

## Disqualification Standards: Party-Selected Appraisers

*Law360, New York (February 08, 2010)* -- Appraisal panels often play a major role in property insurance disputes, and the impartiality of their members is sometimes challenged.

A recent decision by a California appellate court clarifies party-selected appraisers' disclosure obligations and the circumstances under which an appraiser selected by a party may be subject to disqualification, thus providing valuable guidance to practitioners.

Fire insurance policies on California properties are required to use standard language set forth in section 2071 of the Insurance Code. This statute requires that, in the event the insurer and the insured disagree about the amount of the loss, the dispute be resolved by an appraisal process.

The function of appraisers is to determine the amount, or value, of a covered loss; that is, an appraiser only evaluates the loss, and does not resolve questions of coverage or policy interpretation.

Under section 2071, when one of the parties demands an appraisal, the insurer and the insured must each select "a competent and disinterested appraiser." Then, the party-selected appraisers — or the court, if they cannot agree — select "a competent and disinterested umpire."

Once the panel has been constituted, the party appraisers are each required to appraise the loss and, in the event of disagreement, submit their differences to the umpire. The panel will then issue an award determining the amount of loss.

In a recent decision, *Mahnke v. Superior Court*, 180 Cal. App. 4th 565 (2009), the California Court of Appeal analyzed party-selected appraisers' disclosure obligations and the meaning of the requirement that the appraisers selected by the parties be "competent and disinterested."

The case involved a dispute as to the assessment of the damages to the insureds' home in a wildfire. The appraiser selected by the insureds was at the time engaged as an expert for another client of the law firm representing the insureds and, on this basis, the insurer filed a petition seeking to disqualify the insureds' designated appraiser. The trial court granted the petition, and the insureds sought review by the Court of Appeal.

The court first concluded that, in light of an amendment to the California Arbitration Act, which governs appraisal proceedings, the disclosure obligations contained in the act (i.e., section 1281.9) apply only to the jointly selected — or court-appointed — umpire, and not to the appraisers selected by the parties.

The court also determined that the unlimited and unqualified right of disqualification for such disclosures — conferred by section 1281.91 of the Arbitration Act — did not apply to party-selected appraisers in appraisal proceedings governed by Insurance Code Section 2071.

The court reasoned that this interpretation is consistent with the Legislature's effort to streamline proceedings and eradicate tactical delays in claim resolution. The court thus went on to consider the circumstances under which a party-selected appraiser may be disqualified.

The Mahnke court started by reviewing U.S. Supreme Court and California precedent establishing that impartial arbitrators are subject to disqualification when a reasonable person, aware of the relevant facts, would entertain a doubt that the arbitrator would be able to be impartial — the “impression of possible bias” test.

The court further recognized that a frequent cause for an impression of possible bias is the existence of a present or past business relationship between the arbitrator and a party, its counsel, or a witness. To warrant disqualification, the court cautioned, that business relationship must be substantial.

Most importantly for insurance practitioners in California, the Court of Appeal then set out to determine whether the disqualification of the Mahnkes' appraiser was required under the circumstances and, in so doing, provided helpful guidelines that insurers and insureds should consider when selecting appraisers, to minimize the risk of disqualification.

The court rejected the application of overly rigorous standards for the disqualification of party-selected appraisers, which it viewed as short-sighted and naïve of modern litigation practices, where appraisers are drawn from the insurance business and cannot be expected to sever their relationships with the industry.

Disqualification of a party-selected appraiser is required where he or she so regularly performs services for particular clients — or attorneys — that the appraiser becomes financially dependent on the relationship. For example, an appraiser who has been retained by an insurance company in a large number of matters may be subject to disqualification.

In contrast, where the selected appraiser has a broad client base, or his or her prior provision of services to a party or attorney can be described as incidental, the existence of such business relationship will not be a basis for disqualification.

Applying these standards, the Court of Appeal concluded that, viewing the Mahnkes' appraiser's experience as a whole, a reasonable member of the public would not doubt his ability to serve impartially, and thus directed the trial court to vacate its order disqualifying the party appraiser.

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