. ILL. C. LIBERAL ARTS & SCI., <https://www.atmos.illinois.edu/cms/One.aspx?portalId=127458&pageId=209972> (last visited Dec. 26, 2018).

4. NatCatSERVICE, *Overall and Insured Losses in US\$ for Relevant Natural Loss Events Worldwide 1980–2016*, MUNICH RE, <https://natcatservice.munichre.com/overall/1?filter=eyJ5J5ZWFyRnJvbSI6MTk4MCMwieWVhclRvIjoyMDE2fQ%3D%3D&type=1> (last visited Dec. 26, 2018).

Figure 1



Of these storm losses, the cost of claimed hailstorm damage has increased in a particularly dramatic fashion. An analysis of approximately nine million hail claims revealed that “hail-related claims costs soared between 2008 and 2013.”⁵ The data from the analysis shows that nearly 70% of the insured \$54 billion in hail losses were paid in the last six years of the fourteen-year period studied.⁶ To put that in perspective, the six-year period from 2008 to 2013 represents a rate of insured hail payments of over \$6 billion per year. As recently as 2009, scientists had concluded that “recent property-hail losses” insured across the nation “average[] \$850 million per year” and “range between \$895 million and \$971 million yearly.”⁷ The trend in hail payouts from 2008 to 2013 represents a dramatic increase in the severity of hail claims.

Texas experiences the largest number of hail claims per year.⁸ In Texas, the “number of reported claims involving hail damage to residential and commercial roofing products has increased dramatically” from

5. *NICB: Number of Hail Claims Fluctuates but Severity Through the Roof*, CLAIMS J. (May 17, 2016), <https://www.claimsjournal.com/news/national/2016/05/17/270849.htm> [hereinafter *NICB*].

6. *Id.*

7. STANLEY A. CHANGON ET AL., ILL. STATE WATER SURVEY, CONTRACT REPORT 2009-12, HAILSTORMS ACROSS THE NATION: AN ATLAS ABOUT HAIL AND ITS DAMAGES 15, 26 (2009).

8. See *NICB*, *supra* note 5 (explaining that Texas had the most hail-damage claims between 2013 and 2015).

2009 to 2014.⁹ “Some reports place the increase at almost double historical claim totals.”¹⁰

The same phenomenon has occurred in Colorado. Until recently, Colorado had not ranked among the top states for the number of hail events experienced or losses from hail.¹¹ In 2009, scientists published a top-ten list of the highest insured property losses from hail catastrophes from 1951 to 2006.¹² No storm in the history of Colorado made the list.¹³

“[F]rom 2009 to 2013, Colorado experienced a 179% increase in the average claim payment per insured home compared to the previous 12 years—the largest percentage increase in the U.S.”¹⁴ From 2013 to 2015, Colorado generated the second most hail claims in the United States.¹⁵ Colorado generated the second most hail claims again in 2016 according to the largest insurer in the United States¹⁶ and the National Insurance Crime Bureau.¹⁷ Despite having a relatively small population, in 2017, Colorado ranked fourth in the amount paid for hail claims by the nation’s largest property-casualty insurer.¹⁸ Also in 2017, Colorado ranked tenth in the United States in the estimated number of properties affected by hail.¹⁹

Not only have hail claims and losses increased substantially, so have the number of professionals who make their livelihood from storm damage claims.²⁰ In Texas, for example, the number of public adjusters (i.e., persons who act on behalf of policyholders in claiming first-party insurance benefits and are generally paid on a contingency-fee basis²¹)

9. See Steven Badger, *The Emerging Hail Risk: What the Hail Is Going On?*, INS. J. (May 19, 2014), <https://www.insurancejournal.com/magazines/mag-features/2014/05/19/329039.htm>.

10. *Id.*

11. See CHANGON ET AL., *supra* note 7, at 74, 78; *Trends in Homeowners Insurance Claims: Findings from Colorado*, RMIIA, http://www.rmiia.org/catastrophes_and_statistics/Homeowners_Insurance_Trends.asp (last visited Dec. 26, 2018) [hereinafter *Trends in Homeowners Insurance Claims*].

12. CHANGON ET AL., *supra* note 7, at 74.

13. *Id.*

14. *Trends in Homeowners Insurance Claims*, *supra* note 11.

15. Aldo Svaldi, *Colorado Ranks Second to Texas for Number of Hail-Damage Claims*, DENV. POST (May 17, 2016, 12:30 PM), <http://www.denverpost.com/2016/05/17/colorado-ranks-second-to-texas-for-number-of-hail-damage-claims>; see also NICB, *supra* note 5.

16. *State Farm Releases List of States with Biggest Hailstorm Claims*, INS. BUS. (Mar. 20, 2017), <https://www.insurancebusinessmag.com/us/news/environmental/state-farm-releases-list-of-states-with-biggest-hailstorm-claims-63129.aspx>.

17. *Hail Damage: Are You Covered?*, INSURANCE.COM (April 16, 2018), <https://www.insurance.com/auto-insurance/auto-insurance-basics/hail-damage-are-you-covered.html>.

18. *State Farm: Top 10 States for Homeowner Hail Damage Claims*, CLAIMS J. (Apr. 6, 2018), <https://www.claimsjournal.com/news/national/2018/04/06/284004.htm>; *Top 10 States for Hail Claims: State Farm*, INS. J. (Apr. 2, 2018), <https://www.insurancejournal.com/news/national/2018/04/02/484963.htm>.

19. ARINDAM SAMANTA & TING WU, VERISK, HAIL: THE HIDDEN RISK, AN ANALYSIS OF PROPERTY EXPOSURE TO DAMAGING HAIL IN 2017, at 4 (2018).

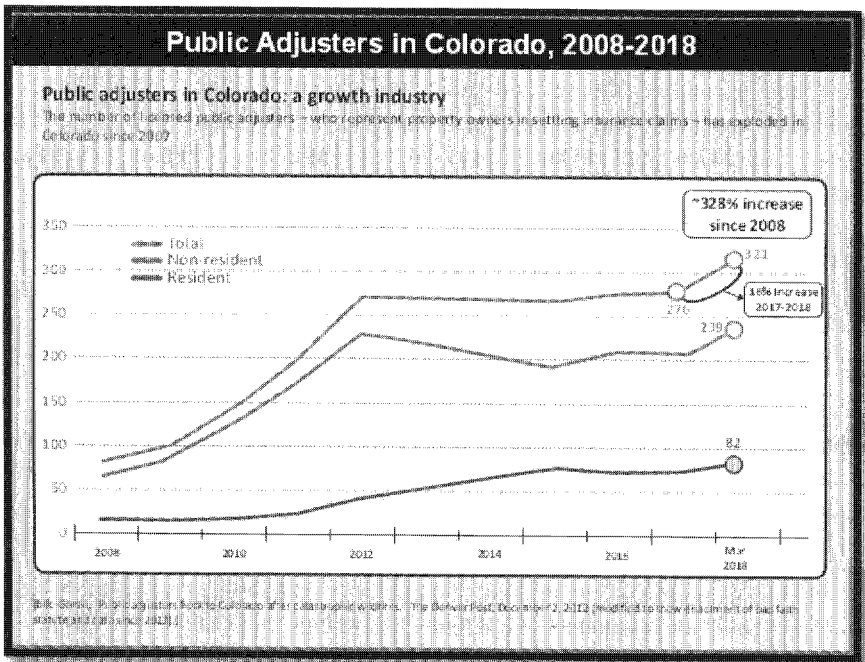
20. Badger, *supra* note 9.

21. See COLO. REV. STAT. § 10-2-103(8.5) (2018).

has increased dramatically.²² From 2012 to 2014, “membership in the Texas Association of Public Insurance Adjusters has more than doubled.”²³

In recent years, Colorado has seen a larger increase in public adjusters than even Texas saw from 2012 to 2014, as shown below in Figure 2²⁴:

Figure 2



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.

The substantial increase in public adjusters is significant for a variety of reasons. “Colorado fully licenses public adjusters, but the bar for becoming licensed is low and the regulations are minimal.”²⁵ Colorado residents applying to be a public adjuster must take “a written exam test-

22. Badger, *supra* note 9.

23. *Id.*

24. Data underlying Figure 2 is on file with the *Denver Law Review*. See also Eric Gorski, *Public Adjusters Flock to Colorado After Catastrophic Wildfires*, DENV. POST (Nov. 30, 2012, 6:15 AM), <https://www.denverpost.com/2012/11/30/public-adjusters-flock-to-colorado-after-catastrophic-wildfires>.

25. Gorski, *supra* note 24.

ing the 'minimum level of competence' in public adjusting."²⁶ Nonresidents need not take any test as long as "they are licensed in their home state and have no complaints pending."²⁷ Unlike some states, Colorado places no fee caps or solicitation restrictions on public adjusters.²⁸

The absence of stronger regulations on the conduct and competence of public adjusters has drawn criticism. Indeed, some have compared public adjusters to "ambulance chasers."²⁹ Perhaps in part because of that perception, Colorado's general assembly allows insureds to "rescind any contract or other form of agreement for representation in a property or casualty loss or claim if the insured exercises this right of rescission in writing . . . within seventy-two hours after signing a settlement representation agreement."³⁰

The Colorado Attorney General's Office has noted that "[u]nscrupulous public adjusters will charge an exorbitant fee for their services and then disappear."³¹ Public adjusters "may refer homeowners to disreputable contractors from whom they get a kickback, leaving the homeowner with shoddy repairs. Others will gain the consumer's trust in order to gather personal information like Social Security and credit card numbers and then use them to commit identity theft."³² In light of these concerns, the Colorado Attorney General's Office has issued guidance to policyholders contemplating hiring a public adjuster, including verifying licensing, checking references, inquiring about permanent residence, and investigating complaints against the public adjuster.³³

With this context in mind, notably, the increase in hail claims, losses, and public adjusters has coincided with a substantial increase in the number of insurance lawsuits pending in the U.S. District Court for the District of Colorado.³⁴ From 2007 to 2012, the rate of new insurance cases stably hovered around 150 per year, as shown in Figure 3 below.³⁵

26. *Id.*

27. *Id.*

28. *Id.*

29. *See id.* ("'In theory [public adjusters] may be beneficial,' said Bob Hunter, director of insurance for the Consumer Federation of America, an advocacy group. 'But it's my experience a lot of them swoop in like ambulance chasers. Especially since regulation is so weak, it's an area for trouble.'")

30. COLO. REV. STAT. § 10-2-417(6)(i)(IV)(A) (2018).

31. Colo. Office of the Attorney Gen., *What Does a Public Adjuster Do and Do I Need One?*, STOP FRAUD COLO., <https://stopfraudcolorado.gov/fraud-center/disaster-fraud/public-adjusters.html> (last visited Dec. 26, 2018).

32. *Id.*

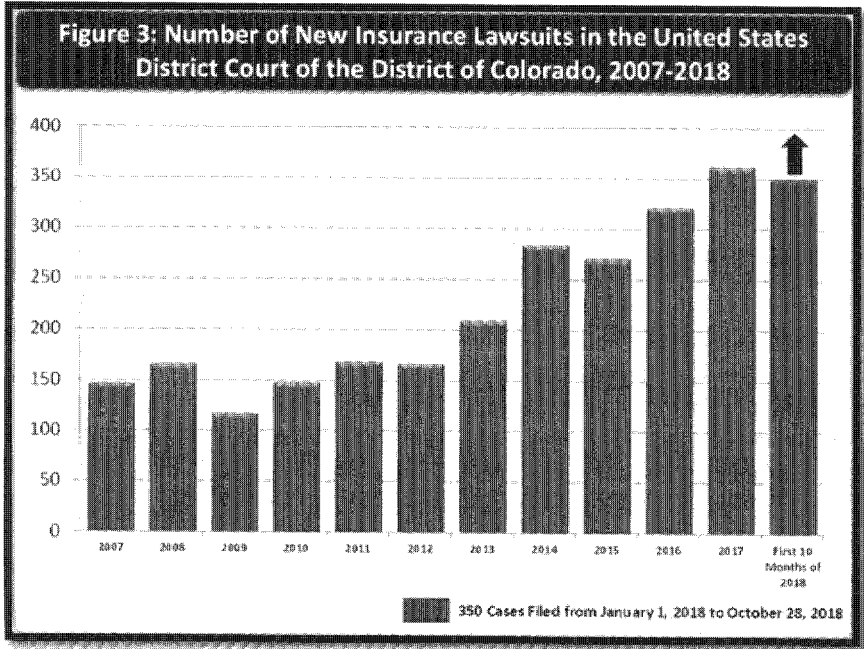
33. *Id.*

34. Amicus Brief of Property Casualty Insurers Association of America and Colorado Civil Justice League in Support of Petitioner at 12–13, *Owners Ins. Co. v. Dakota Station II Condo. Ass'n*, No. 16CA0733, 2017 WL 3184568 (Colo. App. July 27, 2017) [hereinafter Amicus Brief for *Dakota Station*].

35. *Id.* at 13.

Beginning in 2013, however, the number of new insurance cases opened in the District of Colorado increased substantially.³⁶

Figure 3



In 2017, the annual number of new insurance lawsuits filed in Colorado federal court doubled the previous average from 2007 to 2012 of approximately 150 such suits annually.³⁷ The pace of filings appears to be accelerating. During the first ten months of 2018, 350 such cases had been filed—a decade-high rate of filing.

On July 23, 2018, Chief Judge Marcia Krieger of the U.S. District Court for the District of Colorado, in an understatement, noted that “[t]here have been many hail damage insurance claims in Colorado over the past years.”³⁸

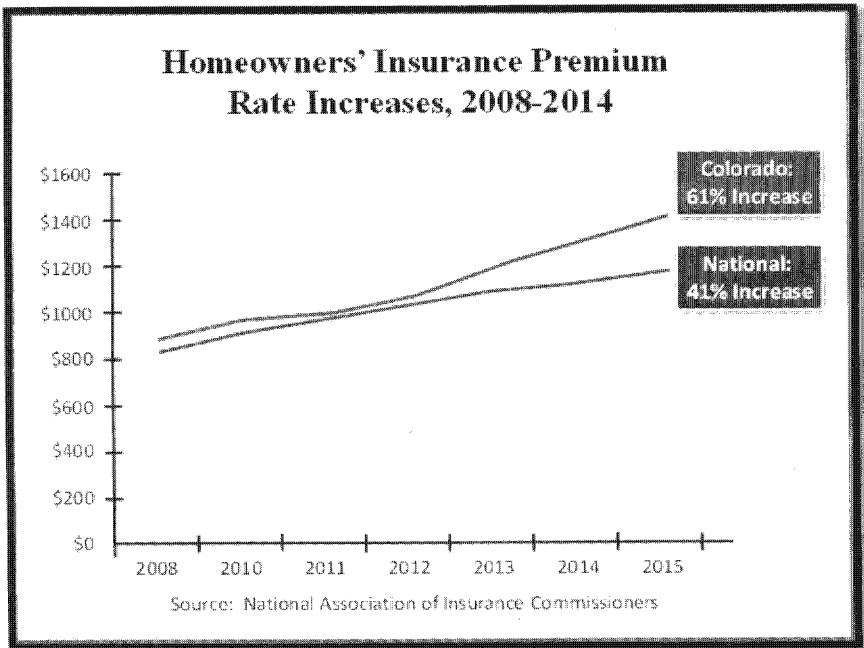
36. *Id.* Data underlying Figure 3 is also on file with the *Denver Law Review*. Federal court filings present the best picture of trends in Colorado’s insurance-litigation climate, because virtually all major insurers remove significant insurance litigation to federal court. See *Rooftop Restorations, Inc. v. Am. Family Mut. Ins. Co.*, No. 15-cv-2560-WJM-MJW, 2017 WL 514060, at *2 (D. Colo. Feb. 8, 2017) (“[M]any such cases are removed from the Colorado courts to this Court pursuant to 28 U.S.C. § 1332, by insurance companies headquartered outside Colorado.”). As Judge William J. Martinez explained in *Rooftop Restorations, Inc.*, the large number of insurance cases removed to Colorado federal court explains why so many issues of Colorado insurance law have been addressed by the federal courts but not the Colorado state appellate courts. *Id.* at *1–2.

37. Amicus Brief for *Dakota Station*, *supra* note 34, at 13.

38. *Copper Oaks Master Home Owners Ass’n v. Am. Family Mut. Ins. Co.*, No. 15-cv-01828-MSK-MJW, 2018 WL 3536324, at *8 (D. Colo. July 23, 2018).

Unsurprisingly, the dramatic increases in hail claims, public adjusters, and insurance lawsuits have been accompanied by increasing insurance premiums both nationally and in Colorado.³⁹ According to data from the National Association of Insurance Commissioners, homeowners' insurance premiums increased 41% nationally from 2008 to 2014.⁴⁰ Over the same period, premiums in Colorado increased 61%.⁴¹ Figure 4 below⁴² illustrates these figures:

Figure 4



According to December 2016 data from GOBankingRates and Zillow, Colorado has the fifth highest homeowners' insurance premiums in the United States, which is higher than the traditionally high-cost states of New York, New Jersey, and Washington.⁴³

39. Amicus Brief for *Dakota Station*, *supra* note 34, at 13, 15.

40. *Id.* at 15.

41. *Id.*

42. Figure 4 is adapted from the *Dakota Station* amicus brief of the Colorado Civil Justice League and PCI. *Id.*

43. Jayleen R. Heft, *10 States with the Highest and Lowest Homeowners' Insurance Rates*, PROPERTYCASUALTY360 (Feb. 22, 2017, 7:01 PM), <https://www.propertycasualty360.com/2017/02/22/10-states-with-the-highest-and-lowest-homeowners-i>.

B. What Explains the Hail Phenomenon? The 2008 Colorado Insurance Statutes

The increases in hail claims, litigation, public adjusters, losses, and premiums are too large and sudden to have resulted from changes in weather, climate change,⁴⁴ population density, insurers' behavior, or bad luck. Their timing and magnitude, as well as other factors, reveal the hail phenomenon's nature: it is a legal gold rush. A legal gold rush may occur when the law substantially creates or expands opportunities to make money by filing civil lawsuits, and plaintiffs' lawyers respond to the incentive by filing many new lawsuits that previously would not have been brought.⁴⁵ Past legal gold rushes have involved lawsuits over silicosis,⁴⁶ employment practices in California,⁴⁷ corporate fraud,⁴⁸ silicone breast implants,⁴⁹ asbestos,⁵⁰ qui tam actions,⁵¹ certain types of patent litigation,⁵² oil and gas development,⁵³ and other subjects.

One commentator on the hail phenomenon in Texas concluded in an insurance-industry trade publication that "the increase in hail damage claims and resulting lawsuits have nothing to do with abnormally large or frequent storms."⁵⁴ The increase in hail claims and litigation in Texas coincided with a lull in hurricane activity that ordinarily supplies the

44. Weather data shows that the number of damaging hail events (i.e., hail events involving hailstones at least one inch in diameter) across the United States varies significantly from year to year with no identifiable increasing trend in the number of U.S. properties affected by one or more hail events. SAMANTA & WU, *supra* note 19, at 2–3, 9. From "observations of recorded hail, there are no clear trends up or down in the last 30 years." Liz Forster, *Does Climate Change Contribute to Severe Hailstorms in Colorado?*, GAZETTE (Aug. 8, 2018), https://gazette.com/news/does-climate-change-contribute-to-severe-hailstorms-in-colorado/article_ddd03534-9a45-11e8-8e34-5f4355c9ad50.html (quoting Andy Prein, scientist with the National Center for Atmospheric Research in Boulder, Colorado).

45. See *infra* notes 46–53 and accompanying text.

46. See generally *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 569–72 (S.D. Tex. 2005) (discussing background information on silicosis and the subsequent explosion of legal claims).

47. Michael D. Johnston, *The Litigation Explosion, Proposed Reforms, and Their Consequences*, 21 BYU J. PUB. L. 179, 181 (2007).

48. Jessica M. Erickson, *Overlitigating Corporate Fraud: An Empirical Examination*, 97 IOWA L. REV. 49, 64–66 (2011).

49. MARCIA ANGELL, M.D., *SCIENCE ON TRIAL: THE CLASH OF MEDICAL EVIDENCE AND THE LAW IN THE BREAST IMPLANT CASE* 69–70 (1997).

50. Marc S. Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 24–25 (1986); Edward F. Sherman, *The Evolution of Asbestos Litigation*, 88 TUL. L. REV. 1021, 1025 (2014) ("Fortunes were made by some 'asbestos lawyers,' and a certain 'gold rush' entrepreneurial mentality pervaded asbestos litigation practice.").

51. Charles E. Grassley, Editorial, *False Claims Gold Rush*, WALL ST. J., May 2, 2008, at A14 ("Welcome to the legal gold rush occurring under the cover of 'reforming' the False Claims Act.").

52. Christopher Beauchamp, *The First Patent Litigation Explosion*, 125 YALE L.J. 848, 938–39 (2016).

53. See J. Zak Ritchie, *A Fresh Look at an Old Tort: Litigating Slander of Title in Mineral Disputes*, 115 W. VA. L. REV. 1097, 1097–99 (2013).

54. Badger, *supra* note 9.

livelihood for public adjusters and policyholder lawyers.⁵⁵ “That is what the hail is going on,”⁵⁶ the commentator punned.

Those observations fit the facts. Verisk’s analysis of nine million hail claims found that “[f]rom 2009 through 2013, approximately 15 percent of hail claims analyzed had no evidence of hail activity on the reported date of loss,”⁵⁷ a fact demonstrating that the hail phenomenon cannot be explained by hail. Nor can the weather explain it. According to a 2017 peer-reviewed scientific paper, there has been no national trend in the number of hail days in the last twenty-five years.⁵⁸ An even longer study found that “[n]ationwide trends in crop-hail losses, in property-hail losses, and in the number of hail days are either flat or slightly downward for the 1950–2009 period, and do not suggest any climate change influence.”⁵⁹

The hail phenomenon is not part of a general increase in loss events. As shown below in Figure 5, data from Munich Re between 1980 and 2016 shows a few outlier years but no overall upward trend in either uninsured or insured loss events during the time period that correlates with the increase in hail litigation.

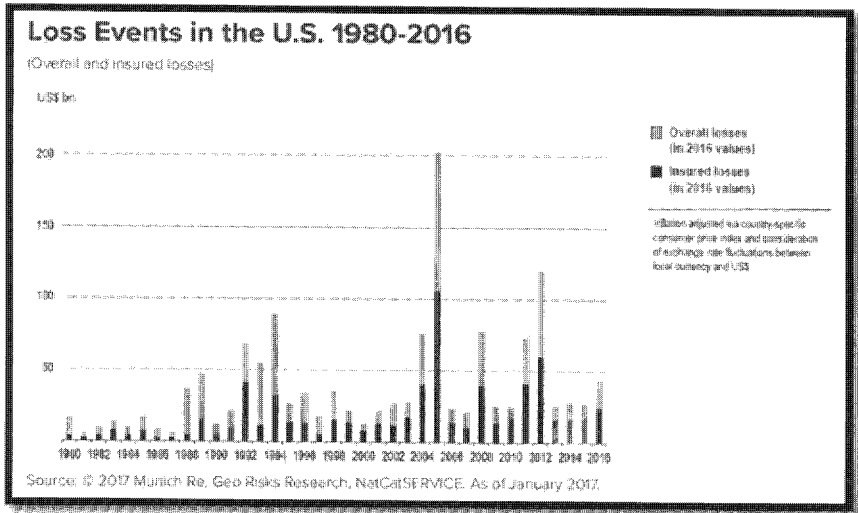
55. *Id.*

56. *Id.*

57. Press Release, Verisk Ins. Sols., Verisk Analytics, New Verisk Insurance Solutions – Underwriting Report Documents the Hail Claims Experience of U.S. Residential Property Insurers from 2000 through 2013 (Aug. 26, 2014), <https://www.verisk.com/archived/2014/august/new-verisk-insurance-solutions-underwriting-report-documents-the-hail-claims-experience-of-u-s-residential-property-insurers-from-2000-through-2013>.

58. John T. Allen & Michael K. Tippett, *The Characteristics of United States Hail Reports: 1955–2014*, ELECTRONIC J. SEVERE STORMS METEOROLOGY, Dec. 31, 2015, at 1, 1.

59. CHANGON ET AL., *supra* note 7, at v.

Figure 5⁶⁰

Nothing in the objective data measuring underlying hail events or loss events can explain the increases in hail claims, litigation, payouts, public adjusters, or insurance premiums.

Legal changes, not the weather or other factors, supply the best explanation for the hail phenomenon. Some commentators have drawn this precise conclusion regarding Texas's experience.⁶¹ The best accepted explanation for the Texas hail phenomenon among insurance-industry professionals is the "Feeding Frenzy Model," in which public adjusters, lawyers, roofers, and others have created a legal gold rush through their own efforts out of a need to replace income lost to tort reform and a lack of hurricane activity.⁶²

That explanation matches the Colorado experience. Colorado has adopted longstanding tort reforms that have had the effect of reducing the lucrativeness of personal-injury cases.⁶³ These include caps on none-

60. *Facts + Statistics: U.S. Catastrophes*, INS. INFO. INST., <https://www.iii.org/fact-statistic/facts-statistics-us-catastrophes> (last visited Dec. 26, 2018).

61. Badger, *supra* note 9 ("With Texas tort reform making it difficult for plaintiffs' attorneys to earn a living handling their usual docket of fender bender and slip-and-fall cases, fighting evil insurance companies became the go-to practice area. All of a sudden, every personal injury plaintiffs' attorney was also a policyholder attorney."). Mr. Badger's explanation has received "widespread" "[s]upport." Steven Badger, *The Emerged Hail Risk: What the Hail Is Still Going on and Getting Worse?*, CLAIMS J. (Apr. 6, 2016), <https://www.claimsjournal.com/news/southcentral/2016/04/06/269853.htm> [hereinafter Badger, *Still Going on*].

62. Badger, *supra* note 9.

63. See *Colorado Issues*, AM. TORT REFORM ASS'N, <http://www.atra.org/state/colorado> (last visited Dec. 26, 2018).

conomic damages,⁶⁴ caps on punitive damages,⁶⁵ requiring punitive damages to be proved beyond a reasonable doubt,⁶⁶ and pro-rata liability.⁶⁷ These legal reforms have long rendered Colorado personal-injury litigation less lucrative than it would be if these reforms had not been enacted.

Because Colorado enacted its tort reforms in the 1980s, however,⁶⁸ it merely set the stage for the current legal gold rush in hail litigation. Gold fever did not set in until the general assembly took dramatic and far-reaching legislative action. On August 5, 2008, two new Colorado insurance statutes became effective.⁶⁹ The statutes permit policyholders to recover two times the amount of any "owed" "covered benefit" the insurance company delays or denies without a reasonable basis.⁷⁰ In effect, the statutes permit treble recovery plus reasonable attorney fees and costs.⁷¹

It is worth noting that the legislative hearings on the 2008 insurance statutes supply no basis to conclude that the general assembly enacted those statutes to curb perceived abuses by property insurers. The legislature conducted hearings on four days, April 24, April 29, May 1, and May 5, 2008.⁷² During none of those sessions did any legislator suggest or state that the statutes served the purpose of curbing any abusive practices by property insurers regarding storm damage claims.⁷³ There is no legislative history suggesting that the general assembly believed that the already-existing tools for pursuing property claims were inadequate or that property insurance claims had become havens for abuse by insurers.

In the years after the statutes were enacted, Colorado has seen increases in hail claim payouts, both per insured and in the aggregate.⁷⁴

64. COLO. REV. STAT. § 13-21-102.5(3) (2018); *Gen. Elec. Co. v. Niemet*, 866 P.2d 1361, 1364 (Colo. 1994).

65. COLO. REV. STAT. § 13-21-102(1)(a) ("The amount of such reasonable exemplary damages shall not exceed an amount which is equal to the amount of the actual damages awarded to the injured party.").

66. *Id.* § 13-25-127(2).

67. *Id.* § 13-21-111.5(1); *Niemet*, 866 P.2d at 1364 ("That section 13-21-111.5 eliminates joint and several liability of defendants and replaces it with pro rata liability also suggests that the legislature's purpose in enacting tort reform was to reduce unfair burdens placed on defendants.").

68. W. Kip Viscusi et al., *The Effect of 1980s Tort Reform Legislation on General Liability and Medical Malpractice Insurance*, 6 J. RISK & UNCERTAINTY 165, 168–171 (1993).

69. COLO. REV. STAT. §§ 10-3-1115 to -1116; *Kisselman v. Am. Family Mut. Ins. Co.*, 292 P.3d 964, 967 (Colo. App. 2011).

70. *See Am. Family Mut. Ins. Co. v. Barriga*, 418 P.3d 1181, 1185 (Colo. 2018). The statutes exempt a few types of insurance policies, but they do not exempt homeowners' or property-insurance policies. COLO. REV. STAT. §§ 10-3-1115 to -1116.

71. *Barriga*, 418 P.3d at 1185.

72. *See* Transcripts from Legislative Hearings 1–120 (2008) (on file with the *Denver Law Review*); *see also* *HB08-1407*, COLO. GEN. ASSEMBLY, <http://www.leg.state.co.us/CLICS/CLICS2008A/csl.nsf> (last visited Jan. 27, 2019).

73. Transcripts from Legislative Hearings, *supra* note 72.

74. *See Trends in Homeowners Insurance Claims*, *supra* note 11; *see also* sources cited *supra* note 18.

Insurance litigation has steadily increased in the decade since the statutes were enacted.⁷⁵

The incentive created by the treble-benefits remedy, plus the availability of attorney fees and costs, is difficult to understate. It is now a truism among lawyers in Colorado that, for cases governed by the statutes, there is “no such thing as a small insurance case.” Even cases in which a few thousand dollars are disputed can result in judgments of hundreds of thousands of dollars in fees alone.

The statutes’ greatest incentive to file new lawsuits, however, arises from the potential to recover treble benefits in cases involving policies with high limits of insurance, which tend to be larger property insurance policies. The ability to treble benefits massively scales up the exposure in those cases. Every additional dollar that can be recovered can become three dollars. For example, in *Auto-Owners Insurance Co. v. Summit Park Townhome Ass’n*,⁷⁶ the policyholder sought to recover an alleged benefit of \$10,870,090.96.⁷⁷ The size of the claimed benefit meant that the insurer “had over \$30 million at stake” from a single hail event to one townhome development.⁷⁸ The multiplied benefits alone in such cases dwarf the initial dispute. The potential to recover three times what the policyholder’s actual loss is, without having to pay one’s own attorney, creates a substantial profit-seeking opportunity for public adjusters, lawyers, roofers, and policyholders. Every insurance claim becomes an opportunity for an insured to be put in a better financial position than if no loss had occurred. Moreover, there is an incentive to inflate or exaggerate a claim because of the statutes. Each dollar of claim inflation can become three dollars of recovery. The statutes, thus, incentivize the filing of more claims and lawsuits and encourage claiming parties to pad or inflate claims.

The profit opportunity created by the statutes explains much of the Colorado hail gold rush. The markers of the hail gold rush, such as substantial increases in hail claims, payouts, insurance litigation, public adjusters, and premiums, all began manifesting around the same time, within a few years of the statutes’ enactment.⁷⁹

75. See *supra* Figure 3.

76. *Auto-Owners Ins. Co. v. Summit Park Townhome Ass’n*, 198 F. Supp. 3d 1239 (D. Colo. 2016), *aff’d*, 886 F.3d 852 (10th Cir. 2018), and *aff’d on other grounds*, 886 F.3d 863 (10th Cir. 2018).

77. *Id.* at 1242.

78. See *Auto-Owners Ins. Co. v. Summit Park Townhome Ass’n*, 886 F.3d 863, 873 (10th Cir. 2018).

79. See *supra* Figures 2–4.

II. THE IMPORTANCE OF THE INSURANCE-APPRAISAL PROCESS TO THE HAIL-LITIGATION GOLD RUSH

Most likely lured by the siren song of windfall profits and fees, out-of-state public adjusters⁸⁰ and law firms are currently attempting to import into Colorado a variety of hail-claim tactics from other states.

Chief among these tactics is the use of the insurance appraisal process provided for in virtually every property insurance policy.⁸¹ "An appraisal process is an agreement by parties to a contract to allow third party experts to determine the value of an item."⁸² "Appraisal clauses, as a consequence of the proliferation of insurance litigation, have become as important as coverage and exclusion provisions."⁸³ A typical appraisal provision reads as follows:

Appraisal. If we and you disagree on the value of the property or 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 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. 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.⁸⁴

Appraisal is intended to be efficient, inexpensive, fair, and limited in scope to the amount of an insured loss.⁸⁵ It is also intended to be conducted on an independent basis by "industry professionals with more expert knowledge about loss valuation than an arbitrator, judge, or jury might possess."⁸⁶ Appraisal rests on the notion that the impartiality and "expert knowledge" of "industry professionals" serving as appraisers and umpires reduce the need for procedural protections.⁸⁷ "[E]xpert

80. See *supra* Figure 2.

81. *State Farm Lloyds v. Johnson*, 290 S.W.3d 886, 888–89 (Tex. 2009) ("Virtually every property insurance policy for both homeowners and corporations contains a provision specifying 'appraisal' as a means of resolving disputes about the 'amount of loss' for a covered claim." (quoting Timothy P. Law & Jillian L. Starinovich, *What Is It Worth? A Critical Analysis of Insurance Appraisal*, 13 CONN. INS. L.J. 291, 292–93 (2007))).

82. *Farmers Auto. Ins. Ass'n v. Union Pac. Ry. Co.*, 768 N.W.2d 596, 606–07 (Wis. 2009).

83. Johnny C. Parker, *Understanding the Insurance Policy Appraisal Clause: A Four-Step Program*, 37 U. TOL. L. REV. 931, 931 (2006).

84. *Auto-Owners Ins. Co. v. Summit Park Townhome Ass'n*, 129 F. Supp. 3d 1150, 1151 (D. Colo. 2015).

85. Amy M. Coughenour, *Appraisal and the Property Insurance Appraisal Clause—A Critical Analysis: Guidance and Recommendations for Arizona*, 41 ARIZ. ST. L.J. 403, 406 (2009).

86. *Id.*

87. See *id.*

knowledge” can efficiently and speedily determine the narrow issue of the “amount of loss” without much need for procedural protections.⁸⁸ The impartiality and expertise of appraisers and umpires supply the justification for conducting a relatively informal *ex parte* process with few formal procedures.⁸⁹

For these reasons, appraisal has fewer procedural protections than arbitration,⁹⁰ and it therefore presents, in theory, a greater opportunity for participants to engage in aggressive tactics. Appraisals do not require a jury trial, rules of procedure, a hearing, discovery, rules of evidence, or counsel.⁹¹ Appraisers are not as a default matter required to give a reasoned decision (although courts may require it in some circumstances), but some courts allow them to determine important factual questions such as whether hail or some other type of event caused a given item of damage.⁹² Appraisal awards are difficult to overturn and bind the parties as to the amount of the loss.⁹³ The appraisal process can potentially combine the worst aspects of (i) an informal process with few procedural protections with (ii) finality and broad decisional powers.

Appraisal has been a process used by insurance companies and insureds for approximately a century in Colorado.⁹⁴ But only in recent years has the appraisal process become an important mechanism for those seeking to make money in the hail-litigation gold rush.⁹⁵ One insurance-industry publication printed a commentary describing the appraisal phenomenon as follows: “Once a dispute arises as to the existence or scope of damage, the contractor or public adjuster has all he needs to demand appraisal. . . . [A]ll that is needed for a guaranteed payday is an aggressive, manipulative appraiser and a favorable umpire appointment.”⁹⁶

A. *Appointment of Biased Appraisers*

This process of “manipulat[ing]” the appraisal is, essentially, a two-step dance. First, the policyholder or public adjuster appoints an appraiser who is an avowed pro-policyholder advocate, instead of an unbiased

88. *See id.*

89. *See id.*

90. *Auto-Owners Ins. Co. v. Summit Park Townhome Ass’n*, 129 F. Supp. 3d 1150, 1152–55 (D. Colo. 2015).

91. *State Farm Lloyds v. Johnson*, 290 S.W.3d 886, 894 (Tex. 2009) (“Appraisals require no attorneys, no lawsuits, no pleadings, no subpoenas, and no hearings.”).

92. *Auto-Owners Ins. Co. v. Summit Park Townhome Ass’n*, 100 F. Supp. 3d 1099, 1101–04 (D. Colo. 2015).

93. *Copper Oaks Master Home Owners Ass’n v. Am. Family Mut. Ins. Co.*, No. 15-cv-01828-MSK-MJW, 2018 WL 3536324, at *1 (D. Colo. July 23, 2018) (“Upon the agreement of the umpire and at least one of the appraisers, the amount of the loss is conclusively determined.”); *Summit Park*, 129 F. Supp. 3d at 1151.

94. *See Providence Wash. Ins. Co. v. Gulinson*, 215 P. 154, 154 (Colo. 1923).

95. Badger, *Still Going on*, *supra* note 61.

96. Badger, *supra* note 9.

and impartial engineer or professional.⁹⁷ The goal of such a partisan appraiser is to maximize the amount of the loss.⁹⁸ The partisan appraiser completes the first step when he moves dramatically upward the range of potential appraisal outcomes by submitting a loss award that dwarfs all others.⁹⁹ Chief Judge Krieger described an instance of the first step of the appraisal dance on July 23, 2018, in *Copper Oaks Master Home Owners Ass'n v. American Family Mutual Insurance Co.*¹⁰⁰:

28. Mr. Keys [the policyholder-selected appraiser] began work on his appraisal for Copper Oaks in January 2016 and submitted his appraisal on February 29, 2016. Mr. Keys found that every roof, every elevation, every chimney, and virtually all of the siding on every building at the Copper Oaks' property had either been damaged by hail or, if undamaged, would nevertheless have to be replaced in order to fully repair the hail damage. His initial loss estimate was \$4,968,115.62, which was revised upwards to \$5,066,238.99. This was more than ten times the estimate by Mr. Whipple (\$406,234.29) [the insurer-appointed appraiser], almost eight times the amount estimated by Madsen, Kneppers & Associates (\$608,393.49) [the insurer's independent adjuster], and almost 50% greater than the estimate by the public adjuster, Mr. O'Driscoll (\$3,599,707.13) [the policyholder's contingent-fee public adjuster].¹⁰¹

As it has been described by Chief Judge Krieger, the first step of the dance, if performed adroitly, moves the upper end of possible appraisal numbers so high that the policyholder would experience a financial windfall just to receive half a loaf in a compromise outcome. In *Copper Oaks*, for example, the policyholder-appointed appraiser increased the highest possible loss estimate from \$3,599,707.13 (the contingent-fee public adjuster's figure) to \$5,066,238.99.¹⁰² He was able to do so because he employed no discernable methodology¹⁰³ and simply added up

97. Badger, *Still Going on*, *supra* note 61.

98. *Id.*

99. *Id.* ("The professional appraiser is an advocate for the policyholder and knows how to turn a legitimate \$1 million dispute as to the cost to replace a large roof into a \$5 million dispute with new allegations of damage to bricks, windows, and other additional damage components not previously part of the claim. The umpire then issues a 'compromise' appraisal award for \$1 million. Some compromise, huh? The law of large numbers prevails.")

100. *Copper Oaks Master Home Owners Ass'n v. Am. Family Mut. Ins. Co.*, No. 15-cv-01828-MSK-MJW, 2018 WL 3536324 (D. Colo. July 23, 2018).

101. *Id.* at *7.

102. *Id.*

103. *Id.* at *14–15 ("The Court finds that Mr. Keys' testimony was often evasive, ambiguous, and largely incredible. In response to many questions by the Court and counsel, Mr. Keys never described any methodology that he used to determine the scope of the hail damage. When asked how he determined that all sides of all buildings were damaged by the 2013 hail storm, he stated that an amorphous 'we' (by which the Court understands to be Mr. Keys and his staff) simply looked at all of the chimneys and elevations of all of the buildings. When asked by the Court whether there were any elevations that did not show hail damage, he gave a very limited response based on his personal knowledge: 'I am not familiar with any elevations that did not show any hail damage, no, ma'am.' When asked how he determined that the hail storm hit all four sides of every single building, he responded, 'what I have been able to learn from the engineers is when storms come through, hail

the cost of repairing or replacing “every roof, every elevation, every chimney, and virtually all of the siding on every building at the Copper Oaks’ property.”¹⁰⁴ For most appraisals, the policyholder will have effectively “won” upon completing the first step of the appraisal dance.

Several techniques exist for ensuring that an appraiser views the case in the appointing party’s favor. These include inserting into the appraiser’s engagement agreement provisions that tie the appraiser’s compensation to the amount of the appraisal award.¹⁰⁵ A less traceable, but equally effective, technique is to appoint an appraiser with fiduciary, business, fundraising, or personal relationships with the party, its law firm, or its public adjuster.¹⁰⁶

B. Appointment of Unsuspecting, Biased, or Ill-Equipped Umpires

The second step—the selection of the umpire—has even greater potential for increasing an appraisal award. The “selection of the umpire is very important to the litigants”¹⁰⁷ because the umpire and one appraiser can dictate the appraisal’s outcome.¹⁰⁸ When faced with an inflated proposed award from an appraiser, some umpires merely split the baby. Policyholders can strike the motherlode, however, if they succeed in convincing either the other appraiser or a court to appoint a biased, unsuspecting, or ill-equipped umpire. When that occurs, the sky is the limit. An unsuspecting, biased, or uninformed umpire is more likely to adopt the partisan appraiser’s inflated figure or a figure closer to it than would have been adopted by another umpire.

predominantly comes through one side and after it passes by, hail also to a lesser degree comes from a different angle.’ Never did Mr. Keys offer a specific and credible explanation as to how hail in the 2013 storm could have damaged every side of every chimney and every wall of every building in the complex, including damage under overhangs and soffits. It appears that Mr. Keys simply assumed that any visible damage to any brick or wall board on any portion of any building was necessarily caused by the 2013 hail storm, regardless of the age of the building or the general condition of the exterior brick or wall board. Mr. Keys also appears to have concluded that even portions of surfaces that displayed no damage would nevertheless have to be replaced completely, ostensibly because brick repairs could only be completed on an elevation-by-elevation basis.”)

104. *Id.* at *7.

105. *E.g.*, *Auto-Owners Ins. Co. v. Summit Park Townhome Ass’n*, 886 F.3d 863, 869 n.2 (10th Cir. 2018) (“Mr. Keys had earlier worked under a contingent-fee cap, which raised his maximum fee based on the total amount recovered by Summit Park. . . . [T]he contingent-fee cap created a financial interest by allowing Mr. Keys to earn a greater fee based on the amount of the appraisal.”); *Colo. Hosp. Servs. Inc. v. Owners Ins. Co.*, No. 14-cv-001859-RBJ, 2015 WL 4245821, at *2 (D. Colo. July 14, 2015) (vacating an appraisal award because the policyholder’s appraiser’s contract contained a provision capping the appraiser’s compensation at a certain percentage of the ultimate appraisal award); *Galvis v. Allstate Ins. Co.*, 721 So. 2d 421, 421 (Fla. Dist. Ct. 1998) (permitting an appraiser to be paid a percentage of the amount of the appraisal that the appraiser participated in determining).

106. *E.g.*, *Summit Park*, 886 F.3d at 868–71, 869 n.2.

107. Karl A. Schulz, *Accurate Outcomes in Appraisal: The Importance of the Umpire’s Subject Matter Expertise*, 15 J. CONSUMER & COM. L. 54, 55 (2012).

108. *Farmers Auto. Ins. Ass’n v. Union Pac. Ry. Co.*, 768 N.W.2d 596, 607 (Wis. 2009) (Appraisal “allows each to appoint an appraiser of their own liking, with a neutral umpire as the deciding vote.”).

Certain public adjusters and policyholder lawyers have developed strategies for getting favorable umpires appointed. One strategy is to ask a court to appoint a retired judge or mediator as an umpire. Many active judges identify with retired judges and have faith in their impartiality. Defense lawyers and insurance companies find it uncomfortable to object to a retired judge or mediator serving as an umpire who works at a mediation firm that employs former judges.

In the overwhelming majority of cases, however, retired judges and mediators cannot properly fulfill the role of an appraisal umpire—a fact that certain public adjusters and policyholder lawyers use to their advantage. Recall that both umpires and appraisers must have all the skills and resources necessary to perform the appraisal and independently.¹⁰⁹ In the Authors' experience, retired judges and mediators generally do not inspect roofs because their employers will not allow it.¹¹⁰ Typically, they make a determination without ever having laid their own eyes on the roof, which is usually the most expensive item in a hail-damage appraisal. Even if they did inspect the roof, most would not know what to look for. Retired judges and mediators tend to know little or nothing about constructing or repairing roofs or other building elements. They almost never have expertise in spotting the difference between hail damage and other types of damage. They usually have no expertise in estimating costs or preparing insurance claims. For example, the Authors have never encountered a retired judge or mediator who had a copy of Xactimate, the software used by most claim adjusters and appraisers for determining the cost of repairing property losses. The skillset of a retired judge or mediator ordinarily has little or no use in an appraisal. By analogy, a judge or mediator who has presided over medical malpractice trials or mediations does not gain the ability to practice medicine as a doctor.¹¹¹ A retired judge or mediator who has learned some accounting from accountancy malpractice litigation is not qualified to audit the financial statements of a substantial company. Similarly, a retired judge or mediator whose insurance knowledge derives from insurance litigation has not gained the ability to adjust a claim or to serve as an umpire or appraiser—particularly not on a complex property claim involving sophisticated issues of engineering, factual causation, or construction.¹¹² The role of an appraisal umpire is not the same as the role of a judge in a trial. The umpire does not simply call balls and strikes. Umpires need industry exper-

109. See Coughenour, *supra* note 85, at 415–16.

110. Axis's Objections to Defendant's Submission of Umpire Candidates, Exhibit 10, Axis Surplus Ins. Co. v. City Ctr. W., LP, No. 2015-cv-30453 (D. Colo. Dec. 1, 2016).

111. For similar reasoning, see *Neal v. CSC Credit Servs., Inc.*, No. 8:02CV378, 2004 WL 628212, at *1 (D. Neb. Mar. 30, 2004) (“[A] lawyer would hardly qualify as a medical expert in a malpractice suit merely because he or she has litigated other malpractice cases.”).

112. See *Cal. Shoppers, Inc. v. Royal Globe Ins. Co.*, 221 Cal. Rptr. 171, 208 (Cal. Ct. App. 1985) (holding that a highly-experienced insurance trial attorney was unqualified to offer expert opinions regarding “an expert on insurance company practices”).

tise sufficient to enable them to personally investigate, adjust, and determine complex insurance losses, something retired judges and mediators generally have not done and cannot do.

The inadequacy of retired judges and mediators as a group to serve as insurance-appraisal umpires is well-known.¹¹³ In a 2009 law review article, one commentator explained this issue as follows:

Similar to an appraiser, an umpire should be qualified to independently inspect and appraise a loss and to determine which, if either, of the parties' appraisers is correct in his appraisal of the loss. An umpire's qualifications should include, at a minimum, "experience in building inspection, communicating with contractors, engineers and architects, damage appraisal, analysis or estimating." This is perhaps the most crucial issue in determining the fairness of the appraisal process

While arbitrators may frequently resolve issues about which they possess limited expertise, umpires must possess qualifications specific to the subject matter, and in the case of property insurance claims, those qualifications should include experience appraising property damage and estimating repairs. An umpire should be a seasoned contractor or appraiser, and able to perform an independent investigation and meaningfully analyze and evaluate the items of damage about which the parties' appraisers disagree. A retired judge or other attorney experienced in alternative dispute resolution, while certainly qualified in that field of expertise, does not have the capability to perform this more narrow function of independently appraising damages and estimating repairs.¹¹⁴

In recognizing that umpires need technical expertise, there is "a growing body of law [requiring] subject matter expertise" to serve as an umpire.¹¹⁵ As one commentator has noted, "the umpire must also have subject matter expertise in those areas in order to knowledgeably decide the unique issues of those cases."¹¹⁶ "Making an accurate decision as to which appraiser is correct requires subject matter expertise."¹¹⁷ For such reasons, courts have increasingly resisted policyholders' attempts to have

113. See Coughenour, *supra* note 85, at 415–16.

114. *Id.* (citations omitted); see also *St. Charles Par. Hosp. Dist. No. 1 v. United Fire & Cas. Co.*, No. 07-5924, 2008 WL 1884051, at *2–3 (E.D. La. Apr. 28, 2008) (stating that a qualified umpire will have "subject matter expertise and be[] knowledgeable about the issues in dispute"); *Liberty Mut. Fire Ins. Co. v. Hernandez*, 735 So. 2d 587, 588–89 (Fla. Dist. Ct. App. 1999) (holding that appraisal umpires are expected to act on their own knowledge and investigation, and therefore must possess experience relevant to the subject matter being appraised); *Levine v. Wiss & Co.*, 478 A.2d 397, 400 (N.J. 1984) ("We have recognized the distinction between a person engaged because of special knowledge, technical skill, or expertise to act as an 'appraiser' in a dispute, as opposed to one appointed to serve in a quasi-judicial capacity as an 'arbitrator' . . ." (citation omitted)); *Providence Lloyds Ins. Co. v. Crystal City Indep. Sch. Dist.*, 877 S.W.2d 872, 877 (Tex. App. 1994) ("He [the umpire] is a third appraiser.").

115. Schulz, *supra* note 107.

116. *Id.* at 57.

117. *Id.*

retired judges and mediators appointed as umpires. In one of the Hurricane Ike damage cases, *American Legion Harrisburg Post No. 472 v. Westport Insurance Co.*,¹¹⁸ one federal judge appointed an engineer as an umpire and rejected the plaintiff's request to appoint a retired judge.¹¹⁹ The court noted that the "plaintiff suggests a number of former state court judges who appear to be fair and might make good mediators in this type of case."¹²⁰ A mediator and an umpire, however, are not the same thing: "But as the defendant points out, they have no apparent experience in appraising structural damage or estimating repair costs or in damage analysis. So I think the most appropriate person to appoint and the person who I will appoint is now David [Nicastro], who will be the umpire."¹²¹ The appointment of retired judges and mediators as umpires favors policyholders because it leads to compromised outcomes that tend to generate follow-on bad-faith litigation.¹²²

Not all policyholder lawyers or public adjusters attempt to appoint retired judges or mediators as umpires in every appraisal. Although it involves greater risk, some policyholder representatives seek umpire appointments for advocates who have technical expertise. These types of umpires may be public adjusters, roofers, or allies of the appointing party's law firm. Although it is more difficult to convince a judge to appoint such an umpire, it has been done. Some judges have been convinced by the contention that the umpire candidate is "local" and thus has superior "local" knowledge of the loss. The "local" argument sometimes turns out to be a ruse.¹²³

For example, the court appointed the umpire in *Summit Park* in part because he was "local" to the site of the loss in Colorado.¹²⁴ In the same general time period, that same umpire succeeded in being appointed as umpire for an appraisal in Nassau County, New York, because the judge there thought his "closeness to the subject property . . . will give him a

118. *Id.* at 57 n.43 (citing *Am. Legion Harrisburg Post No. 472 v. Westport Ins. Co.*, No. 10-2770 (S.D. Tex. 2008)).

119. *Id.* at 57.

120. *Id.*

121. *Id.*

122. *Id.* ("The implications here are important. If the umpire makes a compromise decision rather than an accurate one, he may create a bad faith case where one does not really exist. For example, an umpire may issue a compromise decision showing that the insurer failed to pay all or part of the loss. The insured could then turn around and use that failure to pay all or part of the loss as evidence of bad faith, arguing that the insurer failed to pay what a panel of independent experts decided was payable under the policy. This could be a powerful argument in a motion for summary judgment or in front of a jury. Therefore, it is imperative that the umpire reach the accurate outcome in order to avoid artificially and incorrectly providing support to bad faith liability where it otherwise does not exist.")

123. *See infra* notes 124–27.

124. Transcript of Motions Hearing at 9–10, *Auto-Owners Ins. Co. v. Summit Park Townhome Ass'n*, No. 14-cv-13417-LTB (D. Colo. Sept. 28, 2015), ECF No. 32 (appointing umpire because "[h]e is local, in addition to better qualifications").

greater understanding of the loss in the context of the local area.”¹²⁵ To portray himself as “local” in both Colorado and New York, the umpire changed his resume to emphasize his “office” addresses nearest each loss.¹²⁶ All of his “office” addresses, however, were UPS stores.¹²⁷ Some advocates have used various tactics with purported success. For instance, the appraiser in *Summit Park* claimed to have helped his clients recover over \$100 million in appraisal awards.¹²⁸ In the *Summit Park* case, such tactics were tested in Colorado.¹²⁹

III. *SUMMIT PARK* TRIAL COURT PROCEEDINGS: AN EARLY TEST OF THE HAIL-LITIGATION GOLD RUSH IN COLORADO

In recent years, such claim tactics have reached Colorado and have spread rapidly. One of the early cases demonstrating the potential effectiveness of these tactics arose from a hail-damage claim brought by the Summit Park Townhome Association, Inc. (Summit Park or the Association), a homeowner’s association for a community of fifty-seven townhomes in Aurora, Colorado.¹³⁰ The Association’s hail claim began unremarkably. Auto-Owners Insurance Company (Auto-Owners) issued an insurance policy to Summit Park affording certain commercial property coverage.¹³¹ A hailstorm passed through Aurora in September 2013.¹³² Summit Park submitted an insurance claim to Auto-Owners for hail damage.¹³³ “Auto-Owners investigated the claim and paid Summit Park some \$245,000.”¹³⁴ Summit Park hired a public adjuster who valued the hail loss at “\$7,140,117.82 for the damaged buildings” before any law-

125. Plaintiff Axis Surplus Insurance Company’s Response to Defendant’s Motion to Appoint Umpire at 3–4, Exhibit 5, *Axis Surplus Ins. Co. v. City Ctr. W., LP*, No. 2015-cv-30453 (D. Colo. Nov. 20, 2015); see *Simat v. Tower Ins. Co. of N.Y.*, No. 8969-2014, 2016 WL 3647529, at *1 (N.Y. Sup. Ct. Jan. 29, 2016) (“Having reviewed the credentials of all the potential umpires offered by the parties, the court finds them all competent to perform the task at hand. The court appoints Robert J. Norton, CPCU, AIC as umpire, largely based upon the location of his business, it[s] closeness to the subject property and the assumption that this closeness will give him a greater understanding of the loss in the context of the local area.”).

126. Plaintiff Axis Surplus Insurance Company’s Response to Defendant’s Motion to Appoint Umpire, *supra* note 125, at 3–4, Exhibits 3–5.

127. *Id.* at 3, Exhibit 1. Chief Judge Krieger subsequently vacated an appraisal award because of that umpire’s improper conduct evidencing pro-policyholder bias, among other reasons. *Copper Oaks Master Home Owners Ass’n v. Am. Family Mut. Ins. Co.*, No. 15-cv-01828-MSK-MJW, 2018 WL 3536324, at *15–16 (D. Colo. July 23, 2018).

128. See Plaintiff’s Supplement to Its January 14, 2016 Objections to George Keys Acting as Defendant’s Appraiser and Request for Sanctions, Exhibit 6 at 14, *Auto-Owners Ins. Co. v. Summit Park Townhome Ass’n*, No. 14-cv-03417-LTB (D. Colo. Apr. 15, 2016), ECF No. 55-6 [hereinafter Plaintiff’s Supplement, Exhibit 6].

129. *Auto-Owners Ins. Co. v. Summit Park Townhome Ass’n*, 100 F. Supp. 3d 1099, 1100 (D. Colo. 2015).

130. *Id.* at 1100.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

suit was filed.¹³⁵ Unsatisfied with Auto-Owners’ payment, Summit Park “hired counsel to press its cause with Auto-Owners.”¹³⁶

A. The Association Hires a Florida-Based Law Firm that “Preach[es]” “Anything Goes” Strategies that “Just Win, Baby”

Summit Park’s choice of law firm proved fateful. The firm’s official blog expressed a willingness to do anything technically legal to “win” appraisals.¹³⁷ In August 2009, the law firm’s blog published an article in which the firm’s leader and namesake stated that appraisals have essentially “no rules.”¹³⁸ The article explained that appraisals are an “anything goes” environment in which the law firm would use any means short of “fraud” to “win,” including “get[ting] into the mud”:

If the rule is that there are no rules, I can get into the mud with the best of anybody. All I care about for my client is winning anyway I legally can if we go to an appraisal. Absent fraud, the Courts in informal situations have just about blessed that “anything goes.”¹³⁹

The law firm’s article went even further, stating that “[u]mpire shopping” “goes on everyday in the banter of the appraisal process,” which implies that the article author finds “umpire shopping” acceptable.¹⁴⁰ Another article passage lamented that “[m]any policyholder appraisers do not fully understand how to win the appraisal for the policyholder,” as though the job of an impartial neutral is to “win” for one side.¹⁴¹ The law firm’s article even rejected the notion that appraisals should be fair: “Some may suggest that I am wrong, and that the goal of appraisal is a fair number for both sides.”¹⁴² The law firm’s blog noted that “insurers wrote this clause into the policy” and now “[t]he worm turns.”¹⁴³

Summit Park’s law firm did not simply engage in these tactics itself. The article states: “This is what I teach and preach to public adjusters that attend our workshops. Unlike an insurer to its customer, I have no obligation to be fair and act in good faith to the insurance company during the appraisal process.”¹⁴⁴ The use of the term “preach” is significant. It suggests evangelism—a gospel. This law firm’s gospel, however, in-

135. *Auto-Owners Ins. Co. v. Summit Park Townhome Ass’n*, 198 F. Supp. 3d 1239, 1242 (D. Colo. 2016), *aff’d*, 886 F.3d 852 (10th Cir. 2018), and *aff’d on other grounds*, 886 F.3d 863 (10th Cir. 2018).

136. *Summit Park*, 100 F. Supp. 3d at 1100.

137. Chip Merlin, *Appraisers, Umpires and Appraisals as Valid Substitutions for the Right to a Jury Trial Depend on Viewpoint*, MERLIN L. GROUP: PROP. INS. COVERAGE L. BLOG (Aug. 8, 2009), <https://www.propertyinsurancecoveragelaw.com/2009/08/articles/insurance/appraisers-umpires-and-appraisals-as-valid-substitutions-for-the-right-to-a-jury-trial-depend-on-viewpoint>.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* (emphasis added).

verts the golden rule (“Unlike an insurer to its customer, I have no obligation to be fair and act in good faith to the insurance company”¹⁴⁵), and encourages policyholders to do anything, including act in bad faith, to “win.”

In another August 2009 article, the law firm’s official blog stated regarding appraisal: “There is no second chance. *‘Just win, baby’* is the mantra every policyholder better have in an appraisal.”¹⁴⁶ The article also stated: “My advice to policyholders: **WIN THE APPRAISAL ANY LEGAL WAY YOU CAN BECAUSE THERE IS LITTLE LIKELIHOOD OF OVERTURNING A BAD APPRAISAL AWARD.**”¹⁴⁷

Although “just win, baby” tactics may be successful in some cases, they carry risks. One of the Association’s lawyers had been “regularly sanctioned and/or admonished for litigation misconduct in Florida, to no apparent effect.”¹⁴⁸ “In 2006, U.S. District Judge Gregory Presnell imposed a sanction of attorney’s fees and expenses against” one of the Association’s lawyers “for his deposition misconduct.”¹⁴⁹ “In 2009, Florida Circuit Judge Timothy P. McCarthy recused himself from [that lawyer’s] matters” and told him in open court, “I do not trust you.”¹⁵⁰ “In 2010, U.S. District Judge Virginia Hernandez Covington wrote” that the same lawyer’s “reputation for candor has been questioned by this Court” and, as a result, she “disregard[ed]” his “opinions regarding the appropriate hourly rate to apply in determining a motion for attorney’s fees.”¹⁵¹ “Finally, in 2012, U.S. District Judge Patricia Seitz told” that lawyer “that she ‘contemplated an order to show cause whether or not I should allow you to appear as counsel in this case’ after reviewing his deposition conduct.”¹⁵²

The Association’s law firm’s official blog acknowledged the Florida-specific origin of its “anything goes” philosophy.¹⁵³ Florida’s “public adjuster industry” and “knowledgeable policyholder bar” pioneered it.¹⁵⁴ According to the blog, the Florida strategy has resulted in Florida ap-

145. *Id.*

146. Chip Merlin, *Appraisals Better Be Won Because They Are Difficult to Overturn—Even if Unfair in Result or Procedure*, MERLIN L. GROUP: PROP. INS. COVERAGE L. BLOG (Aug. 7, 2009) <https://www.propertyinsurancecoveragelaw.com/2009/08/articles/insurance/appraisals-better-be-won-because-they-are-difficult-to-overturn-even-if-unfair-in-result-or-procedure>.

147. *Id.*

148. *See, e.g.*, *Auto-Owners Ins. Co. v. Summit Park Townhome Ass’n*, 198 F. Supp. 3d 1239, 1247 (D. Colo. 2016), *aff’d*, 886 F.3d 852 (10th Cir. 2018), and *aff’d on other grounds*, 886 F.3d 863 (10th Cir. 2018).

149. *Id.*

150. *Id.*

151. *Id.* (internal quotation mark omitted) (citing *Ottaviano v. Nautilus Ins. Co.*, 717 F. Supp. 2d 1259, 1269–70 (M.D. Fla. 2010)).

152. *Id.*

153. *See* Chip Merlin, Comment to Merlin, *supra* note 146 (Aug. 7, 2009, 8:10 PM).

154. *Id.*

praisals ending “with a good result” in which “the policyholder recovery is fully realized.”¹⁵⁵ Consistent with the Florida origins of these tactics, many of the people involved in the hail-litigation gold rush in Colorado come from Florida.¹⁵⁶

B. The Association Forces an Appraisal, Obtains a Stay of Auto-Owners’ Action, and Appoints a Partisan Appraiser

Faced with a law firm versed in Florida tactics, and a multimillion-dollar hail claim, Auto-Owners filed an “action for declaratory judgment to determine the extent of coverage . . . for damage to [the] buildings” in the District of Colorado.¹⁵⁷ The Honorable Lewis T. Babcock presided over the case.¹⁵⁸

“Shortly after” Auto-Owners filed the case, “Summit Park invoked the appraisal provision of the policy”¹⁵⁹ and filed a motion to compel appraisal.¹⁶⁰ The motion “request[ed] that the Court compel Auto-Owners’ participation in the appraisal process outlined in the policy in order to determine the ‘amount of loss’ it sustained as a result of a September 2013 hailstorm; stay the litigation pending completion of that process; and reserve jurisdiction to select an umpire.”¹⁶¹ The court granted the motion, compelled appraisal, and stayed the litigation in April 2015.¹⁶² The appraisal provision required in pertinent part that

155. *Id.*

156. *E.g.*, *Auto-Owners Ins. Co. v. Summit Park Townhome Ass’n*, 886 F.3d 863, 865 (10th Cir. 2018) (identifying the appellate counsel for the lawyers who represented the policyholder as a Tampa, Florida attorney); *Summit Park*, 198 F. Supp. 3d at 1240 (identifying the lawyers representing the policyholder as Tampa, Florida lawyers); *Auto-Owners Ins. Co. v. Summit Park Townhome Ass’n*, No. 14-cv-03417-LTB, 2016 WL 1321507, at *3 (D. Colo. Apr. 5, 2016) (in a case involving a Colorado appraisal, noting the policyholder-appointed appraiser’s many activities in Florida and connections to Florida); *Axis Surplus Ins. Co. v. City Ctr. W. LP*, No. 2015-cv-30453, 2016 WL 3254368, at *1 (Weld Cty. Colo. Dist. Ct. July 8, 2016) (permitting a public adjuster who is based in Florida and is a member of the Florida Association of Public Insurance Adjusters to serve as the policyholder-appointed appraiser in a Colorado appraisal matter); *Dep’t of Fin. Servs. v. Haber*, DFS Case No. 104466-09-AG, 2012 WL 1601717, at *9 (Fla. Div. Admin. Hrgs. Apr. 27, 2012) (unredacted copy on file with the authors) (“Angela Laura Haber” was stripped of her insurance licenses in her former home state of Florida for entering a no-contest plea to a felony “crime of moral turpitude” involving “inherent baseness or depravity” because she stole “the funds of an elderly woman who could not care for herself” while “acting in a position of trust”); *Opening Brief at 7 n.1, 34 n.2, Owners Ins. Co. v. Dakota Station II Condo. Ass’n*, No. 2017SC583 (Colo. June 5, 2018), 2018 WL 3493729, at *7 n.1, *34 n.2 (“After she pled no contest to felony grand theft and Florida regulatory authorities revoked her insurance licenses, Ms. Haber moved to Colorado, changed her name, and began pursuing appraisal and umpire jobs without regulatory oversight or disclosure of her criminal history.”); *see In re* Petition of Angela Laura Haber, No. 14C02241 (Denver Cty. Colo. Dist. Ct. Aug. 4, 2014) (“Angela Laura Haber” petitions to change her name to “Laura Haber” in Colorado).

157. Order on Application for Attorneys’ Fees and Expenses at 1, *Auto-Owners Ins. Co. v. Summit Park Townhome Ass’n*, No. 14-cv-03417-LTB (D. Colo. Oct. 14, 2016).

158. *Id.*

159. *Summit Park*, 198 F. Supp. 3d at 1241.

160. *Auto-Owners Ins. Co. v. Summit Park Townhome Ass’n*, 100 F. Supp. 3d 1099, 1100–01 (D. Colo. 2015).

161. *Id.* at 1100.

162. *Id.* at 1105.

[e]ach 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.¹⁶³

Auto-Owners selected an unquestionably impartial and competent appraiser, a well-respected professional engineer with extensive experience with complex roofing systems, including the roof at Denver International Airport.¹⁶⁴ Summit Park, however, appointed an appraiser with fiduciary, financial, and personal ties with Summit Park's law firm who had publicly stated that he is an advocate for policyholders.¹⁶⁵

C. Auto-Owners Counters the Association's Counsel's "Anything Goes" Strategy

After the parties disputed various aspects of the appraisal process, Judge Babcock entered an order imposing appraisal guidelines to "protect the integrity of the process and increase the likelihood of a valid appraisal award."¹⁶⁶ The court required the parties to appoint impartial appraisers under standards of impartiality materially the same as those applicable to Colorado arbitrators.¹⁶⁷ Similar standards had been applied to insurance appraisers at that time under a bulletin issued by the Colorado Division of Insurance.¹⁶⁸ The order (the Disclosure Order) imposed the following duty to disclose:

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. Each appraiser must, after making a reasonable inquiry, disclose to all parties and any other appraiser any known facts that a reasonable person would consider likely to affect his or her impartiality, including (a) a financial or personal interest in the outcome of the appraisal; and (b) a current or previous relationship with any of the parties (including their counsel or representatives) or with any of the participants in the appraisal proceeding, including licensed public adjusters, witnesses, another appraiser, or the umpire. Each appraiser shall have a continuing obligation to disclose to the parties and to any other appraiser any facts that he or she learns after accepting appointment that a reasona-

163. Auto-Owners Ins. Co. v. Summit Park Townhome Ass'n, 886 F.3d 852, 855–56 (10th Cir. 2018).

164. See *Summit Park*, 198 F. Supp. 3d at 1241; Expert Resume of Jim D. Koontz, *Summit Park*, 198 F. Supp. 3d 1239 (Feb. 19, 2016), 2016 WL 8467854.

165. Auto-Owners Ins. Co. v. Summit Park Townhome Ass'n, No. 14-cv-03417-LTB, 2016 WL 1321507, at *1,*3 (D. Colo. Apr. 5, 2016) (identifying extensive ties), *aff'd*, 866 F.3d 852.

166. Auto-Owners Ins. Co. v. Summit Park Townhome Ass'n, 129 F. Supp. 3d 1150, 1154–55 (D. Colo. 2015).

167. *Id.* at 1155 (citing COLO. REV. STAT. § 13-22-212 (2018)).

168. *Id.* (citing Colo. Div. of Ins. Bulletin B-5.26 (#2), 2014 WL 6792685 (Dec. 3, 2014)).

ble person would consider likely to affect his or her impartiality. If an appraiser discloses a fact required to be disclosed pursuant to this paragraph and a party files an objection in this Court to the appointment or continued services of the appraiser no later than 15 days after becoming aware of such fact (or from the date of this order, whichever comes later), the objection may be a ground for vacating an award made by the appraiser. The same objection procedure shall apply in the event a party becomes aware of information bearing on an appraiser's competency.¹⁶⁹

In adopting these requirements, the court faithfully adhered to Colorado Supreme Court precedent holding that "[a]ppraisers are not [arbitration] referees, but their duty of impartiality is the same"¹⁷⁰ and other case law imposing appraisal procedures under the common law.¹⁷¹ The court required only a "reasonable inquiry" to meet the duty of disclosure.¹⁷² The Disclosure Order reminded the parties and their counsel of their duty to ensure compliance with the order and warned of the consequences of noncompliance in all-capitalized letters:

"NOTICE IS GIVEN THAT, IF THE COURT FINDS THAT THE PARTIES AND/OR THEIR COUNSEL HAVE NOT COMPLIED WITH THIS ORDER, THE COURT WILL IMPOSE SANCTIONS AGAINST THE PARTIES AND/OR THEIR COUNSEL PURSUANT TO THE COURT'S INHERENT AUTHORITY."¹⁷³

The Disclosure Order prohibited the Association and its law firm from attempting to manipulate the appraisal with "anything goes" tactics.¹⁷⁴ The order contemplated and required an appraisal performed by appraisers who, like any neutral decision maker, would act "without the slightest degree of friendship or favor toward either party."¹⁷⁵ Under the Disclosure Order, the law firm could not act as though it had "no obligation to be fair and act in good faith to the insurance company during the appraisal process."¹⁷⁶ To the contrary, the Disclosure Order required both sides to "protect the integrity of the process."¹⁷⁷

D. In Violation of the Disclosure Order, the Association and Its Law Firm Continue Business as Usual

Before the ink was dry on the Disclosure Order, the Association and its law firm resumed business as usual. The Disclosure Order entered on

169. *Id.* at 1157.

170. *Providence Wash. Ins. Co. v. Gulinson*, 215 P. 154, 155 (Colo. 1923).

171. *Summit Park*, 129 F. Supp. 3d at 1155 (citing *Providence*, 215 P. at 155; and then citing *St. Paul Fire & Marine Ins. Co. v. Walsenburg Land & Dev. Co.*, 278 P. 602, 602-03 (Colo. 1929)).

172. *Id.* at 1156.

173. *Id.* at 1158.

174. *See id.* at 1156-58.

175. *Noffsinger v. Thompson*, 54 P.2d 683, 683 (Colo. 1936).

176. *Merlin*, *supra* note 137.

177. *Summit Park*, 129 F. Supp. 3d at 1155.

September 10, 2015.¹⁷⁸ Twelve days later, on September 22, 2015, Summit Park’s law firm submitted a brief suggesting various umpire candidates.¹⁷⁹ The court selected one of them in part based on a resume submitted by Summit Park’s law firm.¹⁸⁰ The resume inaccurately portrayed the umpire candidate as local.¹⁸¹

Although the Disclosure Order imposed a “continuing” duty to disclose any facts that a reasonable person might consider likely to affect an appraiser’s impartiality,¹⁸² Summit Park and its law firm provided no meaningful disclosures. To the contrary, their one disclosure, dated June 15, 2015, which occurred before the Disclosure Order, inaccurately stated that the appraiser they selected “does not have any significant prior business relationship with” the Association’s law firm.¹⁸³ Auto-Owners requested further disclosures, but neither the law firm nor the appraiser “ever made the more detailed disclosures requested.”¹⁸⁴ Instead, the appraiser sent an email to Auto-Owners’ counsel on November 24, 2015—after the Disclosure Order was in place—stating, among other things, that “I do not have any substantial business relationship or financial interest in [the Association’s law firm].”¹⁸⁵ The law firm “assisted” the appraiser “in making this disclosure.”¹⁸⁶

The appraisal proceeded. In December 2015, the appraisal panel issued an award signed by the appraiser selected by the policyholder and the umpire.¹⁸⁷ The engineer Auto-Owners had selected to serve as an appraiser did not sign the award.¹⁸⁸ The split-decision appraisal award dramatically increased the amount of the loss far above anything even Summit Park’s contingent-fee public adjuster had suggested. The public adjuster estimated a replacement-cost value “of \$7,140,117.82 for the damaged buildings.”¹⁸⁹ The appraisal award, “by contrast, was

178. *Id.* at 1158.

179. Response to Plaintiff’s Partially Unopposed Motion for Appointment of Umpire at 3–6, Auto-Owners Ins. Co. v. Summit Park Townhome Ass’n, No. 14-cv-03417-LTB (D. Colo. Sept. 22, 2015), 2015 WL 13632288, at *3–6.

180. *See id.* at 4–5; 2015 WL 13632288, at *4–5; *see also* Motions Hearing Transcript at 9–10, Auto-Owners Ins. Co. v. Summit Park Townhome Ass’n, No. 14-cv-03417-LTB (D. Colo. Sept. 25, 2015).

181. *See* Response to Plaintiff’s Partially Unopposed Motion for Appointment of Umpire, *supra* note 179, at 4–5, 2015 WL 13632288, at *4–5; *see also* Motions Hearing Transcript, *supra* note 180.

182. *Summit Park*, 129 F. Supp. 3d at 1157.

183. Auto-Owners Ins. Co. v. Summit Park Townhome Ass’n, 198 F. Supp. 3d 1239, 1242 (D. Colo. 2016), *aff’d*, 886 F.3d 852 (10th Cir. 2018), and *aff’d on other grounds*, 886 F.3d 863 (10th Cir. 2018).

184. *Id.*

185. *Id.* The letter went on to say that he had been retained “under separate contracts” by clients that had also hired the Association’s law firm. *Id.*

186. *Id.*

187. *Id.*

188. *See id.*

189. *Id.*

\$10,870,090.96, an increase of \$3.47 million, or 47%.”¹⁹⁰ What began as a \$245,000 claim¹⁹¹ had become a \$10 million claim. The Colorado insurance statutes magnified the stakes to \$30 million.¹⁹² On January 21, 2016, following the appraisal’s completion, Summit Park filed counterclaims seeking treble recovery and fees under the insurance statutes, claiming more than \$30 million.¹⁹³

The appraisal increased the loss by adding new categories of compensable damage not previously claimed or contemplated. For example, the split decision awarded over \$1.7 million for extensive repair or replacement of the brick veneers of over fifty buildings, a type of damage not previously claimed.¹⁹⁴ The appraisal award also called for the replacement of over seven linear miles of gutters, far more than the public adjuster had thought necessary.¹⁹⁵ Other examples could be cited.

E. Auto-Owners Pays the Appraisal Award and Discovers Violations of the Disclosure Order

Auto-Owners timely paid the actual cash value of the appraisal award under a reservation of rights to challenge the award.¹⁹⁶ “Auto-Owners then launched an investigation, which culminated in an objection to Mr. Keys.”¹⁹⁷ It discovered that the Association, its law firm, and the appraiser they selected had violated the Disclosure Order.¹⁹⁸ In written objections, Auto-Owners informed the court of numerous and deep connections between Summit Park’s law firm and the appraiser that had not been disclosed, as well as other evidence showing that the appraiser was biased.¹⁹⁹ After reviewing the evidence, Judge Babcock vacated the ap-

190. *Id.*

191. *Auto-Owners Ins. Co. v. Summit Park Townhome Ass’n*, 100 F. Supp. 3d 1099, 1100 (D. Colo. 2015).

192. *See Auto-Owners Ins. Co. v. Summit Park Townhome Ass’n*, 886 F.3d 863, 873 (10th Cir. 2018).

193. Defendant/Counter-Plaintiff’s Answer and Affirmative Defenses to Second Amended Complaint for Declaratory Judgment; Counterclaims and Demand for Jury Trial at 22–23, *Auto-Owners Ins. Co. v. Summit Park Townhome Ass’n*, No. 14-cv-03417-LTB (D. Colo. Jan. 21, 2016), ECF No. 45.

194. Appraisal Award, Part 1 at 1–24, *Auto-Owners Ins. Co. v. Summit Park Townhome Ass’n*, No. 14-cv-03417-LTB (D. Colo. Dec. 23, 2015), ECF No. 35-1; Appraisal Award, Part 2 at 1–24, *Auto-Owners Ins. Co. v. Summit Park Townhome Ass’n*, No. 14-cv-03417-LTB (D. Colo. Dec. 23, 2015), ECF No. 35-2.

195. Appraisal Award, Part 1, *supra* note 194; Appraisal Award, Part 2, *supra* note 194; Estimate of C3 Group, *Auto-Owners Ins. Co. v. Summit Park Townhome Ass’n*, No. 14-cv-03417-LTB (D. Colo. Jan. 4, 2016), ECF No. 37-2.

196. *Auto-Owners Ins. Co. v. Summit Park Townhome Ass’n*, 198 F. Supp. 3d 1239, 1242 (D. Colo. 2016), *aff’d*, 886 F.3d 852 (10th Cir. 2018), and *aff’d on other grounds*, 886 F.3d 863 (10th Cir. 2018); *Auto-Owners Ins. Co. v. Summit Park Townhome Ass’n*, 886 F.3d 852, 855 (10th Cir. 2018).

197. *Auto-Owners Ins. Co. v. Summit Park Townhome Ass’n*, 886 F.3d 863, 867 (10th Cir. 2018).

198. *Id.*

199. *Summit Park*, 198 F. Supp. at 1242–43.

praisal award because the appraiser was biased.²⁰⁰ The evidence that supported his conclusion falls into several categories.²⁰¹

First, the appraiser and certain attorneys from the Association's law firm had entered into multiple fiduciary relationships in the past.²⁰² Lawyers affiliated with the firm had represented the appraiser as his personal attorneys in two past lawsuits in Florida.²⁰³ The firm had also performed transactional work for the appraiser.²⁰⁴ It filed "articles of incorporation with the Florida Secretary of State in 1997 on behalf of a public adjusting business for which [the appraiser] served as vice president."²⁰⁵ "The firm then served as that corporation's registered agent for [ten] years."²⁰⁶ Worse, the firm also served "as the registered agent in Texas from 2006 to 2008 for" the precise "business through which [the appraiser] has been rendering his services in this case."²⁰⁷ These fiduciary relationships required a relationship consisting of loyalty, not impartiality.²⁰⁸ None of these relationships were disclosed in compliance with the Disclosure Order.²⁰⁹

Second, the appraiser had undertaken other "joint activities" with lawyers at the Association's law firm.²¹⁰ These activities included founding "the Florida Association of Public Insurance Adjusters" (FAPIA), whose "number one goal is to protect policyholders and the public adjusting profession."²¹¹ The appraiser served as president of FAPIA.²¹² While president, he presented the head of Summit Park's law firm with an award for being a "Gold Sponsor" of FAPIA,²¹³ meaning that the appraiser and the law firm had a financial relationship in which the law firm gave money to the appraiser's organization. Moreover, the appraiser was involved with a political action committee "to further the legislative agenda of FAPIA."²¹⁴ The appraiser and one of the Association's counsel of record in *Summit Park* had recently taught a workshop at a conference.²¹⁵ The record does not reflect whether the "workshop" referenced

200. *Id.*

201. *Auto-Owners Ins. Co. v. Summit Park Townhome Ass'n*, No. 14-cv-03417-LTB, 2016 WL 1321507, at *3-4 (D. Colo. Apr. 5, 2016), *aff'd*, 886 F.3d 852 (10th Cir. 2018).

202. *Id.* at *3.

203. *Id.*

204. *See id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *See id.* at *5.

209. *Id.* at *1, *6.

210. *Id.* at *3.

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.* (internal citation omitted).

215. *Id.*

the firm's "anything goes," "just win, baby" message. None of these connections were disclosed.²¹⁶

Third, the appraiser had served as "either an appraiser or expert witness for the same client [the law firm] represented" in thirty-three cases.²¹⁷ And in the appraiser's marketing brochure, the Association's counsel of record in *Summit Park* stated that the appraiser "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."²¹⁸ "Untold" is correct. The number was neither told nor disclosed.²¹⁹

Fourth, the appraiser had made numerous statements over the years evidencing subjective bias in favor of policyholders and against insurers.²²⁰ He gave "a presentation regarding how to 'harvest the claim money' from a particular insurance company, 'QBE,' and how to use QBE's contractual provision for appraisal to short circuit a lengthy adjustment."²²¹ The appraiser also "launched a 'natural disaster insurance recovery' firm called 'Risk Worldwide' whose stated purpose is '[t]o shift the balance of power from the insurer to the policy holder."²²² The appraiser had also made various comments showing bias, including that he "ha[d] dedicated his professional life to being a voice for policyholders in property insurance claims" and "was taught to always handle a claim as if my momma was the insured."²²³

Fifth, *Summit Park* initially retained the appraiser under an agreement containing a provision that capped his hourly fee at 10% of the recovery from Auto-Owners, thereby requiring him to find Auto-Owners must pay more to ensure his own bill would be paid.²²⁴ The appraiser worked under the contingent-cap agreement "for approximately four months" before the cap provision was removed.²²⁵ None of these facts were disputed and none were timely disclosed.²²⁶ Indeed, Auto-Owners discovered almost all of them through its own diligence, without the aid of discovery.²²⁷ A subsequent fee award in favor of Auto-Owners re-

216. *Id.* at *6.

217. *Id.* at *3.

218. *Id.*

219. *See id.* at *6.

220. *Id.* at *3.

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.* at *4.

225. *Id.*

226. *Id.* at *6.

227. Plaintiff's Supplement, Exhibit 6, *supra* note 128.

vealed that it incurred at least \$354,350.65 in fees and expenses investigating these facts.²²⁸

F. The District Court Rules that Summit Park's Appraiser Is Biased and Vacates the Appraisal Award

The district court vacated the appraisal award because Summit Park and its counsel had violated the Disclosure Order and selected a biased appraiser.²²⁹ The district court noted that the Disclosure Order provided that “[a]n 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.”²³⁰ The court also required the same level of impartiality of the appraiser that is required of arbitrators, meaning that the appraiser must be “without the slightest degree of friendship or favor toward either party.”²³¹

Summit Park’s appraiser could not be considered impartial under that definition of the term.²³² Not only had the appraiser worked on “dozens of prior cases” with Summit Park’s law firm, he had retained the firm’s lawyers as his “personal counsel.”²³³ Moreover, the firm had incorporated certain businesses he owned and also served as the registered agent for some of his companies.²³⁴ These facts, combined with the firm’s history of donating to a pro-policyholder advocacy group led by the appraiser, established bias.²³⁵ The appraiser’s relationship with Summit Park’s law firm was “sufficient by itself to render him other than impartial, [but] the totality of the circumstances here make this conclusion unavoidable.”²³⁶ One of those circumstances included his contingent-cap fee agreement under which he performed a portion of his work.²³⁷ The terms of that agreement encouraged the appraiser to award more money in the appraisal to lift the cap on his hourly compensation.²³⁸ “The fact that [the appraiser] was operating under the agreement, even for a short period, is enough, by itself, to render him other than impartial.”²³⁹ Finally, the district court relied on the outcome of the appraisal award to confirm the partiality of Summit Park’s appraiser.²⁴⁰ Consistent with his onetime financial incentive to inflate the appraisal award,

228. *Auto-Owners Ins. Co. v. Summit Park Townhome Ass’n*, 886 F.3d 863, 867 (10th Cir. 2018).

229. *Summit Park*, 2016 WL 1321507, at *4–7.

230. *Id.* at *4.

231. *Id.*

232. *Id.* at *5.

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.* (citing *Colo. Hosp. Servs. Inc. v. Owners Ins. Co.*, No. 14-CV-001859-RBJ, 2015 WL 4245821, at *2 (D. Colo. July 14, 2015)).

239. *Id.*

240. *Id.*

the appraiser signed an award that increased the highest estimate of the loss by “\$3.47 million, or 47%” to \$10,870,090.96.²⁴¹ “Such a dramatic increase, coinciding with [the Summit Park’s appraiser’s] involvement in this case, confirms my doubts regarding his impartiality,” Judge Babcock wrote.²⁴²

The evidence of bias and partiality was, quite frankly, overwhelming. It raised the question of how Summit Park, its law firm, and the appraiser could have had any justification for their decision to disclose nothing, much less for their affirmative denials of a substantial business relationship. The district court found it “troubling” that none of the facts bearing on partiality were disclosed, and it concluded that the failure to disclose “creates the appearance” that the appraiser “was trying to hide” the “damaging information.”²⁴³ In a particularly well-aimed observation, Judge Babcock noted that the testimonial from Summit Park’s counsel that appeared in the appraiser’s marketing brochure “provided more detail” about their relationship than their letters to Auto-Owners provided.²⁴⁴ After finding that Summit Park’s law firm had “impugned the integrity of not only the appraisal process but also the Court,” Judge Babcock found a violation of the Disclosure Order and vacated the appraisal award.²⁴⁵

G. The District Court Dismisses with Prejudice Summit Park’s Counterclaims and Sanctions Its Lawyers

In a subsequent order, Judge Babcock granted a motion for sanctions he “invited.”²⁴⁶ He dismissed with prejudice Summit Park’s counterclaims and required its lawyers to pay Auto-Owners’ attorney fees.²⁴⁷ The district court invoked Federal Rule of Civil Procedure 41(b), which recognizes that a claim may be dismissed where a party fails to comply with a court order.²⁴⁸ Such a dismissal ordinarily requires consideration of whether the offending party engaged in conduct in bad faith or in a manner tantamount to bad faith, as well as five other factors: “(1) the degree of actual prejudice to the opposing party; (2) the amount of interference with the judicial process; (3) the culpability of the litigant; (4)

241. *Id.*

242. *Id.*

243. *Id.* at *6.

244. *Id.* (“I find 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,’ Doc. # 55-6 at 5—than he did in his disclosures to Auto-Owners before this Court.”).

245. *Id.* at *1, *6–7.

246. *Auto-Owners Ins. Co. v. Summit Park Townhome Ass’n*, 198 F. Supp. 3d 1239, 1243 (D. Colo. 2016), *aff’d*, 886 F.3d 852 (10th Cir. 2018), and *aff’d on other grounds*, 886 F.3d 863 (10th Cir. 2018).

247. *Id.* at 1248.

248. *Id.* at 1243 (citing FED. R. CIV. P. 41(b)).

whether the court warned the party in advance that dismissal of the action would be a likely sanction for noncompliance; and (5) the efficacy of lesser sanctions."²⁴⁹

The court held that the two lawyers representing Summit Park had "acted in bad faith" in light of their affirmative misstatements and failures to disclose.²⁵⁰ The lawyers could not justify all of their failures to disclose by claiming ignorance given that one of the lawyers had been quoted in Summit Park's appraiser's marketing brochure touting the "untold" numbers of claims they had handled together.²⁵¹ Moreover, the lawyers "took steps to conceal the existence of the contingent-cap fee agreement."²⁵² In the face of these incriminating facts, the lawyers resorted to protesting that they misunderstood the Disclosure Order, but the court did not find them "credible in the least."²⁵³ The lawyers also furnished evidence of sanctionable intent by contending that their conduct could not be sanctioned because the district court lacked "authority to enter the disclosure order."²⁵⁴ Their "continued defiance of that order," moreover, further demonstrated "bad faith."²⁵⁵ Summit Park itself engaged in independent conduct that warranted a finding of bad faith.²⁵⁶ The district court further balanced the sanctions factors and held that all five weighed in favor of a dismissal sanction, and it dismissed Summit Park's counterclaims.²⁵⁷ The court emphasized the need for a severe sanction given the massive windfall Summit Park and its law firm nearly obtained: "Where millions of dollars are potentially at stake, imposing sanctions of merely attorney's fees and expenses does not adequately serve to deter Summit Park, Merlin, or other potential wrongdoers from engaging in similar conduct in the future."²⁵⁸ Judge Babcock also emphasized that one of the lawyers for the Association had been repeatedly sanctioned by other courts, to no apparent effect, which further weighed in favor of a severe sanction.²⁵⁹

For materially the same reasons that Summit Park's lawyers had acted in bad faith and violated the Disclosure Order, the court found that they had unreasonably and vexatiously multiplied the proceedings in violation of 28 U.S.C. § 1927.²⁶⁰ The district court required Summit

249. *Id.* (citing *Gripe v. City of Enid*, 312 F.3d 1184, 1188 (10th Cir. 2002); and then citing *Ehrenhaus v. Reynolds*, 965 F.2d 916, 921 (10th Cir. 1992)).

250. *Id.* at 1244.

251. *Id.*

252. *Id.*

253. *Id.* at 1245.

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.* at 1246-47.

258. *See id.*

259. *Id.* at 1247.

260. *Id.*

Park's two lawyers to pay Auto-Owners' reasonable attorney fees and costs resulting from their unreasonable and vexatious conduct.²⁶¹

IV. THE TENTH CIRCUIT REBUKES THE TACTICS OF THE HAIL-LITIGATION GOLD RUSH

Summit Park and the two lawyers appealed to the U.S. Court of Appeals for the Tenth Circuit.²⁶² Two separate appeals were filed. In the first appeal, the two lawyers sought reversal of the sanctions against them.²⁶³ In the second appeal, the Association requested reversal of the order dismissing its counterclaims and sought other appellate relief.²⁶⁴ The two appeals represented an important test of the hail-litigation gold rush, including whether the law entitles parties to engage in "just win, baby" tactics in federal court. In two published opinions, the Tenth Circuit affirmed and rebuked "anything goes" litigation tactics used in the hail-litigation gold rush.²⁶⁵

A. Parties and Lawyers Must Obey an Order of a Court Having Jurisdiction Even if the Order "Lacked Authority"

As their lead argument on appeal, the two lawyers and Summit Park contended that Judge Babcock "lacked authority" to order them to do anything beyond comply with the appraisal provision's terms.²⁶⁶ They "challenge[d] the district court's authority to enter the disclosure order."²⁶⁷ Violating an order entered without authority, the argument goes, cannot justify imposition of sanctions because such an order is void.²⁶⁸

This direct challenge to the authority of the district court had momentous ramifications. The lack-of-authority argument did not depend to any degree on what Summit Park or the two lawyers had done. It was in effect a "get out of jail free card." If Summit Park's argument had prevailed, a party could deliberately disobey with impunity a district court's order by identifying a substantive defect in the order following a viola-

261. *Id.* at 1247–48.

262. *Auto-Owners Ins. Co. v. Summit Park Townhome Ass'n*, 886 F.3d 863, 866 (10th Cir. 2018); *Auto-Owners Ins. Co. v. Summit Park Townhome Ass'n*, 886 F.3d 852, 855 (10th Cir. 2018).

263. *See Auto-Owners Ins. Co. v. Summit Park Townhome Ass'n*, 886 F.3d 863, 866 (10th Cir. 2018).

264. *See Auto-Owners Ins. Co. v. Summit Park Townhome Ass'n*, 886 F.3d 852, 855 (10th Cir. 2018).

265. *See Auto-Owners Ins. Co. v. Summit Park Townhome Ass'n*, 886 F.3d 863, 868–70 (10th Cir. 2018); *Auto-Owners Ins. Co. v. Summit Park Townhome Ass'n*, 886 F.3d 852, 856–57 (10th Cir. 2018).

266. *Auto-Owners Ins. Co. v. Summit Park Townhome Ass'n*, 886 F.3d 863, 866 (10th Cir. 2018) ("In this appeal, the attorneys challenge the sanctions based on five arguments: 1. The district court lacked authority to require the disclosure requirements."); *Auto-Owners Ins. Co. v. Summit Park Townhome Ass'n*, 886 F.3d 852, 855–56 (10th Cir. 2018) ("Summit Park challenges the district court's authority to enter the disclosure order.").

267. *Auto-Owners Ins. Co. v. Summit Park Townhome Ass'n*, 886 F.3d 863, 867 (10th Cir. 2018).

268. *See id.*

tion of it. Had the lack-of-authority argument prevailed, it truly would have meant that “anything goes” in the hail-litigation gold rush, as such a ruling would have encouraged parties to try their luck disobeying court orders. A party would then have had not one but two potential escapes from accountability: the hope (i) that it would not be caught in the first instance or, (ii) if it were caught, that it may find a defect in the court order after the fact.

The lack-of-authority argument had significance for another reason: it threatened to discourage trial courts from imposing any appraisal guidelines. Such guidelines can be crafted to suit the particular appraisal dispute in question. Without them, appraisals can become a “no rules” environment in which “anything goes” and policyholders feel that they are free to act in bad faith to “win.” In *Summit Park*, the guidelines provided a key basis for the vacatur of the \$10 million appraisal award.²⁶⁹ Had no guidelines been in place to protect the appraisal process, Summit Park and its law firm may have gotten away with all of their conduct and reaped a \$10 million to \$30 million windfall.

The Tenth Circuit rejected the lack-of-authority argument as a matter of law: “But even if the court had exceeded its authority, [the two lawyers] would still have needed to comply with the disclosure order.”²⁷⁰ The court reasoned that “[i]f the two attorneys believed that the order had been unauthorized, they could have sought reconsideration or a writ; but they could not violate the order.”²⁷¹ “If a person to whom a court directs an order believes that order is incorrect the remedy is to appeal, but, absent a stay, he must comply promptly with the order pending appeal.”²⁷² The Tenth Circuit ruled that whether the district court had authority to enter the Disclosure Order was irrelevant: “Regardless of whether the district court had authority to issue the disclosure order,” the two lawyers “bore an obligation to comply in the absence of an appellate challenge” and “could be sanctioned for noncompliance.”²⁷³ In *Summit Park*, the Tenth Circuit drew a bright line requiring compliance with court orders while they are in effect and thereby discouraged “anything goes” tactics.

B. Parties and Lawyers Must Obey a Court Order Even if the Order Contains an Error of Law

Summit Park and its two lawyers further contended that they never violated the Disclosure Order, chiefly because the Disclosure Order purportedly adopted the wrong definition of the term “impartial.”²⁷⁴ Echoing

269. *Id.* at 866–67.

270. *Id.* at 867.

271. *Id.*

272. *Id.* (quoting *Maness v. Meyers*, 419 U.S. 449, 458 (1975)).

273. *Id.* at 867–68.

274. *Id.* at 868; *Auto-Owners Ins. Co. v. Summit Park Townhome Ass’n*, 886 F.3d 852, 856–57 (10th Cir. 2018).

its reasoning regarding the district court's authority, the Tenth Circuit concluded that it did not matter whether the court erred in interpreting the term "impartial."²⁷⁵ Because the district court's commands (right or wrong) were clear, compliance was required as long as the Disclosure Order remained in place.²⁷⁶ Summit Park and its lawyers "could not disobey the order even if the court had based the disclosure requirements on a misguided definition of 'impartial.'"²⁷⁷ Again, the Tenth Circuit closed off a potential opening for "just win, baby" tactics.

C. The Tenth Circuit Rejects Other Proposed Barriers to Dismissal Sanctions

In addition to attacking the district court's authority and reasoning, Summit Park asked the Tenth Circuit to erect various legal barriers to a district court's imposition of dismissal sanctions.²⁷⁸ Each of the proposed new barriers would have extended or changed the existing law in a manner that would have weakened courts' ability to hold bad conduct to account. The Tenth Circuit rejected them all.²⁷⁹

1. Lawyers' Sanctionable Conduct Is Attributable to the Client

First, Summit Park contended that it could not be sanctioned for the conduct of its lawyers.²⁸⁰ The Tenth Circuit rejected that contention, reasoning that a party cannot "avoid the consequences of the acts or omissions of [a] freely selected agent."²⁸¹ Thus, Summit Park's lawyers' violation of the Disclosure Order "could be attributed to Summit Park itself."²⁸² The lawyers' conduct alone prompted the Tenth Circuit to conclude that "we cannot disturb the finding that Summit Park violated the disclosure order."²⁸³ This ruling prevents parties from enjoying an "everything to gain, nothing to lose" scenario when they hire a law firm that bends or breaks the rules. Had Summit Park reaped a windfall of tens of millions of dollars, it would have benefitted from "just win, baby" tactics. Absolving Summit Park of sanctions would also have eliminated any risk for parties to engage in those strategies. By holding the client accountable for the lawyers' conduct, however, the Tenth Circuit discouraged gold-rush behaviors.

275. *Auto-Owners Ins. Co. v. Summit Park Townhome Ass'n*, 886 F.3d 863, 868 (10th Cir. 2018).

276. *Id.* at 870.

277. *Id.*; *see also* *Auto-Owners Ins. Co. v. Summit Park Townhome Ass'n*, 886 F.3d 852, 857 (10th Cir. 2018).

278. *See* *Auto-Owners Ins. Co. v. Summit Park Townhome Ass'n*, 886 F.3d 863, 871–73 (10th Cir. 2018).

279. *Id.*

280. *See* *Auto-Owners Ins. Co. v. Summit Park Townhome Ass'n*, 886 F.3d 852, 856–57 (10th Cir. 2018).

281. *Id.* at 857 (quoting *Link v. Wabash R.R. Co.*, 370 U.S. 626, 633–34 (1962)).

282. *Id.*

283. *Id.*

2. Trial Courts Are Not Required to Resort to Federal Rule of Civil Procedure 11 Before Exercising Inherent Power

As another hurdle to accountability, “Summit Park argue[d] that the district court abused its discretion by exercising the court’s inherent powers rather than applying” Rule 11 of the Federal Rules of Civil Procedure.²⁸⁴ In effect, Summit Park asked the Tenth Circuit to adopt a skewed reading of *Chambers v. NASCO, Inc.*,²⁸⁵ which held that courts ordinarily first look to Rule 11 to sanction bad faith.²⁸⁶ Summit Park sought a ruling precluding inherent-power sanctions as an initial matter until after Rule 11 remedies had proved inadequate.²⁸⁷

Such a rule would limit courts’ ability to control bad conduct arising from legal gold rushes. Mandating that a court first resort to Rule 11 would require aggrieved parties to satisfy the Rule 11 safe harbor and effectively give the wrongdoers a second chance to remedy each improper act before a court could impose a remedy under Rule 11.²⁸⁸ After completing satellite litigation over Rule 11, only then could aggrieved parties move on to seek inherent-power sanctions, prompting yet another round of potential second chances, briefing, and satellite briefing. Such a quagmire of burdensome and unnecessary process slows down accountability and gives wrongdoers room to maneuver.

Summit Park’s reading of *Chambers* also would have required the Tenth Circuit to apply Rule 11 to all manner of out-of-court conduct, causing the rule to colonize areas far beyond its intended or traditional reach.²⁸⁹ In *Summit Park*, the Association’s and its lawyers’ wrongdoing consisted of many acts that did not take place in the litigation but that supported sanctions. These included their letters misrepresenting the appraiser’s relationships; Summit Park’s failure to investigate or vet the appraiser; and failing to give truthful testimony regarding the contingent-cap contract in an insurance examination under oath, outside the litigation.²⁹⁰

The Tenth Circuit rejected these additional proposed hurdles to sanctions.²⁹¹ *Chambers*, the court noted, does not require Rule 11 remedies to precede the use of inherent powers.²⁹² Accordingly, the Tenth Circuit declined to create a new rule that would expand Rule 11 beyond

284. *Id.*

285. 501 U.S. 32 (1991).

286. *See Summit Park*, 886 F.3d at 857–58 (10th Cir. 2018).

287. *Id.* at 857.

288. Rule 11’s “safe harbor” provision allows the party and attorneys against whom the Rule 11 sanctions are to be sought the opportunity to correct or withdraw the “challenged paper, claim, defense, contention, allegation, or denial” without adverse consequences. FED. R. CIV. P. 11(c)(2).

289. *See* FED. R. CIV. P. 11, advisory committee’s note to 1993 amendment (“The rule applies only to assertions contained in papers filed with or submitted to the court.”).

290. *Summit Park*, 886 F.3d at 858.

291. *Id.* at 857–58.

292. *Id.* at 858.

its traditional scope: “Rule 11 does not generally apply to a party’s out of court conduct.”²⁹³

3. The Tenth Circuit’s Decision in *Ehrenhaus v. Reynolds* Does Not Set a Floor for Imposing Dismissal Sanctions

Summit Park further contended that the district court erred in imposing a dismissal sanction because “its misconduct was not as egregious as the misconduct of the sanctioned party in *Ehrenhaus*.”²⁹⁴ “In *Ehrenhaus v. Reynolds*,²⁹⁵ the sanctioned party ‘simply and intentionally refused to appear, which the Court [found] to be in bad faith and willful and intentional disobedience to two court orders.’”²⁹⁶

Summit Park’s attempt to transform *Ehrenhaus* into a floor for dismissal sanctions was important. A rule that severe sanctions cannot be imposed absent the equivalent of an intentional refusal to show up to court would set the bar for sanctions high—so high that mere uncertainty in the evidence of intent would allow many wrongdoers to avoid harsh sanctions, even where they might be deserved. Such a rule would have an especially large impact on cases in which the wrongdoing consisted of deliberate inaction, such as a failure to disclose. For that reason, transforming *Ehrenhaus* into a floor for severe sanctions would have effectively opened the door to “no rules” tactics in which a party hides or conceals evidence of appraiser or umpire bias. The Tenth Circuit disagreed with that approach, noting that “*Ehrenhaus* did not establish a floor of culpability.”²⁹⁷ Relying on *Jones v. Thompson*,²⁹⁸ the Tenth Circuit ruled that it “is enough to say the [sanctioned party] repeatedly ignored court orders and thereby hindered the court’s management of its docket and its efforts to avoid unnecessary burdens on the court and the opposing party.”²⁹⁹ *Summit Park* permitted severe sanctions because of inaction and gave weight to the overall impact of the misconduct, rather than setting a floor requiring intentional violations of court orders.³⁰⁰ In so ruling, *Summit Park* again increased a district court’s ability to control hyperaggressive litigation tactics associated with legal gold rushes.

4. As a Prerequisite to Imposing Dismissal Sanctions, District Courts Are Not Required to Expressly Warn that Dismissal Is Likely

Next, Summit Park asked the Tenth Circuit to adopt a rule precluding dismissal sanctions unless the district court gave an express warning

293. *Id.*

294. *Id.* at 860.

295. 965 F.2d 916 (10th Cir. 1992).

296. *Summit Park*, 886 F.3d at 860 (quoting *Ehrenhaus*, 965 F.2d at 921).

297. *Id.*

298. 996 F.2d 261 (10th Cir. 1993).

299. *Summit Park*, 886 F.3d at 860 (quoting *Jones*, 996 F.2d at 265).

300. *Id.*

“that dismissal was a likely sanction.”³⁰¹ Summit Park argued that a warning in capitalized letters that “THE COURT WILL IMPOSE SANCTIONS” was not enough.³⁰² It would have been enough, however, had it said, “THE COURT WILL IMPOSE DISMISSAL SANCTIONS.”³⁰³ This proposed rule, like the others Summit Park advocated for, would erect an artificial barrier to accountability for sanctionable conduct. Exempting bad conduct from severe sanctions merely because a court did not use the word “dismissal” in an advance warning would give a green light to “no rules” tactics.

In another victory for accountability, the Tenth Circuit did not agree to Summit Park’s proposal.³⁰⁴ The court noted that circuit law did not require the word “dismissal” to appear in an express warning of likely sanctions.³⁰⁵ A warning could be “constructive” and not express.³⁰⁶ Moreover, it was not even necessary for each of the *Ehrenhaus* factors to weigh in favor of dismissal to uphold the sanction.³⁰⁷ In *Ehrenhaus* itself, only two of the five factors supported the dismissal sanction.³⁰⁸ Thus, even if the district court had issued no warning—express or constructive—that would not necessarily prevent a dismissal sanction from being imposed if other factors supported dismissal. In rejecting Summit Park’s proposed new rule requiring an express warning that dismissal is a likely sanction for specific conduct, the Tenth Circuit again empowered district courts to control their courtrooms and deter bad conduct.

D. An Appraiser’s Subjective Bias and Relationships with the Party’s Representatives Can Be Disqualifying

The Tenth Circuit not only declined to rework the law governing sanctions to encourage gold-rush behavior it also made contributions to the law of appraisal that may yet help to break gold fever in Colorado. Summit Park contended that appraiser bias should lead to disqualification of the appraiser only based on (i) an appraiser’s relationship to a party, not its counsel; and (ii) the structure of the appraiser’s compensation.³⁰⁹ In Summit Park’s view, generalized bias for or against policy-

301. *Id.* at 861.

302. *Id.*

303. *See id.* (emphasis added).

304. *Id.*

305. *Id.*

306. *Id.*

307. *See id.*

308. *Ehrenhaus v. Reynolds*, 965 F.2d 916, 922 (10th Cir. 1992).

309. Opening Brief for Appellants at 25–28, *Summit Park*, 886 F.3d 852 (Apr. 7, 2017), 2017 WL 1375081, at *25–28 (citing *Cent. Life Ins. Co. v. Aetna Cas. & Sur. Co.*, 466 N.W.2d 257, 261 (Iowa 1991); then citing *Bunting v. State Farm Lloyds*, No. 3-98-cv-2490-BD, 2000 WL 191672, at *3 (N.D. Tex. Feb. 14, 2000) (holding an “appraiser is ‘independent’ unless he [or she] has a direct, pecuniary interest in the outcome of the appraisal”); and then citing *Tiger Fibers, LLC v. Aspen Specialty Ins. Co.*, 571 F. Supp. 2d 712, 717 (E.D. Va. 2008) (holding that “the disinterestedness of a selected appraiser pertains only to the partiality of that appraiser for or against the specific parties in issue”)).

holders should never lead to disqualification.³¹⁰ And a business relationship that includes repeated nonappraiser engagements with the selected appraiser cannot lead to disqualification.³¹¹ As long as lawyers and public adjusters believe that courts may permit the selection of appraisers who advertise their nonneutrality and partiality to obtain work as appraisers, the "just win, baby" philosophy will continue and likely spread.³¹²

In *Summit Park*, the Tenth Circuit undermined that philosophy, holding that the "district court did not err in vacating the appraisal award."³¹³ The court reasoned that, "even if Summit Park had not violated the disclosure requirement, the insurance policy would have compelled vacatur of the appraisal award."³¹⁴ The award could not stand because Summit Park's appraiser was biased and was required to be disqualified due to "his past expressions of favoritism toward policyholders and his extensive relationship with" Summit Park's law firm.³¹⁵ In ruling that disqualification can be compelled by "favoritism toward policyholders" and relationships with a party's representatives, the Tenth Circuit directly undercut one of the keystones supporting the survival of the "anything goes," "just win, baby" mentality and the gold rush it has created. Only time will tell whether other courts continue in the same direction.

E. The Tenth Circuit Rebuked Hyperaggressive Litigation Tactics

Finally, the Tenth Circuit generally rebuffed the sharp practices Summit Park used in pursuing approximately \$30 million of recovery. In particular, the court criticized Summit Park's counsel's repeated misleading or false statements to Auto-Owners in response to its requests for information that later proved outcome determinative.³¹⁶ For example, Auto-Owners asked Summit Park for "all 'drafts, additions, amendments and/or revisions'" of Summit Park's appraiser's agreement with the Association.³¹⁷ Summit Park's counsel promised to bring "a copy of the agreement" to the Association's examination under oath, thereby imply-

310. Opening Brief for Appellants, *supra* note 309, at 25–26, 2017 WL 1375081, at *25–26.

311. *Id.* at 26, 2017 WL 1375081, at *26.

312. The Colorado Court of Appeals has provided support for these arguments in *Owners Ins. Co. v. Dakota Station II Condo. Ass'n*, No. 16CA0733, 2017 WL 3184568, at *3 (Colo. App. July 27, 2017), *cert. granted*, No. 17SC583, 2018 WL 948601 (Colo. Feb. 20, 2018). There, the court ruled that "impartial" appraisers could "favor" one side more than the other and be advocates, while also recognizing that appraisers must be "unbiased." *Id.* The court did not explain how any person could be both unbiased while favoring one side and being an advocate—a contradiction. Judge Terry's well-reasoned partial dissent noted that *Dakota Station* conflicted with Colorado Supreme Court authority and "read[s] the term 'impartial' completely out of the contract." *Id.* at *10 (Terry, J., concurring in part and dissenting in part).

313. *Summit Park*, 886 F.3d at 857.

314. *Id.*

315. *Id.*

316. *See, e.g., Auto-Owners Ins. Co. v. Summit Park Townhome Ass'n*, 886 F.3d 863, 869 n.2 (10th Cir. 2018).

317. *Id.*

ing that no other drafts existed.³¹⁸ In fact, a prior version of the agreement existed that contained a contingent cap, which creates a financial incentive to increase the award.³¹⁹ When Auto-Owners followed up at the examination under oath of Summit Park's former president, he made a "false statement" that the appraisal engagement agreement had not been amended.³²⁰ Summit Park's counsel knew that the engagement agreement had been revised but did not correct the false statement until after the appraisal award had been issued.³²¹ The revelation that the appraiser's engagement agreement had been amended "revealed another false statement by" Summit Park's lawyer.³²² He had previously represented to Auto-Owners (again in response to a request for information from Auto-Owners) that the appraiser had "no financial interest in the claim," which was untrue because the original appraiser engagement agreement contained a contingent cap that "created a financial interest by allowing [the appraiser] to earn a greater fee based on the amount of the appraisal."³²³ By criticizing and sanctioning the "anything goes" approach to litigation, the Tenth Circuit set high standards that will encourage district courts to control bad conduct.

V. CONCLUSION

The Tenth Circuit's published opinions in *Summit Park* represent the court's first encounter with the Colorado hail-litigation gold rush. In affirming severe dismissal and other sanctions against Summit Park and its lawyers, the court made clear that district courts have discretion to curb abuses. The court's specific legal rulings are salutary and encourage parties to appoint truly impartial, unbiased appraisers who will conduct appraisals fairly and accurately. Finally, the court's strong rebuke of Summit Park's lawyers sends a strong message that attorneys should not sacrifice honesty or integrity in a quest to "just win" for their clients.

318. *Id.*
319. *Id.*
320. *See id.*
321. *Id.*
322. *Id.*
323. *Id.*