

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ALLIED TRUST INSURANCE	§	CIVIL ACTION NO.: 2:23-cv-2251
COMPANY	§	
Plaintiffs	§	
	§	JUDGE: WENDY B. VITTER
VERSUS	§	
	§	
SHERI AND JASON CONSENTINO	§	MAGISTRATE JUDGE:
	§	JANIS VAN MEERVELD
Defendant	§	

ALLIED’S MEMORANDUM PURSUANT TO ORDER FOR ADDITIONAL BRIEFING

NOW INTO COURT, through undersigned counsel, comes Allied Trust Insurance Company (hereinafter “ALLIED”), and respectfully submits the following memorandum of law.

During a January 8, 2024 status conference, additional briefing was ordered on two issues: (1) whether an insured has the right to select an appraiser of their choosing and (2) whether a declaratory judgment action is proper to address the issue. [Rec. Doc. 15].

I. There are Limitations on the Right to Select an Appraiser

There are limitations on the insured’s right to select an appraiser of their choosing, and these limitations have been enforced by the Eastern District in advance of appraisal awards.

There are several appraiser requirements in both the insurance policy and Louisiana law. First, La. R.S. 22:1706 decisively provides that an individual may not function as a public adjuster and an appraiser for the same claim. Second, pursuant to La. R.S. 22:1807.1, “no person shall act as an appraiser unless such person is registered with the commissioner of insurance as an appraiser.” Third, an appraiser must not violate the appraisal provisions of the policy and the

appraisal provisions of La. R.S. 22:131, Louisiana's standard fire policy. These provisions provide, *inter alia*, that the parties must appoint a competent and disinterested appraiser.

Thus, the Consentino's cannot appoint anyone who would violate the requirements of the insurance policy or Louisiana law, namely La. R.S. 22:131, R.S. 22:1706, and R.S. 22:1807.1. This includes anyone who has acted as a public adjuster, any interested individual, and any incompetent individual. With limitations set forth, we turn to how and when they may be enforced.

II. Declaratory Judgment Is Appropriate to Determine Rights of Parties to a Contract Such as Insurance Policy

Under the Declaratory Judgment Act, a court "may declare the rights and other legal relations of any interested party seeking such declaration." 28 U.S.C. § 2201(a). Being mindful of the space allotted for briefing, Allied concisely avers that the Court would have federal diversity jurisdiction over the parties, no pending state actions exist, and there is an actionable controversy regarding the rights of the parties and how the parties should proceed with appraisal.

Subject to the broad discretion of the federal courts, interpreting the rights of parties to a contract has often been recognized as an appropriate use of the Declaratory Judgment Act. Moreover, declaratory relief may be particularly appropriate where it seeks adjudication of the parties' rights under an agreement and guides their future conduct. *Annie Sloan Interiors, Ltd. v. Jolie Design & Decor, Inc.*, 2018 U.S. Dist. LEXIS 75740. (Underline added).

In the instant matter, the Consentino's had not filed suit when a controversy arose over their selection of Nader Odeh as appraiser. Allied requested, to no avail, that another appraiser be appointed so the process could move forward without delay. At that juncture, there was a clear and justiciable controversy surrounding the parties' rights under the policy agreement that falls well-within the federal court's broad discretion to declare these rights and guide the parties future conduct for appraisal.

If suit were filed by the insureds when this controversy arose, Allied would have filed a motion seeking the same relief in advance of the appraisal moving forward. Allied respectfully avers that the mechanism is proper, and it will now address the timing of disqualification in advance of appraisal.

III. The Eastern District Has Ruled on Appraiser Disqualification Before the Appraisal Award on More than One Occasion

Undersigned was able to locate three analogous cases from the Eastern District where a party sought to disqualify an appraiser in advance of the appraisal. As discussed below, in two of these cases, the Court ruled on the motions in advance of appraisal, declared the appraiser partial, and ordered that another impartial appraiser be appointed to conduct the appraisal. In the third case, the Court instead found that the appraiser's qualification would be determined after the appraisal award was rendered and the appraiser subjected to cross examination.

In *Chardonay Vill. Condo. Ass'n v. James River Ins. Co.*,¹ the plaintiff condo association invoked appraisal in their insurance claim for wind damage, naming Mr. DiSimone as their appraiser. The insurer, James River Ins. Co., filed a motion asking the court to strike DiSimone as appraiser and direct the plaintiff to appoint an impartial appraiser. James River alleged that DiSimone's contract with the plaintiff rendered them a partial, interested party. Specifically, the contract had an hourly rate, but a maximum cap set as a percentage of recovery. Plaintiff opposed, saying the hourly rate was not a contingency contract and the appraiser was impartial and disinterested. The Honorable Judge Barbier determined that the evidence rendered DiSimone a partial, interested party. The appraiser was disqualified, and the plaintiff was directed to appoint another appraiser before the appraisal process began.

¹ *Chardonay Vill. Condo. Ass'n v. James River Ins. Co.*, 2008 U.S. Dist. LEXIS 59989.

In *Rats Nest Condo. Ass'n v. Allstate Ins. Co.*,² the insured sought to compel an appraisal which Allstate resisted, in part, on the basis that the insured had failed to appoint an impartial appraiser. Instead, Allstate argued that the condo association's appraiser, Mr. Carr, was partial and interested because he served as a public adjuster on the claim before appraisal. The Honorable Judge Roby held that Carr would not be an impartial appraiser because he also served as a public adjuster who advanced Rats Nest's interest. Both parties were ordered to appoint impartial appraisers and proceed to appraisal.

In *Ams. Ins. Co. v. Jarreau*,³ both the insurer and the insured filed competing motions to compel appraisal, the plaintiff filed a motion to dismiss plaintiffs' claims for attorney fees, and the defendant filed a motion to disqualify the plaintiff's appraiser. Deciding all four motions, the Honorable Judge Zainey dismissed the plaintiff's claim for attorney fees, compelled both parties to participate in appraisal, and declined to disqualify the appraiser (Nader Odeh) at that time, stating that the insurer could cross-examine the appraiser later and seek to vacate the appraisal after an award was rendered.

In sum, the Eastern District has determined appraiser qualification in advance of an appraisal award more than once, and in another instance has elected to wait until after the award. Allied respectfully avers that both the authority and precedent exist to make this determination.

IV. Considerations for Disqualifying the Appraiser Pre or Post Appraisal

Three types of harm may arise from proceeding to appraisal with an unqualified appraiser. First, the time and costs associated with appraisal are significant and will be lost if an appraisal is vacated. The process will have to start over, and the innocent/qualified party is unfairly prejudiced.

² *Rats Nest Condo. Ass'n v. Allstate Ins. Co.*, 2008 U.S. Dist. LEXIS 135726.

³ *Ams. Ins. Co. v. Jarreau*, 2018 U.S. Dist. LEXIS 160361.

Second, an appraisal vacated after completion is likely to create significant issues with evidence. While examples may exist, Counsel was unable to locate examples of how evidence is handled when an appraiser is disqualified after the award issues. There would be two or three fact witnesses, one disqualified from appraisal but with relevant information, another qualified appraiser who interacted with the disqualified appraiser, and an umpire. There would be an award, qualified and unqualified appraiser panel estimates, photographs from both, and likely communications with the insured by both during the appraisal process. Determining which evidence and testimony from a vacated appraisal is admissible may be challenging and risks jury confusion if weeks or months of claims activity is inadmissible. If disqualification can be determined beforehand, this would be avoided.

Third, the insurer will face a dilemma not borne by the insured. Insurers are inclined to pay appraisal awards within thirty (30) days of their issuance, or they risk allegations of severe bad faith damages under La. R.S. 22:1892. Challenging an appraiser once an award is issued but prior to payment is unfairly discouraging against insurers while the insureds have no such concern should they wish to challenge an insurer's appraiser.

Allied routinely enters into appraisals. It has rarely moved to disqualify an appraiser. It does so now in advance of any award due to a legitimate and documented concern with Mr. Odeh *in this particular case*. Mr. Odeh advocated on the Consentino's behalf in communications to Allied and his company has a close relationship with the only other interested party in this claim, FC Home Renovation, LLC. Allied respectfully suggests the evidence is sufficient to direct the appointment of another appraiser or, alternatively, to allow limited discovery on the issue of partiality.

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Respectfully submitted by:

BARRY, ROME & SCOTT

 /s/ W. Briggs Scott

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has on this date been serviced on all counsel of record

in this proceeding by:

Hand Delivery

Facsimile

Electronic Mail

Prepaid U.S. Mail

Federal Express

CM/ECF

New Orleans, Louisiana this 12th day of January, 2024.

 /s/ W. Briggs Scott

W. BRIGGS SCOTT