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Tenth Circuit

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UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

BONBECK PARKER, LLC; BONBECK HL, LLC,

Plaintiffs - Appellees,

v.

THE TRAVELERS INDEMNITY COMPANY OF AMERICA,

Defendant - Appellant.

No. 20-1192

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 1:14-CV-02059-RM-NRN)

Amy M. Samberg (Renee M. Peters and Jonathan T. Koehler with her on the briefs), of Foran Glennon Palandech Ponzi & Rudloff PC, Denver, Colorado, for Defendant-Appellant.

Larry E. Bache, Jr. (Jonathan Bukowski with him on the brief), of Merlin Law Group, P.A., Denver, Colorado, for Plaintiffs-Appellees.

Before **MATHESON**, **MORITZ**, and **CARSON**, Circuit Judges.

MORITZ, Circuit Judge.

This summary-judgment appeal stems from an insurance claim filed by Bonbeck Parker, LLC and BonBeck HL, LC (collectively, BonBeck) for hail damage.

The Travelers Indemnity Company of America (Travelers) acknowledged that some of the claimed damage to BonBeck's property was caused by a covered hailstorm but argued that the remaining damage was caused by uncovered events such as wear and tear. BonBeck requested an appraisal to determine how much damage occurred, but Travelers refused this request unless BonBeck agreed that the appraisers would not decide whether the hailstorm in fact caused the disputed damage. When BonBeck rejected this condition, Travelers filed this lawsuit, seeking a declaratory judgment that the appraisal procedure in BonBeck's policy does not allow appraisers to decide the causation issue. The district court disagreed, ruling that the relevant policy language allowed appraisers to decide causation. After the appraisal occurred, the district court granted summary judgment to BonBeck on its breach of contract counterclaim, concluding that Travelers breached the policy's appraisal provision. Travelers appeals.

Applying Colorado law, we affirm. The disputed policy provision allows either party to request an appraisal on "the amount of loss," a phrase with an ordinary meaning in the insurance context that unambiguously encompasses causation disputes like the one here. And contrary to Travelers' view, giving effect to this meaning aligns both with other related policy language and with the appraisal provision's purpose of avoiding costly litigation. For these reasons, the district court appropriately allowed the appraisers to resolve the parties' causation dispute and granted summary judgment for BonBeck on its breach of contract claim.

Background

In June 2012, a hailstorm damaged three buildings owned by BonBeck. BonBeck submitted a claim for the damage under its commercial insurance policy with Travelers (the Policy), which covers hail damage. For each building, BonBeck alleged that the hailstorm damaged the exterior siding, overhang, HVAC, and roof. Travelers acknowledged that some hail damage occurred to all the building components except for the roofs, and it covered this damage with two payments totaling about $ 34,200.[1] But Travelers denied coverage for the roof damage, asserting that it resulted not from the hailstorm but from uncovered events like wear and tear, deterioration, and improper installation.

Faced with this impasse over the roof damage, BonBeck invoked the Policy provision at the heart of this appeal. This provision, which we later quote in full, allows either party to request an appraisal of certain issues on which they might disagree during the claims process, including "the amount of loss." App. vol. 2, 294. Invoking the appraisal provision sends the parties' dispute to a panel comprised of three appraisers (the Panel, for short). But it did not immediately have that effect when invoked by BonBeck.

That's because Travelers would only agree to BonBeck's appraisal request under certain conditions. In particular, Travelers insisted that the parties require the Panel to distinguish between disputed and undisputed damages. Travelers considered

[1] This amount reflects Travelers' estimate of the cost to repair the damaged building components, minus depreciation and BonBeck's deductible.

undisputed damages to be those that it already agreed resulted from the hailstorm, a covered cause of loss; in other words, the non-roof damage. Disputed damages, by contrast, referred to the roof damage, which Travelers contended resulted from excluded causes of loss like wear and tear. So under Travelers' conditions, the Panel would be required to separately allocate damages for the roofs and for the other building components, assigning a specific dollar amount to each. But crucially, Travelers' proposal would not allow the Panel to decide what caused the roof damage, whatever that amount of loss turned out to be. That is, the Panel could decide how much it would cost to repair the roofs but not what caused the roofs to require repair in the first place.

When BonBeck rejected Travelers' conditions, Travelers filed this lawsuit. Its complaint sought declarations that (1) the Policy precludes the Panel from determining causation issues and (2) Travelers owed BonBeck nothing more because the remaining damage (meaning the disputed roof damage) was caused by excluded causes of loss. As relevant here, BonBeck counterclaimed for breach of contract and for a declaration that the Policy does allow the Panel to decide the cause of loss.

Two rounds of summary-judgment motions followed. In the first round, the parties moved for summary judgment on their respective declaratory-judgment claims about whether the Panel could decide causation. The district court sided with BonBeck, concluding that the appraisal provision authorizes the Panel to make cause-of-loss determinations. It then stayed the case pending an appraisal and rejected Travelers' request to require that the Panel separately assess disputed and undisputed

damages. About nine months later, the Panel issued its appraisal award, estimating the total repair cost for BonBeck's loss from hail damage (excluding depreciation) to be about $216,000. Travelers paid BonBeck the appraisal-award amount, minus the approximately $34,200 it had already paid.

With the causation issue now resolved, the parties filed a second round of summary-judgment motions, this time on BonBeck's remaining counterclaim for breach of contract. The district court granted summary judgment for BonBeck on this counterclaim, finding no genuine dispute that Travelers breached the Policy by not agreeing to an appraisal when BonBeck requested one. For that claim, the district court awarded BonBeck nominal damages ($1) and statutory interest ($36,142.63). Travelers appeals.

Analysis

We review orders granting summary judgment de novo, affirming only if "there is no genuine dispute as to any material fact and the mov[ing party] is entitled to judgment as a matter of law." *Auto-Owners Ins. Co. v. Csaszar*, 893 F.3d 729, 733–34 (10th Cir. 2018) (quoting Fed. R. Civ. P. 56(a)). Here, Travelers contends that the district court erred in granting summary judgment for BonBeck because under the appraisal provision's plain language, the Panel could determine how much damage BonBeck incurred but not what caused that damage. BonBeck disputes this reading, arguing that the Policy allows appraisers to decide the cause of loss. BonBeck also raises several preliminary issues that potentially affect our ability to decide the causation issue. We begin by addressing those issues.

I. Preliminary Issues

A. Waiver

BonBeck argues that as a matter of federal procedure, Travelers waived its challenge to the scope of the appraisal provision. In support, BonBeck cites district-court filings after the appraisal in which Travelers noted that the causation issue—whether BonBeck's damages resulted from a covered cause of loss—was "now moot" given the district court's earlier summary-judgment order concluding that the Panel would decide that issue. App. vol. 7, 1369. According to BonBeck, these filings show that Travelers "expressly waived and abandoned" its argument that the Policy precludes the Panel from deciding the cause of loss. Aplee. Br. 15.

We disagree. To be sure, we generally decline to consider on appeal issues that a party initially raised but later abandoned in the district court. *See Lyons v. Jefferson Bank & Tr.*, 994 F.2d 716, 722 (10th Cir. 1993). But that's not what happened here. Instead, as Travelers argues, the statements BonBeck pulls from Travelers' district-court filings "simply reflect what the remaining issues appeared to be at that time, at the district[-]court level, in light of the prior [summary-judgment order]." Rep. Br. 3–4. By stating that the causation issue was "now moot," Travelers simply acknowledged that the district court had resolved the issue. Travelers neither agreed with the district court's resolution of the issue nor suggested that it would not appeal that resolution. App. vol. 7, 1369. Indeed, Travelers had no opportunity to appeal until after the district court resolved BonBeck's counterclaims and entered a final judgment. *See* 10A Charles Alan Wright & Arthur R. Miller, *Federal Practice and*

Procedure § 2715 (4th ed.) ("[T]he grant of a summary judgment on less than all the claims . . . in the litigation normally is not appealable until the full case reaches judgment."); *Haberman v. Hartford Ins. Grp.*, 443 F.3d 1257, 1264 (10th Cir. 2006) ("[W]hen the material facts are not in dispute and the denial of summary judgment is based on the interpretation of a purely legal question, such a decision is appealable after final judgment."). In short, Travelers did not waive its challenge to the district court's interpretation of the Policy by abandoning that challenge in the district court.[2]

B. Payment of Appraisal Award

Even if Travelers' challenge is procedurally sound, BonBeck maintains that Colorado insurance law independently bars Travelers from challenging the scope of the appraisal provision. That is the case, BonBeck argues, because Travelers "paid the [appraisal award] without protest, reservation, or any other limitation." Aplee. Br. 19. And in Colorado (says BonBeck), such payment constitutes "acceptance of the appraisal award and waive[r of] any future right to challenge the award." *Id.*; *see also, e.g.*, *Pueblo Country Club v. AXA Corp. Sols. Ins. Co.*, No. 05-cv-01296, 2007 WL 951790, *4 (D. Colo. Mar. 28, 2007) (finding that insurer "waived its right to assert a counter[]claim for reimbursement" when it paid insured's litigation

[2] Nor are we precluded from considering that challenge under the law-of-the-case doctrine. Despite BonBeck's contrary suggestion, the fact that the district court declined to reconsider its earlier decision that the Panel could decide cause of loss "does not defeat appellate review when the issue is properly preserved and presented." 18B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 4478.6 (2d ed.); *see also Ute Distrib. Corp. v. Sec'y of Interior of U.S.*, 584 F.3d 1275, 1281 n.7 (10th Cir. 2009).

settlement "with full knowledge of any defenses [it] had to coverage" and never "requested reimbursement . . . following entry of [j]udgment").

Travelers' response to this argument makes it unnecessary to decide whether Travelers waived a challenge to the appraisal award by paying it. In its reply brief, Travelers represents that it does not "seek[] reimbursement of the payment of the appraisal award." Rep. Br. 4. Instead, Travelers seeks to recover the "nominal damages ($1) and statutory interest [awarded] to BonBeck ($36,142.63)" on the breach-of-contract claim. *Id.* at 5. And the district court awarded those amounts based on its prior resolution of the scope of the appraisal provision. Specifically, it reasoned that when Travelers "refus[ed] to engage in the appraisal requested by Bon[B]eck," Travelers "failed to perform in accordance with the [a]ppraisal [c]lause" because "Bon[B]eck was correct" that the Policy allows "the appraisers [to] determine the issue of causation." App. vol. 11, 2092. BonBeck does not explain how Travelers' unconditional payment of the appraisal award—which under Colorado law may preclude Travelers from recouping the payment itself—affects Travelers' attempt to recover the nominal damages and statutory interest on the breach-of-contract claim. And we do not see how that could be. Accordingly, we reject BonBeck's argument that we should decline to consider the scope of the appraisal clause because Travelers paid the appraisal award.

C. Mootness

Importantly, though, Travelers' response to BonBeck's argument about the effect of its payment of the appraisal amount effectively moots its argument for

reversal of summary judgment on its declaratory-judgment claim. That is, because Travelers admits it does not seek reimbursement of the appraisal-award payment, any relief we could grant on that claim would be illusory. In other words, even if we were to agree with Travelers on the underlying legal issue and conclude that the appraisers cannot decide causation, the resulting reversal of summary judgment on the declaratory-judgment claim would have no real-world impact—Travelers disclaims any intent to seek reimbursement of the appraisal money it already paid. *See Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1110 (10th Cir. 2010) (sustaining live controversy for declaratory-judgment claim requires that "a *present* determination of the issues offered will have some effect in the real world" (quoting *Wyoming v. U.S. Dep't of Agric.*, 414 F.3d 1207, 1212 (10th Cir. 2005))). We therefore dismiss Travelers' appeal of its claim for declaratory judgment as moot and consider the order resolving the declaratory-judgment claim only to the extent that the district court incorporated that order's legal analysis concerning the appraisal provision's scope into its later summary-judgment order on BonBeck's breach-of-contract claim.

II. Merits

As discussed, Travelers argues that the district court granted summary judgment on BonBeck's breach-of-contract claim based on an erroneous view that the Policy allows the Panel to decide the cause of loss. Assessing that argument requires us to interpret the Policy. Given the nature of our jurisdiction in this case, Colorado law governs our interpretation. *See Rocky Mountain Prestress, LLC v. Liberty Mut.*

Fire Ins. Co., 960 F.3d 1255, 1259 (10th Cir. 2020). And because the Colorado Supreme Court has not addressed the issue Travelers raises, we must predict how that court would decide the issue.[3] *Id.* Analogous decisions from the Colorado Supreme Court inform our prediction and provide a framework for interpreting the disputed Policy language. *See id.* at 1259–60 (discussing general principles for interpreting insurance policies in Colorado when predicting how Colorado Supreme Court would interpret policy at issue); *Phillips v. State Farm Mut. Auto. Ins. Co.*, 73 F.3d 1535, 1537 (10th Cir. 1996) (noting our ability to consider, among other sources, "analogous decisions by the [state] [s]upreme [c]ourt" in predicting how that court would rule). In doing so, we may also rely on decisions from other state and federal courts, as well as on "the general weight and trend of authority." *Phillips*, 73 F.3d at 1537 (quoting *Farmers All. Mut. Ins. Co. v. Bakke*, 619 F.2d 885, 888 (10th Cir.1980)).

Under Colorado law, an insurance policy is a contract subject to the same interpretive principles as any other contract. *Owners Ins. Co. v. Dakota Station II Condo. Ass'n, Inc.*, 443 P.3d 47, 51 (Colo. 2019). Chief among those principles is that courts should enforce the intent and reasonable expectations of the parties as

[3] Alternatively, we could certify this issue of first impression for consideration by the Colorado Supreme Court. *See* 10th Cir. R. 27.4(A)(1). The district court denied Travelers' request for certification, and Travelers did not renew its request on appeal until rebuttal at oral argument. Although we may order certification without a request from the parties, *see* 10th Cir. R. 27.4(B), we decline to do so here because "we see a reasonably clear and principled course" for resolving the issue on our own, *Pino v. United States*, 507 F.3d 1233, 1236 (10th Cir. 2007).

expressed in the policy's plain language, giving each word its ordinary meaning. *Id.* And if the disputed language's meaning is unambiguous—not "susceptible . . . to more than one reasonable interpretation"—we must give effect to that meaning. *Cary v. United of Omaha Life Ins. Co.*, 108 P.3d 288, 290 (Colo. 2005).

Travelers contends that, contrary to the district court's view, the Policy unambiguously precludes the Panel from deciding the cause of loss. The key language underlying this argument appears in the Policy's appraisal provision, which is worth quoting in full before we dissect its individual parts:

> Appraisal
>
> If we and you disagree on the value of the property, the amount of Net Income and operating expense[,] 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, the amount of Net Income and operating expense[,] or the 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.

App. vol. 2, 294.

The district court based its interpretation on the first sentence, which lists three items on which either party may request an appraisal: the value of the property, the amount of income and expense, or the amount of loss. It determined that the third item, "the amount of loss," encompasses causation disputes. *Id.* On appeal, Travelers

barely mentions that phrase or the district court's conclusion about its meaning. Travelers instead argues that allowing the Panel to decide causation conflicts with other language in the appraisal provision and with the Policy's purpose.[4]

We first consider the language on which the district court based its conclusion that the Panel could decide what caused the roof damage: "the amount of loss." Because the Policy does not define that phrase, we must look elsewhere to discern its plain meaning. *See Renfandt v. N.Y. Life Ins. Co.*, 419 P.3d 576, 580 (Colo. 2018). Dictionary definitions are a good place to start. *See id.* ("When determining the plain and ordinary meaning of words, we may consider definitions in a recognized dictionary.").

Although neither party cites a dictionary that defines the full phrase "amount of loss," several dictionaries define the word "loss."[5] Black's Law Dictionary, for

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[4] Travelers also argues that the district court's interpretation "result[s] in a waiver of Travelers' jury[-]trial rights on issues of coverage and causation." Aplt. Br. 43. We decline to consider this argument because Travelers has not provided any record cites to show that it raised the argument below, we see no indication that Travelers did so, and Travelers has not requested plain-error review on appeal. *See* 10th Cir. R. 28.1(A) ("For each issue raised on appeal, all briefs must cite the precise references in the record where the issue was raised and ruled on."); *United States v. Leffler*, 942 F.3d 1192, 1196 (10th Cir. 2019) (stating that when appellant fails to provide record cites showing where argument was raised below, "we may assume the appellant did not preserve the issue for appeal and refuse to review the alleged error"); *Evanston Ins. Co. v. L. Off. of Michael P. Medved, P.C.*, 890 F.3d 1195, 1199 (10th Cir. 2018) (explaining that appellant's failure to request plain-error review on appeal "marks the end of the road" for argument not raised below (quoting *Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1131 (10th Cir. 2011))).

[5] The district court did cite a case quoting an earlier edition of Black's Law Dictionary that defined the full phrase "amount of loss" as the decrease in value of "the insured subject [matter] to the assured, by the direct consequence of the operation of the risk insured against, according to its value in the policy, or in

example, has a specific entry for that term in the insurance context: "The amount of financial detriment caused by . . . an insured property's damage, for which the insurer becomes liable." *Loss*, Black's Law Dictionary (11th ed. 2019). So do everyday dictionaries: "[T]he amount of an insured's financial detriment due to the occurrence of a stipulated contingent event (as death, injury, destruction, or damage) in such a manner as to charge the insurer with a liability under the terms of the policy." Webster's Third New International Dictionary 1338 (Philip Babcock Gove ed. 1961); *see also* Merriam-Webster's Collegiate Dictionary 736 (11th ed. 2003) (defining "loss" as "the amount of an insured's financial detriment by . . . damage that the insurer is liable for"). Significantly, these definitions all include a causation component, each making clear that "loss" refers to damage resulting from a covered event.

The district court was by no means the first court to recognize that causation is an ingredient of loss. Indeed, several state courts have reached the same conclusion after citing the same definitions quoted above. *See Quade v. Secura Ins.*, 814 N.W.2d 703, 706 (Minn. 2012) (concluding, based on Black's Law Dictionary and Merriam-Webster's Collegiate Dictionary, that "amount of loss" unambiguously "includes a determination of the cause of the loss" and that "dictionary definitions of 'loss' for purposes of insurance expressly contemplate an element of causation"); *N. Glenn*

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contribution for loss, so far as its value is covered by the insurance." App. vol. 7, 1294 (emphasis omitted) (quoting *CIGNA Ins. Co. v. Didimoi Prop. Holdings, N.V.*, 110 F. Supp. 2d 259, 264 (D. Del. 2000)).

Homeowners Ass'n v. State Farm Fire & Cas. Co., 854 N.W.2d 67, 71 (Iowa Ct. App. 2014) (citing Black's Law Dictionary to support view that "[c]ausation is an integral part of the definition of loss, without consideration of which the appraisers cannot perform their assigned function"); *Walnut Creek Townhome Ass'n v. Depositors Ins. Co.*, 913 N.W.2d 80, 92 (Iowa 2018) (agreeing with *North Glenn* and holding that "appraisers may decide the factual cause of damage to property in determining the amount of loss from a storm"). Federal courts applying state law have done the same. *See CIGNA*, 110 F. Supp. 2d at 264–65 (citing Black's Law Dictionary and Merriam-Webster's Collegiate Dictionary to hold that phrase "amount of loss" "necessarily includes a determination of the cause of loss"). We therefore conclude that the Colorado Supreme Court, if faced with the issue, would join these courts in recognizing that in the insurance context, the ordinary meaning of the phrase "amount of loss" encompasses causation.[6] *See Phillips*, 73 F.3d at 1537 (explaining that "decisions . . . of other state courts" inform our prediction of how state supreme court would rule).

[6] We recognize that other courts faced with similar policy language have accepted the view that appraisers can't resolve cause-of-loss issues. *See, e.g.*, *Rogers v. State Farm Fire & Cas. Co.*, 984 So. 2d 382, 392 (Ala. 2007) (concluding that appraisers decide only "the monetary value of the property damage" and that "[t]he determination of the causation of th[o]se [damages] is within the exclusive purview of the courts, not the appraisers"); *Munn v. Nat'l Fire Ins. Co. of Hartford*, 115 So. 2d 54, 55 (Miss. 1959) (ruling "that the appraisers have no power to determine the cause of the damage"). We make no attempt here to analyze every rationale those courts provide to support their contrary view. Instead, focusing on the arguments before us and applying settled principles of Colorado insurance law, we simply conclude that the Colorado Supreme Court would resolve those arguments in BonBeck's favor, as the district court did.

As alluded to earlier, Travelers has little to say about the phrase "the amount of loss." It acknowledges that courts adopting the district court's (and BonBeck's) interpretation do so by finding that "the plain meaning of the term 'amount of loss'" necessarily includes causation. Aplt. Br. 37. Yet it offers almost no support for its contrary view that, "[i]n common, ordinary parlance, 'amount of loss' means the monetary value of property damage, irrespective of insurance coverage or source of damage." Aplt. Br. 38 (quoting *Caribbean I Owners' Ass'n v. Great Am. Ins. Co. of N.Y.*, 619 F. Supp. 2d 1178, 1187 (S.D. Ala. 2008)). Travelers solely relies on *Caribbean*, which does not cite any dictionary definitions of "loss" or provide any examples of how that word might be used in the insurance setting to reference property damage apart from causation. *See Rankin v. USAA Cas. Ins. Co.*, 271 F. Supp. 3d 1218, 1227 (D. Colo. 2017) (adopting "insurance-specific definition[s] of 'loss'" from two dictionaries; noting that insured "offered no argument why a nonspecific definition should control over the insurance-specific definitions from Black's and Merriam-Webster" (italics omitted)); *Quade*, 814 N.W.2d at 706 (concluding that "dictionary definitions of 'loss' *for purposes of insurance* expressly contemplate an element of causation" (emphasis added)). Rather, Travelers primarily relies on its argument that other language in the appraisal provision precludes the Panel from resolving causation issues.

Travelers first directs our attention to the appraisal provision's last sentence: "If there is an appraisal, [Travelers] will still retain [its] right to deny the claim." App. vol. 2, 294. Travelers reads this sentence as preserving its ability, after an

appraisal occurs, to deny coverage on "any ground available under the Policy." Aplt. Br. 20. Because one such ground is that the claimed damage "resulted from an excluded cause of loss," Travelers argues, we cannot "give effect to the plain meaning of" this sentence if the Panel determines causation; allowing the Panel to do so would necessarily deprive Travelers of one ground on which it could otherwise deny coverage. *Id.* at 20–21. Put another way, Travelers contends that allowing the Panel to determine what caused BonBeck's damage prevents Travelers from later denying coverage based on its view that something other than the hailstorm caused the damage.

The flaw in Travelers' argument about the meaning of the appraisal provision's last sentence is that it can't be reconciled with the plain language of the first sentence. When interpreting the appraisal provision, we must give effect to both sentences "so that n[either] will be rendered meaningless." *Cyprus Amax Mins. Co. v. Lexington Ins. Co.*, 74 P.3d 294, 307 (Colo. 2003) (quoting *Pub. Serv. Co. v. Wallis & Co.*, 986 P.2d 924, 933 (Colo. 1999)). We must also follow the "basic principle of contract interpretation that a more specific provision controls the effect of more general provisions." *Massingill v. State Farm Mut. Auto. Ins. Co.*, 176 P.3d 816, 825 (Colo. App. 2007); *see also Green Shoe Mfg. Co. v. Farber*, 712 P.2d 1014, 1016 (Colo. 1986) ("[S]pecific provisions in contract express more exactly what parties intend than broad or general clauses."). And here, the first sentence more specifically addresses the issue we face: the subjects on which the parties may request an appraisal. The last sentence, on the other hand, covers Travelers' right to deny a

claim after an appraisal on one of those subjects occurs. So to the extent that the two sentences conflict, the first sentence—which we have already explained allows the Panel to decide causation based on the ordinary meaning of "amount of loss"—must prevail.

But in any event, our interpretation avoids any conflict between the first and last sentences. Under this interpretation, the Panel makes a factual finding on how much hail damage occurred. After the appraisal, Travelers can't rehash that finding, but it can deny the claim for a host of other reasons having nothing to do with the cause of the damage. For instance, Travelers could argue that BonBeck failed to provide "prompt notice of the loss or damage," failed to "[c]ooperate with [Travelers] in the investigation and settlement of the claim," or "intentionally conceal[ed] or misrepresent[ed] a material facts" when filing the claim. App. vol. 2, 295, 299. Granted, Travelers ultimately did not raise these defenses after the Panel issued its decision in this case. But the point is that they remained available to Travelers, even after the Panel determined how much hail damage occurred. And because they did, Travelers "retain[ed] [its] right to deny the claim." App. vol. 2, 294; *see also State Farm Fire & Cas. Co. v. Licea*, 685 So. 2d 1285, 1288 (Fla. 1996) (construing "retained[-]rights clause . . . as retaining only the right to dispute the issues of coverage as to the whole loss" and to assert "that there has been a violation of the usual policy conditions such as fraud, lack of notice, and failure to cooperate"). For these reasons, we reject Travelers' fixation on the appraisal provision's last sentence. Instead, we endorse the district court's harmonious

interpretation, which gives effect both to the plain meaning of the phrase "amount of loss" in the first sentence and Travelers' retained defenses in the last sentence. *See Cyprus*, 74 P.3d at 307.

Next, Travelers focuses on the word "appraiser," which appears several times throughout the appraisal provision. *See, e.g.*, App. vol. 2, 294 ("[E]ach party will select a competent and impartial *appraiser*." (emphasis added)). Travelers argues that the "plain meaning of [this term] and the Policy's requirements for appraisers reflect an intent to limit the scope of appraisals to monetary determinations, thus precluding causation determinations." Aplt. Br. 23.

Again, Travelers' argument can't be reconciled with the first phrase permitting appraisal regarding "the amount of loss." In its opening brief, Travelers points to a definition of an appraiser as "[a]n impartial person who estimates the value of something." *Appraiser*, Black's Law Dictionary (11th ed. 2019). But nothing in that definition excludes causation as an appropriate consideration for appraisers in estimating value. Far from it: Here, the "something" to be valued is "the amount of loss," a phrase with an ordinary meaning that, in the insurance context, encompasses causation. App. vol. 2, 294. Travelers' point about the purportedly minimal qualifications required to receive an appointment as an appraiser under the Policy—specifically, that a person need only be "competent and impartial"—fails for the same reason. *Id.* This observation cannot overcome the Policy's plain language authorizing the Panel to determine the cause of loss. Neither the word "appraiser" nor the qualifications for appraisers render the unambiguous phrase "amount of loss"

ambiguous.

Travelers' final textual argument involves what Travelers views as a shared characteristic of the three items on which either party may request an appraisal: Each item "involve[s] 'dollar' controversies." Aplt. Br. 30. Recall that those three items, listed in the appraisal provision's first sentence, are "the value of the property, the amount of Net Income and operating expense[, and] the amount of loss." App. vol. 2, 294. Travelers argues that, unlike those three items, "the 'cause' of damages is not a dollar controversy," and so the last item ("the amount of loss") necessarily does not include causation. Aplt. Br. 31. But this argument improperly shifts the focus onto the numerical nouns that introduce each item and away from the corresponding objects that follow those nouns. *See* Merriam-Webster's Collegiate Dictionary 42 (11th ed. 2003) (defining the noun "amount" as "the total number or quantity"). That the Policy expresses each appraisal-appropriate topic as a dollar amount says nothing about what each amount represents. And here, the relevant dollar amount reflects the amount of "loss," which, again, includes a causation component. As a result, Travelers' final textual argument fares no better than its others.

Besides the text, Travelers also relies on the appraisal provision's purpose. We need not consider this argument, however, because the disputed language is unambiguous. *See Pompa v. Am. Fam. Mut. Ins. Co.*, 520 F.3d 1139, 1143 (10th Cir. 2008) (noting Colorado authority that "construction of a potentially ambiguous term in an insurance-policy provision requires consideration of the purpose of the provision"); *Cary*, 108 P.3d at 290 ("We must enforce an insurance policy as written

unless the policy language contains an ambiguity."). And were that not the case, Colorado law would require us to construe any ambiguity against Travelers as the drafter of the Policy. *See Union Ins. Co. v. Houtz*, 883 P.2d 1057, 1061 (Colo. 1994).

Even so, if considered, the purpose of the appraisal provision only confirms what the text compels. As the district court persuasively reasoned, and as Travelers seems to agree, the appraisal provision's aim "is to avoid litigation and encourage settlement of the parties' dispute." App. vol. 7, 1296; *see also* Aplt. Br. 32 ("The purpose of the appraisal provision is to afford a simple, speedy, inexpensive[,] and fair method determining the amount of loss."). Removing causation from the appraisal process frustrates that purpose by "reserving a plethora of detailed damage assessments for judicial review." *CIGNA*, 110 F. Supp. 2d at 269. Doing so is especially unwise when, as here, "the causation question involves separating loss due to a covered event from a property's pre-existing condition." *State Farm Lloyds v. Johnson*, 290 S.W.3d 886, 892 (Tex. 2009). As the Texas Supreme Court observed, that kind of causation issue arises "in every case," and if "appraisers can never allocate damages between covered and excluded perils, then [they] can never assess hail damage unless a roof is brand new." *Id.* at 892–93. Such a result "would render appraisal clauses largely inoperative, a construction we must avoid." *Id.* at 893. Other district-court decisions have recognized as much, and we find their reasoning persuasive. *See, e.g.*, *Auto-Owners Ins. Co. v. Summit Park Townhome Ass'n*, 100 F. Supp. 3d 1099, 1103 (D. Colo. 2015). Accordingly, even if the appraisal provision were ambiguous and even if that ambiguity were not to be construed against

Travelers, its purpose only bolsters the district court's conclusion that the Panel can decide the cause of loss.

Conclusion

The Policy's plain language identifies disputes like this one, over "the amount of loss," as one of the issues on which the parties may request an appraisal. App. vol. 2, 294. And because we conclude that the Colorado Supreme Court, if faced with the issue, would recognize that the ordinary meaning of the phrase "amount of loss" encompasses causation issues, the district court properly interpreted the Policy to conclude that the Panel could determine the cause of BonBeck's roof damage. The district court therefore properly granted summary judgment for BonBeck on its claim that Travelers breached the Policy when it refused to allow such an appraisal to proceed, and we affirm that ruling.[7] Finally, given Travelers' concession that it does not seek reimbursement of the appraisal award itself, we dismiss as moot Travelers' appeal from the order denying summary judgment on the declaratory-judgment claim.

[7] This conclusion also resolves Travelers' argument that the district court should have required the Panel to issue an itemized appraisal award distinguishing between disputed and undisputed damages. Travelers contends that itemization was required if "the Policy does not authorize appraisers to determine the cause of loss." Aplt. Br. 45. Because the Policy does authorize causation determinations, we affirm the district court's decision not to require itemization.