

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

KELLY KENNEDY
Plaintiff,

vs.

**GEOVERA SPECIALTY
INSURANCE COMPANY**
Defendant.

*
*
*
*
*
*
*
*

CIVIL ACTION NO. 2:23-cv-06395

**JUDGE/SECTION:
BARRY W. ASHE/M**

**MAGISTRATE/DIVISION:
KAREN WELLS ROBY/4**

**GEOVERA SPECIALTY INSURANCE COMPANY’S
MEMORANDUM IN SUPPORT OF ITS MOTION TO STRIKE APPRAISAL AWARD**

MAY IT PLEASE THE COURT:

Defendant, GeoVera Specialty Insurance Company (“GeoVera”) files this Memorandum in Support of its Motion to Strike the Appraisal Award. This case is currently pending through the CMO, but GeoVera notes that this is a vital preliminary matter and its resolution will aid in the overall progress of the case in chief.

Specifically, GeoVera moves this Honorable Court to (1) deem the Appraisal Award as invalid due to the contingency fee charged by Plaintiffs’ appraiser, per the terms of the Insurance Policy and Louisiana Law, and (2) to strike the Appraisal Award in its entirety given the lack of credibility with same as more fully explained as follows.

I. FACTUAL BACKGROUND

This action stems from Kelly Kennedy’s (“Plaintiff”) claim with GeoVera, relating to alleged Hurricane Ida damage to her property. GeoVera issued a wind-only homeowners policy to Plaintiff, bearing policy number GC60014003 (“Policy”), noting the policy period of March 31,

2021 through March 31, 2022, for the property located at 1932 Concord Road, Terrytown, Louisiana 70056 (“Property”).¹

On October 19, 2021, fifty-one (51) days after Hurricane Ida made landfall in Louisiana, Plaintiff reported alleged property damage to GeoVera. Two (2) days later, on October 21, 2021, Michael Pleasant of AllCat Claims inspected the property. Within thirty (30) days of receipt of the estimate, photographs, and report, GeoVera timely issued payment of the undisputed amount, \$7,259.23, pursuant to the estimate and in accordance with the terms, conditions, provisions, and exclusions of the Policy.

On December 29, 2021, GeoVera received a letter of representation from Plaintiff’s attorney, along with a demand and estimate from Plaintiff’s public adjuster, Galmon International.² This estimate alleged damages totaling \$55,692.21.³ In response to receipt of this estimate, seventeen (17) days later, on January 15, 2022, Mark Simmons of AllCat Claims reinspected the Property. Again, within thirty (30) days of receipt of the estimate, photographs, and report, GeoVera timely issued payment of the undisputed amount, \$2,465.71, pursuant to the reinspection estimate and in accordance with the terms, conditions, provisions, and exclusions of the Policy.

On or around March 4, 2022, Plaintiff invoked the appraisal provision of the Policy and named Irwin & Associates as their appraiser. On March 9, 2022, GeoVera acknowledged the invocation of appraisal and named its appraiser as Christopher Craig.⁴ The letter GeoVera provided fully outlined the policy provisions regarding the appraisal process.⁵

¹ Exhibit A – Certified Copy of Policy No. GC60014003

² Exhibit B – December 27, 2021 Estimate from Galmon International

³ *Id.*

⁴ Exhibit C – March 9, 2022 Ltr to Insured’s Counsel naming GeoVera’s Appraiser

⁵ *Id.*

On May 27, 2022, the appraisers participated in a joint inspection. The appraisers could not reach an agreement on the price and scope of damage, and the umpire was invoked on August 23, 2022. It is unclear whether the umpire inspected the property as he provided no photographs. The umpire signed the appraisal award on March 24, 2023. The opposing appraiser with Irwin + Associates signed the award on March 26, 2023 for \$146,436.65.⁶ Interestingly, GeoVera's appraiser was not even provided the proposed award until March 27, 2023 and was not given any opportunity to produce any remarks on the award prior to it being executed.

On April 19, 2023, GeoVera requested the examinations under oath ("EUO") of Plaintiff, the umpire, and Plaintiff's appraiser, per the terms of the Policy.⁷ These requests went unanswered and eventually Plaintiff filed suit. The parties proceeded through the CMO, and albeit woefully late, Plaintiff produced her initial disclosures on September 25, 2024. The initial disclosures included documents related to the appraisal, as required by the CMO. Upon review of the appraisal documents from Plaintiff, it became clear that a contingency fee existed. This Motion follows.

II. GEOVERA POLICY

GeoVera issued a wind-only homeowners policy to Kelly Kennedy for the Property located at 1932 Concord Road, Terrytown, LA 70056. This Policy was in effect from March 31, 2021 through March 31, 2022. The forms and endorsements that make up the Policy are listed on the Declarations page. For purposes of this Motion, the relevant forms and endorsements are the "Homeowners 3 – Wind Only Form WH 00 03, 08-20" and the "Special Provisions – Louisiana Form WH 01 17, 03-17".

The Homeowners 3 – Wind Only Form is a basic form for GeoVera and outlines several policy provisions, including the appraisal provision. It provides, in pertinent part:

⁶ Exhibit D – Non-binding Appraisal Award

⁷ Exhibit E – April 19, 2023 Demand for EUOs, *in globo*

CONDITIONS

...

F. Appraisal

If you and we fail to agree on the amount of loss, either may demand an appraisal of the loss. In this event, each party will choose a competent and impartial appraiser within 20 days after receiving a written demand from the other and notify the other of the appraiser's name and contact information. *An appraiser will not be considered impartial if their compensation is determined by the amount of the appraisal award.* If the appraisers cannot agree on the amount of loss or the actual cash value in accord with this Condition, the two appraisers will choose a competent and impartial umpire. If the appraisers cannot agree upon an umpire within 15 days, you and we shall jointly ask a judge of a court of record in the judicial district where the "residence premises" is located to choose an umpire. Neither you nor we may assign the right to demand appraisal to anyone.

The appraisers will separately set the amount of loss and provide a written appraisal report specifically describing:

- a. Each item of property being appraised;
- b. The types and kinds of damage to each item of property;
- c. The extent of the damage to each item of property;
- d. The estimated costs of repair or replacement of each item of property;
- e. The estimated amount of depreciation and/or obsolescence of each item of property; and
- f. The actual cash value of each item of property.

If the appraisers submit a written report of an agreement to us, the amount agreed upon will be the amount of loss.

If the appraisers cannot agree, they will each submit their differences to the umpire, specifically describing the differences and the amount attributable to each difference. The umpire will set the amount of loss and provide an itemized written award specifically describing a. through f. above. An award will not be considered valid without the required itemization. A decision agreed to by any two will set the amount of loss.

Each party will:

1. Pay its own appraiser;
2. Pay the costs of experts or any other expenses not mutually agreed in advance to share; and
3. Bear the other expenses of the appraisal and umpire equally.

If there is an appraisal:

- a. You and we agree that any suit for or involving a disagreement in the amount of loss claimed under this policy shall be abated on the demand for appraisal by either you or us until after an appraisal award is issued in accord with this Condition; and
- b. **We retain the right to apply the policy coverages, terms, and conditions under this policy to any appraisal award.**

Critically, the appraisal provision clearly outlines the requirements that must be met in order for an appraisal under the Policy to be valid. In fact, the appraisal provision goes a step further and explains the definition of impartiality with respect to financial interests in the outcome of the appraisal. Further, the appraisal provision is written in such a way that allows GeoVera to “apply the policy coverages, terms, and conditions” to the appraisal award. The impact of both is clear, not only is the appraisal in direct violation of the appraisal provisions, the appraisal award is not and cannot be binding.

III. **LAW AND ARGUMENT**

GeoVera’s motion seeks to completely strike the appraisal award and exclude it as evidence of the amount of loss due to the abundance of inaccuracies, misrepresentations, clear financial interest in the award, and lack of credibility of both Plaintiff’s appraiser and the appraisal award itself. GeoVera also seeks affirmation that the Policy language is clear in that the appraisal award is non-binding in accordance with Louisiana law.

- a. **AN IMPROPER FINANCIAL INTEREST IN THE APPRAISAL EXISTS, THUS INVALIDATING THE APPRAISAL AWARD.**

Louisiana law has made clear the problematic nature of contingency agreements during the appraisal process. In fact, public adjusters are now specifically prohibited from soliciting or entering into any agreement with an insured “which is contingent upon, or calculated as a percentage of, the amount of any claim or claims paid to or on behalf of an insured by the insurer and any such contract shall be against public policy and is null and void.”⁸ Such contingency fee

⁸ La. Stat. Ann. 22:1703(A).

contracts are inherently partial and, therefore, against public policy. For the same reasons, these issues also prohibit appraisers from having similar arrangements.

Courts throughout this district have disqualified appraisers with similar fee agreements. In *Chardonay Village Condominium Association, Inc. v. James River Ins. Co.*, Judge Barbier addressed the disqualification of a partial or biased appraiser, determining that a person is only qualified to be an appraiser if the person is impartial and disinterested.⁹ Judge Barbier further noted, much like the GeoVera Policy provisions, that an appraiser is not deemed impartial if he has a financial interest in the results of the appraisal by means of a contingency fee.¹⁰

The Court in *Chardonay* examined the holding in *Harris v. Am. Modern Home Ins. Co.*, where an appraiser was appointed, and the Plaintiff entered into a contingency fee contract in which that appraiser would receive 15% of the final appraised value of the damages to the home.¹¹ Given that the policy language in *Harris* explicitly required the appraisers to be competent and disinterested, the Court in *Harris* ruled that an appraiser becomes an interested or biased party once there is an indirect or direct financial interest in the appraisal's outcome, i.e. a contingency fee.¹²

The ruling in *Harris* further explains that an appraiser's fee cannot be based on a percentage of the settled loss in any manner, including just as a cap of amounts to be recovered.¹³ The court reasoned that even an hourly rate with a percentage cap based on the amount of the loss morphs an hourly fee contract into a contingency fee contract and effectively creates a direct financial

⁹ *Chardonay Village Condominium Association, Inc. v. James River Insurance Company*, No. 06-4878, 2008 WL 3285908, at *1 (E.D. La. Aug. 9, 2008) (citing *Hyland v. Millers Nat. Ins. Co.*, 91 F.2d 735 (C.C.A. 9th Cir. 1937))

¹⁰ *Id.* (citing *General Star Indem. Co. v. Spring Creek Village Apartments Phase V, Inc.*, 152 S.W.3d 733 (Tex. App. Houston 14th Dist. 2004)).

¹¹ *Harris v. Am. Modern Home Ins. Co.*, 2008 WL 2312930 (E.D. Mo.), citing, *Orr v. Farmers Mut. Hail Ins. Co. of Mo.*, 201 S.W.2d 952,957 (Mo. 1947)

¹² *Id.*

¹³ *Id.*

interest for the appraiser in the outcome of the appraisal.¹⁴ As such, the Court in *Harris* held that an appraiser's interest in the outcome of the appraisal invalidates the appraisal altogether.¹⁵ Based on this finding, in *Chardonay*, Judge Barbier held that when an appraiser's hourly contract more so resembles that of a contingency fee-based contract, such contract renders that appraiser a "partial, interested party" and he should be disqualified.¹⁶

Here, Plaintiff produced a copy of the actual appraisal contract.¹⁷ It is formulated as a "Ranged Flat Fee Appraisal Contract"; however, a cursory review of said contract shows that there is a clear financial interest in the outcome of the appraisal. In this case, with the appraisal award totaling "between \$140,001 and \$150,000", Plaintiff's appraiser's invoice totaled \$13,900.00.¹⁸ Essentially, this is "an hourly rate with a percentage cap based on the amount of the loss", as contemplated by the *Harris* decision. Accordingly, the Irwin + Associates appraisal contract "morphs an hourly fee contract into a contingency fee contract and effectively creates a direct financial interest for the appraiser in the outcome of the appraisal." It is apparent that Plaintiff's appraiser had a financial interest in the outcome of the appraisal, either in his appraisal position or the ultimate appraisal award; therefore, he is not a competent or impartial appraiser. For instance, if the appraisal valuation totaled between "\$200,001 and \$225,000" the Plaintiff's appraiser's invoice would have totaled almost \$20,000 for the same amount of work.¹⁹ GeoVera's Policy explicitly precludes this type of an arrangement by the clear language of the Policy.²⁰ Plaintiff's appraiser cannot and should not be considered impartial. This is a clear breach of the Policy's

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Chardonay Village Condominium Association, Inc. v. James River Insurance Company*, No. 06-4878, 2008 WL 3285908, at *1 (E.D. La. Aug. 9, 2008)

¹⁷ Exhibit F – Irwin + Associates Appraisal Contract

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Ex. A

appraisal provision,²¹ in direct violation of Louisiana jurisprudence, and the ultimate reason to strike the appraisal award.

b. THE APPRAISAL ESTIMATE ITSELF IS INACCURATE AND UNRELIABLE

Moreover, as a result of the improper appraisal process, the award itself is inaccurate and unreliable. Both Plaintiff's appraiser and the umpire failed to consider the actual Ida-related damage and included numerous repairs wholly unrelated to Hurricane Ida. Further, the excessive scope of repairs is not supported by any photographs or even by the Plaintiff.

i. BARRY VAN SHOUBOUK'S ESTIMATE IS HIGHLY INFLATED AND INACCURATE

Plaintiff's appraiser, Barry Van Shoubouek, highly inflated his appraisal estimate.²² Prior to any involvement with Irwin + Associates, Plaintiff, through her attorney, produced a public adjuster estimate from Galmon International which estimated Ida-related repairs at \$55,692.21.²³ Shoubouek completely disregarded the Galmon International estimate, instead valuing alleged damages at nearly three times the amount of the Galmon International estimate, which is not supported by the facts or photographic evidence.²⁴ Shoubouek included multiple rooms in his appraisal estimate that were not reported as having damage originally by Plaintiff, during the GeoVera inspections and resulting estimates, or in the Galmon International estimate, including the kitchen, linen closet, all bathrooms, living room, dining room, mud room, laundry, and garage.²⁵ Shoubouek also included almost \$20,000 in excessive general conditions, as well as, over \$20,000 in unsupported and unexplained contents, and over \$9,000 in unincurred additional

²¹ Exhibit A

²² Ex. G – Shoubouek Appraisal Estimate

²³ Exhibit B

²⁴ Ex. G

²⁵ *Id.*

living expenses.²⁶ Perhaps this was to artificially inflate the estimate for a higher appraisal invoice under the contingency fee contract. Regardless, since Shouebouek had a clear financial interest in the outcome of the appraisal, he cannot be considered impartial, and his signature on the award is invalid.

ii. LIKewise, MILES CORBITT'S UMPIRE ESTIMATE IS HIGHLY INFLATED

The umpire Miles Corbitt's valuation heavily relied on the estimate prepared by Shouebouek, resulting in the highly inflated valuation wrought with errors.²⁷ For instance, Corbitt included antimicrobial, duplicate cleaning, disinfectant spray, and emergency mitigation resulting in approximately \$20,000 in overages.²⁸ Corbitt also included repairs to the garage, even though the Insured had confirmed there was no damage.²⁹ Corbitt also allowed for repairs to the laundry room, kitchen, bathrooms, and dining rooms, even though no damage was observed during GeoVera's appraiser's inspection.³⁰ Not only that, no damage to these areas was ever observed prior to the involvement of Irwin + Associates. Corbitt also included an excessive \$16,731.20 in general conditions and an additional \$15,218.14 in pack out charges, both of which are unwarranted.³¹ Corbitt also included \$15,500 in unincurred and unnecessary additional living expenses.³² Further, Corbitt failed to use the industry standard of 10% overhead and 10% profit, instead using 15% overhead and 10% profit without providing any explanation as to this deviation from the customary 10/10.³³ It does not appear that Corbitt even considered the Galmon International estimate either.

²⁶ *Id.*

²⁷ Ex. H – Corbitt Umpire Estimate

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

c. **FURTHER, UNDER LOUISIANA LAW AND PER THE TERMS OF THE POLICY, THE APPRAISAL AWARD IS NOT BINDING.**

As a general rule, “appraisal clauses... are enforceable under Louisiana law and are interpreted according to normal Louisiana principals of contract interpretation.”³⁴ Further, the language of the contract is “the law between the contracting parties.”³⁵

Under the language of the Policy at issue, GeoVera retained the right to “apply the policy coverages, terms, and conditions” to the appraisal award.³⁶ Although the specific term “non-binding” is not used, the result of this provision is clear, any appraisal award is not binding and cannot be used to set the amount of the loss against either party. To allow otherwise could result in misinterpretation and misapplication of the Policy provisions. Further, to make the jump would result in the prohibition of any challenge to the appraisal.

Further, and of important note, the Appraisal Award reached by the Plaintiff’s appraiser and the Umpire contain the following language regarding the explicit limitations of the award:

This award is made without consideration of any deductibles or prior payments. Such deductibles and prior payments will be subtracted from any payments due and owing as a result of the entry of this award. This award is made subject to all the terms, conditions, depreciation, and exclusions of the above listed policy.³⁷

GeoVera does not dispute that the Policy contains a valid and enforceable appraisal clause, which was timely requested in this matter, rather GeoVera requests this Court to confirm the non-binding nature of the appraisal award, because the Policy’s appraisal provision provides that, GeoVera retained the right to “apply the policy coverages, terms, and conditions” to the appraisal award.³⁸

³⁴ *Lighthouse Ranch for Boys, Inc. v. SafePoint Ins. Co.*, No. CV 22-1988, 2023 WL 2540295, at *2 (E.D. La. Mar. 16, 2023), citing *Spann v. Southern Fidelity Ins. Co.*, No. 13-6134, 2014 WL 444527, at *2 (E.D. La. Sept. 9, 2014), quoting *St. Charles Parish Hosp. Serv. Dist. No. 1 v. U. Fire & Cas. Co.*

³⁵ *Id.*

³⁶ Ex. A

³⁷ Ex. D

³⁸ Ex. A

The Louisiana Civil Code provides the guiding principles for construing contracts in Louisiana, for court's sitting in diversity. "Interpretation of a contract is the determination of the common intent of the parties."³⁹ Such intent is derived from the actual language of the contract. If that language is "clear and explicit and leads to no absurd consequences, no further interpretation may be made in search of the parties' intent."⁴⁰ Further, "each provision in a contract must be interpreted in light of the other provisions so that each is given the meaning suggested by the contract as a whole."⁴¹

Because the Policy⁴² language at issue is clear and unambiguous, the contract must be construed in accordance with the plain language of the Policy pursuant to La. C.C. Art. 2046. GeoVera has continuously outlined the disputed nature of the appraisal award, submitted requests for information, and even requested the examinations under oath of Plaintiff, Plaintiff's appraiser, and the umpire, to no avail. It is clear that a dispute remains surrounding the validity of the appraisal award, which is precisely the reason such provisions are considered non-binding throughout the state.

More specifically, the shift in Louisiana insurance policy language from binding to non-binding is a direct result of the Louisiana Department of Insurance's ("LDI") prior mandate against binding appraisal awards. The LDI revised and reissued Directive 173 on October 5, 2020⁴³, which made clear that "an appraisal provision that states the appraisal process is 'binding' or 'final' or uses similar language *is not lawful in Louisiana* per La. R.S. 22:868(A)(2) and La. R.S. 22:862."⁴⁴ The Directive further explains that any such language would not be approved by the LDI and that

³⁹ La. C.C. Art. 2045

⁴⁰ La. C.C. Art. 2046

⁴¹ La. C.C. Art. 2045.

⁴² *Id.*

⁴³ Ex. I – Louisiana Department of Insurance Directive 173

⁴⁴ *Id.*

if any such language was included in a policy, said policy would be treated as if “the non-compliant condition or provision did not exist and/or worded to be in full compliance with the law...” per La. R.S. 22:880.⁴⁵

For these reasons, even though the GeoVera Policy provisions do not explicitly state that the appraisal provision is non-binding, Louisiana Law directly prohibits the clause from being treated as binding. The policy language, jurisprudence interpreting same, and the LDI Directive, make it abundantly clear that the subject appraisal award is not and cannot be considered binding.

d. **THE APPRAISAL AWARD SHOULD BE STRICKEN.**

While the appraisal award itself is non-binding, in normal circumstances, a non-binding award can (and often is) used as evidence of the amount of loss, much like a public adjuster or contractor estimate aiding a Plaintiff in carrying their burden of proof. However, here, the appraisal process, clear financial interest of Plaintiffs’ appraiser, and blatant inaccuracies in the award give serious concern as to the honesty and integrity of the Plaintiff’s appraiser.

GeoVera asserts that the evidence heavily suggests that, at the very least, Plaintiff’s appraiser failed to comply with Policy requirements, engaged in a corrupt and clearly biased appraisal, had an improper financial interest in the appraisal process, and created a heavily inaccurate and inflated estimate. Not only should the award be deemed unenforceable per the policy language and Louisiana law, but also, the appraisal award should be stricken and not allowed to be used for the purposes of demonstrating amounts of loss under the Policy.

IV. **CONCLUSION**

In this case, the appraisal award is not binding on either party involved, as mandated by the Policy language, all relevant case law, and the clear intent of the Louisiana Department of

⁴⁵ *Id.*

Insurance. As a result, and pursuant to the overwhelming case law, this award “does not set the contractual amount of loss and cannot be confirmed.”

Further, this award should be invalidated, stricken, and prohibited from being used as proof of the alleged damages sustained by the Insured. It is abundantly clear that Plaintiff’s appraiser had an improper financial interest in the appraisal process and included inaccurate and unsubstantiated damages to artificially inflate the ultimate award, which directly resulted in an excessive appraiser fee. Additionally, Plaintiff’s attorney entered into the contract with the appraiser, contrary to the Policy provisions. Although this award is in no way binding upon GeoVera, it needs to be entirely stricken from this case as it is the clear byproduct of partial, interested actors, leading to the wildly absurd results.

Dated: October 25, 2024

Respectfully Submitted:

/s/ Jeanne S. Arceneaux
MICHAEL E. HILL (25708)
Email: mhill@kelleykronenberg.com
JEANNE ARCENEUX (36035)
Email: jarceneaux@kelleykronenberg.com
KELLEY KRONENBERG, PA
400 Poydras Street, Suite 2400
New Orleans, Louisiana 70130
Phone: 504-208-9055
*Counsel for Defendant, GeoVera Specialty
Insurance Company*

CERTIFICATE OF SERVICE

I do hereby certify that I have on October 25, 2024, served a copy of the foregoing was served electronically with the Clerk of Court by using the CM/ECF system.

/s/ Jeanne S. Arceneaux
Jeanne S. Arceneaux