Removal, Remand & More: Rules and New Developments in Forum Battles for Coverage Disputes[1]

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[1] The authors' views are their own and not that of their firms or their clients. Further, each individual author does not necessarily agree with everything in this paper, which is a joint project and which necessarily contains portions that were authored by other panelists.

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I. INTRODUCTION — THE IMPORTANCE OF SHARPENING YOUR AXE[2]

Abraham Lincoln once said, "Give me six hours to chop down a tree and I will spend the first four sharpening the axe." Savvy coverage lawyers know that the initial preparation is critical to the events that will unfold. An outcome may be well be determined by the choice of a specific state or federal court forum to resolve the dispute and the battle to maintain that forum in the earliest stages of the coverage action.

As a basic rule, plaintiffs will generally prefer state courts, while defendants tend to prefer to litigate in federal courts. Insurance disputes follow these general preferences. Policyholders, typically plaintiffs, perceive they will receive more favorable treatment in the state court system; insurance carriers almost invariably will steer towards the federal courts when bringing or defending such actions. This paper will address some of the considerations and strategies employed by policyholders and insurance companies to secure and protect what they perceive to be the more advantageous forum for their dispute.

II. GENERAL CONSIDERATIONS

A. Choice of Law

1. State Law Governs

The substantive law of insurance is left to the states under the McCarran-Ferguson Act, 15 U.S.C. § 1012(a). Consequently, all 50 states (plus the District of Columbia and various U.S. Territories) have their own statutory, administrative, and/or case law with regard to insurance. It follows that (1) there are potential and actual conflicts of law among the various states' application of the law of insurance and interpretations of insurance policies; and (2) the states apply different conflicts of law principles to determine the applicable law once a conflict is seen.

2. Possible Conflicts Among Potentially Applicable State Law

The infinite number of ways in which the substantive law of insurance coverage may differ among the states is well beyond the scope of this paper. Suffice it to say that potential and actual differences may appear anywhere and everywhere. By way of example only, states differ as to the insurability of punitive damages. In New York, directly assessed punitive damages and vicariously assessed punitive damages are deemed uninsurable. *Zurich Ins. Co. v. Shearson Lehman Hutton, Inc.*, 642 N.E.2d 1065 (N.Y. 1994); in California, directly assessed punitive damages may not be insurable (Cal. Ins. Code § 533; *PPG Indus., Inc. v. Transamerica Ins. Co.*, 975 P.2d 652 (Cal. 1999)), but vicariously assessed punitive damages probably are, *see Arenson v. Nat'l Auto. and Cas. Ins. Co*., 286 P.2d 816 (Cal. 1955) (section 533 has no application to situation where insured not personally at fault) and *J.C. Penney Cas. Ins. Co*., 804 P.2d 689 (§ 533 does not preclude coverage for negligent acts); and in Arizona, no public policy prohibits insurance coverage for punitive damages arising out of gross negligence, wantonness, or recklessness. *Price v. Hartford Accident & Indem. Co*., 502 P.2d 522 (Ariz. 1972). In Texas, punitive damages are insurable

[2] The authors express their gratitude to Rhonda Thompson and Robert Gessinger for their contributions to portions of this paper.

unless they arise from "extreme and avoidable conduct that causes injury." *See Am. Int'l Specialty Lines Ins. Co. v. Res-Care, Inc.,* 529 F.3d 649 (5th Cir. 2008) (applying Texas law).

Similarly, in California, an insurance company may have a right to reimbursement for costs of defense paid to defend claims that were never even potentially covered. *Buss v. Superior Court*, 16 Cal.4th 35 (1997). In Illinois, no such right exists unless it is expressly set forth in the policy. *Gen. Agents Ins. Co. of Am. v. Midwest Sporting Goods, Co*., 215 Ill.2d 146, 165, 828 N.E.2d 1092 (2005); *Excess Underwriters at Lloyd's, London v. Frank's Casing Crew & Rental Tools, Inc.*, 246 S.W.3d 42 (Tex. 2008) (same).

3. Differing Principles to Resolve Conflicts of Law

Each state court will apply its own conflict of law rules, while the federal courts will apply the law of the state in which they sit. Restatement (Second) of Conflict of Laws ("Second Restatement") § 6; *Klaxon v. Stentor Elec. Mfg. Co*., 313 U.S. 487 (1941). Just as different states apply different substantive law, they may differ with regard to the rules they apply to resolve conflicts.

Some states still apply the traditional rule of *lex loci contractus*, enforcing the law of the state where the contact was made. *See Lexie v. State Farm Mt. Auto Ins. Co*., 469 S.E.2d 61, 63 (Va. 1996). Other states have abandoned *lex loci* in favor of the Second Restatement which, absent a controlling statutory directive, looks to:

> (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the laws to be applied.

Second Restatement, §6. *See, e.g., Duncan v. Cessna Aircraft Co.,* 665 S.W.2d 414, 420-21 (Tex. 1984).

Still other states apply one variety of hybrid or another. Florida applies *lex loci*, subject to a narrow exception where necessary to protect a Florida citizen and enforce a "paramount" state policy. *See State Farm Mt. Auto Ins. Co. v. Roach*, 945 So. 2d 1160 (Fla. 2006). Tennessee does as well, subject to a statutory exception for policies made to benefit a citizen of the state. *Ohio Cas. Ins. Co. v. Travelers Indem. Co.*, 493 S.W.2d 465 (Tenn. 1973); Tenn Code §56-7-102.

Even application of *lex loci* is not mechanical. Determining the place in which a contract was made, or made and delivered, may entail disputed facts. Was the contract made where the policyholder received a copy? Where the broker received a copy? If a policy was distributed to more than one location, which is the operative delivery?

The analysis is further complicated where the policy uses a "most favorable jurisdiction" provision, which would contractually superimpose a different analytical framework for starting the analysis and might require separate analyses for most favorable jurisdiction with respect to punitives, to the extent that the policy requires "most favorable jurisdiction"-law for that issue,

while employing the otherwise state-mandated choice of law analysis for other issues relevant to the dispute.

4. Enforceability of Choice of Law Provisions

Counsel must carefully review all applicable contract materials to determine whether the contracting parties agreed to a choice of applicable law, however unlikely that may be. Even where the parties have entered into a choice of law provision, it is critical for attorneys to pay attention to the choice of law rules of the state in which the forum is located. This is because even where an insurance contract includes a choice of law provision, there is no guarantee that the court will enforce the parties' choice of law.

Just as each state will apply its own conflict of law rules, so too will states apply their own standards in determining whether or not to enforce choice of law provisions. The following examples are illustrative, but not exhaustive. In some cases, courts have declined to enforce a choice of law provision where there was no substantial relationship between the insurer, insured, or policy and the chosen state. *See, e.g.*, *Industrial Indemnity Ins. Co. v. United States*, 757 F.2d 982, 987-88 (9th Cir. 1985) (declining to enforce Illinois choice-of-law provision to policy or parties having no substantial relationship with Illinois). In other cases, courts may decline to enforce a choice of law provision where the chosen law would conflict with a forum state's public policy, and where the forum state has a materially greater interest in the determination of the issue than the contractually chosen state. *See, e.g.*, *Pitzer College v. Indian Harbor Ins. Co.*, 779 Fed. Appx. 495 (9th Cir. 2019) (following determination that application of New York law was contrary to California public policy, remanding to district court to determine whether California had a "materially greater interest" than New York in resolution of issues). Still other states will decline to enforce a choice of law provision where either: (1) the chosen law has no relation to the parties or agreement; or (2) the chosen law thwarts the public policy of the forum state. *See, e.g.*, *DeSantis v. Wackenhut Corp.,* 793 S.W.2d 670, 677 (Tex. 1990) (courts will enforce the parties' choice of law provision unless the chosen jurisdiction has no relation whatever to them or their agreement thwarts Texas public policy).

B. Perceived Advantages of State Forum to Policyholders

Typically, policyholders consider themselves advantaged if they can proceed in state court. As a general proposition, insurers consider themselves better off in federal court. While counsel should re-examine these assumptions in every case, some basic considerations underlying the conventional wisdom include the following.

1. Pleading Standards

Whether an initial claim has sufficient merit to proceed beyond the pleading stage may be viewed leniently under the procedural law of many states.

In Texas, for example, pleadings brought before state courts must contain a "statement in plain and concise language, of the plaintiff's cause of action or the defendant's grounds of defense . . ." Tex. R. Civ. P. 45(b). As a benchmark for determining which complaints are litigated and which dismissed, this "fair notice" standard imposes a limited onus on the plaintiff. The court will consider "whether the opposing party can ascertain from the pleading the nature and basic issues

of the controversy and what testimony will be relevant." *Horizon/CMS Healthcasre Corp. v. Auld*, 34 S.W.3d 887, 896 (Tex. 2000); *but see Plascencia v. State Farm Lloyds*, No. 14-CV-524-A, Doc. No. 17, at 9 (N.D. Tex. Sept 25, 2014) (McBryde, J.) (concluding that TRCP 91a renders the issue of federal pleading standard versus state pleading standard somewhat moot). Allegations that include legal conclusions will not establish grounds for objection, as long as fair notice is communicated by the complaint as a whole. Tex. R. Civ. P. 45(b).

Plaintiffs may also benefit from the broader interpretive latitude usually afforded state court judges. In states with liberal notice pleading requirements, an original petition should typically be construed liberally in favor of the pleader, and the court "should uphold the petition as to a cause of action that may be reasonably inferred from what is specifically stated, even if an element of the cause of action is not specifically alleged." *Boyles v. Kerr*, 855 S.W.2d 593, 601 (Tex. 1993).

In sum, the insurance carrier being sued in most state courts will encounter a forum simply more amenable to the allegations set forth in the complaint filed against it. Of course, while such a defendant might eventually prevail over the course of trial, the prospects for defeating the suit early on, at the pleadings stage, are significantly curtailed.

2. Pre-Trial Discovery

Most state courts continue to permit extremely broad pre-trial discovery. *See, e.g.,* Cal. Code Civ. Proc. § 2017.010 (unless limited by order, "any party may obtain discovery regarding any matter [that] appears reasonably calculated to lead to the discovery of admissible evidence"). Federal courts may be more likely to limit pre-trial discovery, as evidenced by recent change to Federal Rule of Civil Procedure 26(b)(1) ("Scope in General. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense *and proportional to the needs of the case*, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.") (emphasis added).

3. Summary Judgment

Many state courts tend to be reluctant to grant motions for summary judgment. Federal courts, by contrast, tend to be less hostile to an early disposition of the case.

4. Trial Procedure

Federal judges are generally more likely to place time limitations on the parties during trial. Policyholders, generally wearing the plaintiff hat and often seeking damages for bad faith, perceive limited trial time to be unfavorable.

5. Non-unanimous Jury Verdicts

Unless stipulated otherwise, jury verdicts in federal court must be unanimous. Fed. R. Civ. P. 48(b). Thus, failure to win a single juror will prevent the plaintiff (usually the policyholder) from

prevailing. Many states, however, do not require unanimous verdicts; in California, three-fourths of the jury is sufficient to deliver an effective verdict after trial. Cal. Code Civ. P. § 618. In Texas, a minimum of ten members of the jury must concur in the verdict. Tex. R. Civ. P. 292(a).

6. Other Provincialism

As discussed below, coverage cases in the federal courts almost always involve an insurer "foreign" to the forum state. Policyholders perceive the local courts to be more solicitous of protecting the citizenry of the forum state; insurers typically perceive the federal courts to be less partial to the policyholder resident in the forum state. Insurers tend to fear the latitude the typical state court judge has in making rulings, from evaluating the pleadings to deciding motions for new trial and for judgment notwithstanding the verdict.

C. Necessity of Thorough Pre-Suit Analysis, *i.e.,* "Sharpening the Axe"

Given the breadth of considerations such as those identified above, careful coverage counsel must at the earliest stage of a developing dispute examine all of the circumstances and attempt to decide

- which forums are potentially available for litigation under applicable rules of personal jurisdiction, subject matter jurisdiction, and venue;
- which states' laws are potentially applicable;
- which state's (or states') laws would be most beneficial to her client, and on which issue(s);
- which forum is most likely to apply the law deemed most favorable; and
- whether there will be competition between state and federal forums.

Only after questions such as these are examined as fully as possible can counsel apply principles such as those discussed below to try to secure the most favorable forum.

III. FORUM CHOICE AND PRESERVATION TACTICS

A. Diversity Jurisdiction

Coverage litigation between a policyholder and an insurance carrier frequently involves an insurer domiciled in one state, and a policyholder domiciled in another. 28 U.S.C. § 1332(a) confers original jurisdiction upon federal district courts for civil suits where: (1) the amount in controversy exceeds $75,000, and (2) diversity of citizenship exists. As an initial proposition, insurers battling their customers would seem to hold the upper hand as far as presenting their case in the preferred federal forum.

1. Requirement of Complete Diversity

The federal courts' diversity jurisdiction depends, of course, upon *complete* diversity of the plaintiffs and the defendants. 28 U.S.C. § 1332. Frequently, however, attorneys for policyholders have resourceful methods for preserving state court adjudication.

2. Joinder of Non-Diverse Defendants

One tactic to eliminate complete diversity has been to join non-diverse persons or entities involved in the placement of the policy or adjustment of the claim. In order to do so, the claimant must analyze the facts under an array of jurisdiction specific common law and statutory rules and structure the allegations to capitalize on a theory most supportive of joinder. These theories include, but are not limited to, negligence, breach of contract, breach of fiduciary duty, and the violation of various Consumer Fraud and Deceptive Business Practices Acts. *See, e.g., Brennan v. Hall*, 904 N.E.2d 383 (Ind. Ct. App. 2009) (negligence); *Ex parte Certain Underwriters at Lloyd's of London,* 2001 WL 283262 (Ala. 2001) (breach of contract); *Triarsi v. BSC Group Services, LLC,* 422 N.J. Super. 104, 27 A.3d 202 (App. Div. 2011) (fiduciary duty); *Esteban v. State Farm Lloyds*, 23 F. Supp. 3d 723 (N.D. Tex. 2014) (claim against independent insurance adjuster for unfair or deceptive practices in the business of insurance under Texas Insurance Code). By filing suit against the insurance company and joining non-diverse persons also involved in business activities related to the policy, such as local claim adjusters, agents, and brokers, policyholders can potentially preclude federal jurisdiction over their claim.

a. Local Claims Adjusters

Insurance companies will in many instances dispatch locally based representatives, either as employees or independent contractors, to act as their claims adjusters. Several states have enacted statutes that create liability against these individuals.[3]

For example, in *Vail v. Texas Farm Bureau Mut. Ins. Co.*, 754 S.W.2d 129, 132 (Tex. 1988), the Texas Supreme Court acknowledged adjusters as persons attributed statutory duties pursuant to the Texas Insurance Code ("TIC"). Specifically, the *Vail* opinion expressly stated that the adjustment of claims and losses were covered under the TIC. *Id.*; *see also W. States Asset Mgmt., Inc. v. AIX Specialty Ins. Co.*, No. 13-CV-0234-M, 2013 WL 3349514, at *4 (N.D. Tex. July 3, 2013).

Despite these statutory enactments, an adjuster's own direct actions are the most relevant factors in determining liability in most cases, whether such individual is actually employed by the insurer or merely acting as an independent contractor. *See, e.g., Garza v. Geovera*, No. 13- CV-525, 2014 WL 66830, at *2 (S.D. Tex. Jan. 18, 2014); *Rocha v. Geovera Specialty Ins. Co.,* No. 13–CV–0589, 2014 WL 68648, at *2 (S.D. Tex. Jan. 8, 2014); *see also Gasch v. Hartford Indem. Co.*, 491 F.3d 278, 282 (5th Cir. 2007). "[T]he Code itself indicate[s] that an adjuster has an individual duty that arises when he engages in the business of insurance and that is not derived from the duty owed to the insured by an insurer." *Esteban v. State Farm Lloyds*, No. 13-CV-3501-B, 2014 WL 2134598, at *6 (N.D. Tex. May 22, 2014) (citing TEX. INS. CODE ANN. §§ 541.002, 541.151).

Nevertheless, federal court authority occasionally recognizes that an adjuster who is a state resident, quite often, is simply named in a case because he or she showed up for work, particularly when an allegation of fraud is at play. *See Waters v. State Farm Mutual Automobile Ins Co.*, 158

[3] If your state has adopted a Deceptive Trade Practices Act, evaluate the facts of your case carefully to determine if such an act might apply. It is uncommon for states to extend the application of such statutes to claims handling practices particularly if there is a Fair Claims Handling Act.

F.R.D. 107, 108-109 (S.D. Tex. 1994); *Herrman Holdings, Ltd v Lucent Techs., Inc.*, 302 F.3d 552, 564-65 (5th Cir. 2002).

In that respect, decisions such as the Texas Supreme Court's in *Natividad v. Alexsis, Inc*., 875 S.W.2d 695 (1994), are an additional resource for insurers. *Natividad* focused on an alleged breach of the duty of good faith and fair dealing by an independent insurance adjuster. The Texas Supreme Court reiterated the policy rationale that the duty of good faith and fair dealing arises from the type of unequal bargaining power that is typically present in insurance placements; furthermore, according to the Court, this duty is non-delegable. *Id*. at 698. As a result, the duty of good faith and fair dealing does not apply to independent contractors who are not in direct privity with the policyholder.[4]

Insurance carriers often argue that, according to decisions similar to *Natividad*, policyholders cannot sue an independent adjuster under any theory of law when contractual privity is lacking. By and large, this position has proven unpersuasive in attempts to defeat motions for remand. The court in *Esteban*, for example, clarified that *Natividad* "only precluded an independent adjuster's liability for breach of the duty of good faith and fair dealing and did not insulate an insurance agency's employee-adjuster from liability under the Texas Insurance Code." *Esteban,* at *5 (citing *Gasch,* 491 F.3d at 282).

As such, the legal cover provided in this context to representatives of insurance companies for breaching the duty of good faith and fair dealing constitutes a typically fairly narrow exception. Leaving good faith aside, the statutes of various states appear to establish a broad basis on which to hold third-parties liable for unfair and/or deceptive acts and practices.

b. Local Insurance Agents and Brokers

Claims adjusters are not the only non-diverse joinder candidates which policyholders may target as a means for keeping their lawsuits in state court. The common-law and statutes of many jurisdictions establish duties that create the possibility for both agent and broker liability in the context of a coverage action.

These common-law and statutory duties encompass adjusters, agents and brokers inclusively, and may or may not draw a distinction between insurance agents affiliated with an insurer and independent insurance brokers that can procure insurance from various insurers. *Webb v. Unumprovident Corp.*, 507 F. Supp. 2d 668, at 683 (W.D. Tex. 2005). However, the respective functions of each in placing policies and adjusting claims are, of course, fundamentally different.

[4] *See id.* at 698 ("When the insurance carrier has contracted with agents or contractors for the performance of claims handling services, the carrier remains liable for actions by those agents or contractors that breach the duty of good faith and fair dealing owed to the insured by the carrier…Because [the agents] were not parties to a contract with Natividad giving rise to a 'special relationship,' [they] owed Natividad no duty of good faith and fair dealing."); *see also Johnson v. Doodson Ins. Brokerage of Tex., LLC,* 1 F. Supp. 3d 776 (E.D. Mich. 2014) (for any plaintiff to sustain a claim for professional negligence against an insurance broker in Texas, the plaintiff and the broker must be in privity of contract); *Wormsbacher v. Seaver Title Co.*, 284 Mich. App. 1, 772 N.W.2d 827 (2009) (title insurer and its agents do not have a professional duty of care to those who employ them, apart from their contractual obligations).

Whereas adjuster liability stems mostly from actions undertaken after the policyholder has submitted its claim, a lawsuit against agents and brokers often alleges misconduct closer to the point of sale. *See*, *e.g. Nahmias Realty, Inc. v. Cohen*, 484 N.E.2d 617, 620 (Ind. Ct. App. 4th Dist. 1985) ("If an insurance agent undertakes to procure insurance for his principal and through his fault or neglect fails to do so, the agent is liable to the principal for any damages resulting from his failure."); *Bucksaw Resort, LLC v. Mehrtens*, 414 S.W.3d 39 (Mo. Ct. App. W.D. 2013) (failure to procure insurance); *Clements v. Thornton*, 268 Or. 367, 520 P.2d 893, 898 (1974) (same); *but see Baranowski v. Safeco Ins. Co. of Am.*, 119 Conn. App. 85, 986 A.2d 334 (2010) (Insurance is a highly regulated industry by state, so the standard of care applicable to an insurance agent varies from state to state).

In the event that the coverage that the insured believed it was purchasing is not actually provided by the policy and the insured cannot successfully reform the policy, the insured might have a remedy against its insurance broker. An insurance broker is obligated to act in good faith and with reasonable care, skill, and diligence in transacting business on behalf of the insured. *See e.g., In Royal Ins. Co. of Am. v. Cathy Daniels, Ltd.*, 684 F. Supp. 786, 792-93 (S.D.N.Y. 1988) (broker procured a policy that was rescinded because of the broker's failure to disclose certain facts to the insurer, and court held that the broker had breached its duty to exercise skill, care, and diligence in procuring coverage for the insured and broker was liable for the losses that the insured could have recovered if the policy had been properly obtained).

Along those lines and due to the particular roles of insurance agents and brokers, some of the more notable cases addressing joinder focus on misrepresentations made by brokers/agents to purchasers. For example, in *Peterson v. Big Bend Insurance Agency, Inc.*, the Washington Court of Appeals held that liability may be imposed on an insurance agent for making negligent misrepresentations as to how policy limits are to be determined where the client justifiably relies on the representations. *Peterson v. Big Bend Ins. Agency, Inc.*, 150 Wash. App. 504, 202 P.3d 372 (Div. 3 2009), as amended on reconsideration, (July 14, 2009). In a similar ruling, *May v. United Servs. Ass'n of Am.*, 844 S.W.2d 666, 669 (Tex. 1992), the Texas Supreme Court explained, "it is established in Texas that an insurance agent who undertakes to procure insurance for another owes a duty to a client to use reasonable diligence in attempting to place the requested insurance and to inform the client promptly if unable to do so." Under Texas law, an agent or broker would thus violate such obligation when he has "induced the plaintiff to rely on his performance of the undertaking to procure insurance, and the plaintiff reasonably, but to his detriment, assumed that he was insured against the risk that caused his loss." *Id.*

As a result, if a policy does not provide the coverage that the insured hired the broker to obtain, and the broker does not apprise the insured of that fact, the insured may have a remedy against the broker for the equivalent of the missing policy benefit in the event of a later occurrence that was supposed to have been, but was not, covered. *See, e.g., Commercial Ins. Consultants, Inc. v. Frenz Enterprises, Inc.*, 696 So. 2d 871, 873 (Fla. Dist. Ct. App. 5th Dist. 1997) (if broker fails to procure insurance, it is liable "to the same extent as the insurer had the insurance been properly obtained"); *Clements v. Ohio State Life Ins. Co.*, 33 Ohio App. 3d 80, 514 N.E.2d 876, 881 (1st Dist. Hamilton County 1986) ("An insurance agent who advises a client that the coverage sought is in effect with the knowledge that the insurance company has not yet agreed to provide the coverage thereby incurs personal liability as an insurer…. In addition, if the agent is negligent in failing to acquire coverage he has undertaken to procure, he may be liable for resulting damage"); *Lazzara v.*

Howard A. Esser, Inc., 802 F.2d 260, 266, 6 Fed. R. Serv. 3d 54 (7th Cir. 1986) (Illinois law) ("damages for a broker's failure to procure or maintain insurance are determined by the terms of the policy that the broker failed to procure").

Thus, between adjusters, agents and brokers, a variety of non-diverse targets may land in a policyholder's crosshairs. Insurance carriers defending a suit involving those non-diverse defendants, however, are hardly devoid of avenues for subverting such designs.

B. Federal Forum Wrangling

1. Removal and Remand

When a coverage action is filed initially in state court, a defendant may have the option to remove it to federal court under 28 U.S.C. § 1446.

As an initial matter, a case filed in state court may be removed to federal court only by "the defendant or the defendants." 28 U.S.C. § 1441(a). "A non-party, even one that claims to be the proper party in interest, is not a defendant and accordingly lacks the authority to remove a case." *Valencia v. Allstate Tex. Lloyd's*, 976 F.3d 593, 595 (5th Cir. 2020). In *Valencia*, the Fifth Circuit held that a homeowner was entitled to have the suit remanded to state court because the insurer's associated Illinois company, which answered the suit and removed the case to federal court, was not a party to the case, and a non-party did not have the authority to remove a case under 28 U.S.C. § 1441(a). 976 F.3d at 596. The non-party entity "never claimed that it was misnamed or misidentified … and never sought to join the case as a defendant, but rather unilaterally 'changed the case caption without notifying the parties or the court' of its intention to defend the case." *Id.* at 595. Because the non-entity lacked removal authority and the proper parties to the action were all Texas residents, the Court remanded the matter to the district court with instructions to remand to state court for lack of subject matter jurisdiction. *Id.* at 596.

Most frequently, the basis for removal is diversity of citizenship. The removing party must establish diversity. A "corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business . . . ." 28 U.S.C. § 1332(c)(1). The corporation's "principal place of business" is determined by the corporation's "nerve center." *Hertz Corp. v. Friend*, 559 U.S. 77 (2010).

For the purpose of diversity jurisdiction, partnerships are citizens of the states where each partner or limited partner is a citizen. *Carden v. Arkoma Assocs.*, 494 U.S. 185, 186 (1990). Similarly, "the citizenship of an LLC for purposes of the diversity jurisdiction is the citizenship of its members." *E.g.*, *Cosgrove v. Bartolotta*, 150 F.3d 729, 731 (7th Cir. 1998). "To sufficiently allege the citizenships of these unincorporated business entities, a party must list the citizenships of all the members of the limited liability company and all the partners of the limited partnership." *Rolling Greens MHP, L.P. v. Comcast SCH Holdings L.L.C.*, 374 F.3d 1020, 1022 (11th Cir. 2004). Furthermore, "if any of an LLC's members are themselves non-corporate entities, then a plaintiff must allege the identity and citizenship of their members, proceeding up the chain of ownership until it has alleged the identity and citizenship of every individual and corporation with a direct or indirect interest in the LLC." *U.S. Liab. Ins. Co. v. M Remodeling Corp.*, 444 F. Supp. 3d 408, 410 (E.D.N.Y. 2020); *see also Delay v. Rosenthal Collins Grp., LLC,* 585 F.3d 1003, 1005

(6th Cir. 2009) ("When diversity jurisdiction is invoked in a case in which a limited liability company is a party, the court needs to know the citizenship of each member of the company. And because a member of a limited liability company may itself have multiple members—and thus may itself have multiple citizenships—the federal court needs to know the citizenship of each 'sub-member' as well.").

For example, with respect to federal cases involving Lloyd's, an unincorporated association "with the members or investors who collectively make up Lloyd's known as 'Names'[,]" the party asserting diversity jurisdiction must show that "the citizenship of each Name [is] diverse when the syndicate as a whole is suing or being sued." *Park 10 Hosp., LLC v. Certain Underwriters at Lloyd's London*, No. 4:19-cv-05013, 2020 U.S. Dist. LEXIS 169327, at *3 (S.D. Tex. Sep. 16, 2020).

Some federal courts will issue a show cause order requiring the removing party to adduce further proof of the citizenship of the parties. *See, e.g., Univ. of St. Augustine for Health Servs. v. Allied World Surplus Lines Ins. Co.*, 3:15-cv-00608-BJD-JRK, Dkt. No. 5 (M.D. Fla. May 20, 2015); *Fin. Strategy Grp. v. Cont'l Cas. Co*., No. 2:14-cv-2154, Dkt. No. 24 (W.D. Tenn. Sept. 9, 2014). In some instances, the facts concerning citizenship may be derived from public records of which the federal court may take judicial notice. The types of documents of which the federal court may take judicial notice are defined by Rule 201(b) of the Federal Rules of Evidence. They include court records and certain information published on government websites. For example, individual states' Secretary of State or Office of Corporations-type departments may have publicly available certificates of incorporation for corporations. Prior statements about citizenship of parties may be available from court filings in Pacer or Securities and Exchange Commission filings. Websites maintained by the parties may also contain admissible proof of citizenship. Proof of citizenship of a partnership or an LLC is a particularly vexing issue because the identity of all partners or the members of the LLC is often not publicly available. Some courts will allow limited discovery for the purpose of establishing jurisdiction. *See, e.g., Dougherty Funding, LLC v. Gateway Ethanol, LLC*, No. 08-XC-2213-JWL, 2008 WL 2354965 (D. Kan. June 5, 2008) (allowing defendant to conduct limited written discovery concerning the citizenship of the plaintiff LLC's members to determine whether diversity jurisdiction existed); *but see Abrego Abrego v. Dow Chem. Corp*., 443 F.3d 676, 691 (9th Cir. 2006) (holding that under facts presented it was "it is well within the court's discretion to remand to state court rather than ordering jurisdictional discovery, with the knowledge that later-discovered facts may prompt a second attempt at removal").

It is critical that the removing party get the facts straight at the time of removal. "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." 28 U.S.C. § 1447. If diversity jurisdiction was not correctly determined, the jurisdictional question can be raised by another party or the court at any time and thereby defeat even years of litigation effort. *See, e.g., Thermoset Corp. v. Bldg. Materials Corp. of Am.*, 849 F.3d 1313 (11th Cir. Mar. 2, 2017) (appellate court *sua sponte* determined that one of the appellees, which was an LLC, had a non-diverse member from the plaintiff and thus vacated the summary judgment order in favor of the defendants, remanded the case back to the district court, and instructed it to remand the entire case back to the Florida state court to begin the litigation anew); *M Remodeling Corp*., 444 F. Supp. 3d at 409 (*sua sponte* rejecting complaint allegations of citizenship as insufficient to demonstrate diversity under 28 U.S.C. § 1332 and issuing show cause order why case should not be dismissed for lack of subject matter jurisdiction). "A challenge to

the Court's subject-matter jurisdiction is never waived and may be raised at any time." *Xome Settlement Servs., LLC v. Certain Underwriters at Lloyd's*, 2020 U.S. Dist. LEXIS 16516, *10-11 (E.D. Tex. January 31, 2020) (rejecting insurers' argument that plaintiffs waived their challenge to the jurisdictional minimum by raising it in a reply).

If the federal court concludes *sua sponte* or upon motion of a plaintiff that any of the requirements for proper removal have not been met, the matter may be remanded to the state court where it was initially filed. A proposed amendment to Fed. R. Civ. P. 7.1, if adopted, would require unincorporated business organizations to file with the court information as to the citizenship of each of its partners/members/beneficial owners. The proposed amendment has drawn criticism regarding the burden that it would impose on unincorporated associations as well as the fact that the purpose of the rule is to allow the court to determine whether disqualification based on conflict of interest is appropriate, not proof of diversity jurisdiction. The proposed amendment has not been adopted to date.

In addition to proof of diversity, the removing party bears the burden to establish the amount in controversy. The movant may be able to establish the amount in controversy based on the insured's demand or the coverage action complaint allegations. At other times, the complaint filed in state court will allege with specificity only the amount of damages necessary for the state court's jurisdiction, such as damages in an amount of at least $15,000. Indeed, some states prohibit a plaintiff from specifying the demand. And many states even prohibit plaintiffs from alleging a specific number for certain claims. *See, e.g.,* Cal. C.C.P. § 425.10(b) ("where an action is brought to recover actual or punitive damages for personal injury or wrongful death, the amount demanded shall not be stated"); N.Y. C.P.L.R. § 3017(c) ("In an action to recover damages for personal injuries or wrongful death, the complaint . . . shall not state the amount of damages to which the pleader deems himself entitled."). Where the amount in controversy cannot be determined from the complaint itself, the information may be derived from a judgment in the underlying claim, a demand letter, discovery responses in the underlying action relating to damages, and similar sources. The removal statute incorporates a "preponderance of the evidence" standard, which means that a removing party need not prove the amount in controversy to a "legal certainty." 28 U.S.C. § 1446(c)(2)(B).

The amount in controversy determination becomes more complicated where Lloyd's is a party. There is a split of authority whether the amount in controversy must be established separately with respect to each Name. *Compare E.R. Squibb & Sons, Inc. v. Accident & Cas. Ins. Co.*, 160 F.3d 925 (2nd Cir. 1998) (holding that each Name must satisfy the jurisdictional amount) *with Cronin v. State Farm Lloyd's,* No. H-08-1983, 2008 WL 4649653, at *6 (S.D. Tex. Oct. 10, 2008) ("[F]or unincorporated associations . . . , courts have consistently looked to the individual members of the association for complete diversity purposes, but at the association itself as an entity for amount in controversy purposes.") (citing cases).

In *Xome Settlement Services., LLC v. Certain Underwriters at Lloyd's*, Civil Action No. 4:18-CV-00837, 2020 U.S. Dist. LEXIS 16516 (E.D. Tex. Jan. 31, 2020), the Eastern District of Texas found that remand for lack of subject-matter jurisdiction was required for failure to meet the amount in controversy, where the policyholders sued all Names subscribing to and severally liable under the policy, and the Lloyd's entities did not show that the amount in controversy exceeded

$75,000 for each individual Name. First, the Court explained the "unique" nature of lawsuits involving Lloyd's of London:

> As the Fifth Circuit explained in *Corfield v. Dall. Glen Hills LP*, 355 F.3d 853 (5th Cir. 2003): "Lloyds of London is not an insurance company. . . . Thus, a policyholder insures *at* Lloyd's but not *with* Lloyd's." 355 F.3d at 857-58. Usually, a Lloyd's policy has several "Syndicates," which are collectively responsible for 100% of the policy's coverage. *Id.* at 858. But these "Syndicates" are "creature[s] of administrative convenience"—Syndicates have no independent legal identity, and they bear no liability for the risk on a Lloyd's policy. *Id.*
>
> The members who belong to these Syndicates—and bear the liability for the risk—are called "Names." *Id.* The Names "finance the insurance market and ultimately insure risks." *Id.* These Names may be individuals, corporations, or unincorporated entities. *See id.* Typically, "hundreds of Names will subscribe to a single policy, and the liability among the Names is several, not joint." *Id.* The Names are contractually committed to the insured; a Syndicate, which is simply a group of Names, does not have a contractual relationship with the insured. *Id.* at 859. But, "[t]he insured does not have to sue each Name individually [] to collect on their individual promises." *Id.* So, when there is litigation involving a Lloyd's policy, the lead underwriter on the policy typically appears as a representative on behalf of all Names. *Id.*

Id. at *7-8.

As an initial matter, the court found that the Names subscribing to the policy were the real parties in interest such that the amount-in-controversy requirement must be met for each individual Name underwriting the Policy. *Id.* at *9. "Courts within the Fifth Circuit have held that filing suit against 'Certain Underwriters at Lloyd's' is synonymous with suing every Name subscribing to the policy." *Id.* at *11 (collecting cases). Because the policyholders sued every Name subscribing to the Policy, the court found that the Lloyd's entities "must accordingly show that the jurisdictional amount is met as to each individual Name." *Id.* at *13-14. The Lloyd's entities failed to meet their burden.

The policy had a $5 million limit of liability and "the three Syndicates ha[d] an equal 33.34% share of the liability under the Policy … Which means that within any one of the three Syndicates, the Names comprising that Syndicate are severally liable for an equal share of approximately $1,667,000.00." *Id.* at *14. One of the Policy's Syndicates had approximately 1,400 Names; so, each of these 1,400 Names shares an equal portion of the $1,667,000.00 liability." *Id.* "In other words, each Name in this Syndicate is responsible for approximately 0.0238% of the total, $5 million Policy limit. At most, this means each Name's several liability is capped at around $1,200. This is nowhere near the jurisdictional amount. And because liability among the Names is several under the Policy, it cannot be aggregated in order to satisfy the jurisdictional amount." *Id.* at *14-15. Because the Lloyd's entities failed to meet their burden regarding the amount in controversy, the Court remanded for lack of subject-matter jurisdiction. *Id.* at *14.

In *PHL*, the policyholder pressed the argument further, asserting that the amount sought from each excess insurer, and not simply the primary insurer, must exceed $75,000 for diversity jurisdiction to exist, and that, because the excess insurers were Lloyd's entities, the amount sought from each Name subscribing to the underwriting syndicates participating in each excess policy must exceed $75,000. Although the policyholder admittedly sought tens of millions of dollars in the coverage action, it argued that the jurisdictional amount for diversity jurisdiction was not satisfied absent proof of the amount in controversy as to each Name participating in the excess insurers. While the court acknowledged that this might be a "patently unreasonable" interpretation of the diversity statute, it nonetheless concluded that the "clear directives of the law" mandated dismissal where one of the Lloyd's syndicates comprising one of the excess insurer parties consisted of thousands of Names.

The *PHL* decision potentially has implications for any insurance coverage action involving excess insurers, not only Lloyd's insurers, where the amount in controversy clearly exceeds $75,000, but the exact amount implicated at each excess layer is less clear. Nonetheless, at least one court has concluded that the argument presented in *PHL* is "frivolous" with respect to the amount in controversy as to excess insurers, and that removability exists as long as the entire proceeding concerns a controversy concerning an amount in excess of $75,000, without regard to whether the amount would impair each excess layer by $75,000. *See Pierce v. Atl. Specialty Ins. Co.*, No. 16-cv-00829 (D.N.M. July 26, 2017).

2. Snap Removal

Even if diversity exists, a defendant cannot remove an action to federal court if any defendant that has been properly "joined and served" is a citizen of the state in which the case was filed. 28 U.S.C. § 1441(b). The "resident defendant" exception to removal means that a defendant sued in its home state court cannot remove the case to federal court, even if diversity jurisdiction exists. The "joined and served" requirement in the exception provides a small loophole, though. If the resident defendant has not yet been formally served with the state court complaint, the removing party may act quickly to remove the action and obtain jurisdiction in the federal forum, in what is sometimes referred to as a "snap removal." "Snap removal allows cases that would otherwise not be removable because they involve one or more forum defendants to be removed to federal court if removal occurs before any forum defendant has been served." *Latex Constr. Co. v. Nexus Gas Transmission, LLC*, No. 4:20-1788, 2020 U.S. Dist. LEXIS 122244, at *4 (S.D. Tex. July 13, 2020).

The Courts of Appeal that have addressed snap removal to date have approved it based on the plain language of the statute. *See Latex Constr. Co.*, 2020 U.S. Dist. LEXIS 122244, at *3-4 ("The Fifth Circuit, along with other appellate courts, have held that § 1441(b)(2) allows for "removal prior to service on all defendants," also known as 'snap removal.'"); *Tex. Brine Co., LLC v. Am. Arbitration Assoc., Inc.*, 955 F.3d 482 (5th Cir. 2020) (approving snap removal by non-resident defendant before any resident defendant was served as consistent with plain language of rule); *Gibbons v. Bristol-Myers Squibb Co.*, 919 F.3d 699, 705-07 (2d Cir. 2019) (the resident defendant rule "is inapplicable until a home-state defendant has been served in accordance with state law; until then, a state court lawsuit is removable"); *Encompass Ins. Co. v. Stone Mansion Rest. Inc.*, 902 F.3d 147, 152 (3d Cir. 2018) (approving removal by resident defendant before service and

explaining that § 1441(b)(2) precludes removal "on the basis of in-state citizenship only when the defendant has been properly joined and served").

In *Texas Brine Company v. American Arbitration Association, Inc.*, the Court of Appeals for the Fifth Circuit held that the forum-defendant rule does not prohibit a non-forum defendant from removing a case when a not-yet-served defendant is a citizen of the forum state. 955 F.3d 482, 487 (5th Cir. 2020). The plaintiff, Texas Brine Co. LLC, sued the American Arbitration Association and two arbitrators for more than $12 million in damages and equitable relief in Louisiana state court, alleging that the defendants engaged in intentional and wrongful fraudulent conduct in connection with arbitration proceedings. *Id.* at 484-85. As an out-of-state defendant, the AAA removed the case to federal court before the other two defendants, Louisiana residents, had been served. *Id.* at 485. The district court denied the plaintiff's motion to remand, holding that the plain language of the removal statute did not bar snap removal. *Id.* The Fifth Circuit affirmed, recognizing that the plain language of 28 U.S.C. § 1441(b)(2) allowed for snap removal. *Id.* at 486. "When the AAA filed its notice of removal, the case was 'otherwise removable' — as required by Section 1441(b) — because the district court ha[d] original jurisdiction of a case initially filed in Louisiana state court in which the parties [we]re diverse." *Id.* As the court explained, the "forum-defendant rule's procedural barrier to removal was irrelevant because the only defendant 'properly joined and served,' the AAA, was not a citizen of Louisiana, the forum state." *Id.* The court agreed with the Second Circuit's interpretation that "By its text, then, Section 1441(b)(2) is inapplicable until a home-state defendant has been served in accordance with state law; until then, a state court lawsuit is removable under Section 1441(a) so long as a federal district court can assume jurisdiction over the action." *Id.* (quoting *Gibbons*, 919 F.3d at 705).

However, a split of authority remains at the district court level. *Compare, e.g., Francis v. Great W. Cas. Co.*, No. 5:17-CV-432 (MTT), 2018 WL 999679, at *2 (M.D. Ga. Feb. 21, 2018) (permitting snap removal by non-resident defendant before resident defendant is served) *with Delaughder v. Colonial Pipeline Co.*, No. 1:18-cv-04414-RWS, 2018 WL 6716047, at *1 & 3 & 7 (N.D. Ga. Dec. 21, 2018) (remanding action after snap removal and finding that "gamesmanship is evidenced by Colonial's pre-service electronic monitoring of the docket" and stating that snap removal is an "absurd loophole" in the resident defendant rule); *and Zirkin v. Shandy Media, Inc.*, No. 2:18-cv-09207-ODW (SSx), 2019 WL 626138, at *2-4 (C.D. Cal. Feb. 14, 2019) (allowing snap removal where resident defendant removed before being served) *with Mohammed v. Watson Pharm., Inc.*, No. 30–2009–00116911, 2009 WL 857517, at *4 (C.D. Cal. Mar. 26, 2009) (remanding action removed by non-resident defendant and stating that "the purpose of the [removal] statute is to prevent gamesmanship by plaintiffs and should not allow for a similar gamesmanship by defendants"); *and Magallan v. Zurich Am. Ins. Co.*, 228 F. Supp. 3d 1257, 1260-61 (N.D. Okla. 2017) (permitting snap removal by non-resident defendant) *with In re Jean B. Mcgill Revocable Living Tr.,* No. 16-CV-707-GKF-TLW, 2017 WL 75762, at *3 (N.D. Okla. Jan. 6, 2017) (holding that removal was not appropriate when the resident defendant sought to remove).

Some courts even permit a forum defendant to remove to federal court an action in which it is the *sole defendant* prior to being served. *See Latex Constr. Co.*, 2020 U.S. Dist. LEXIS 122244, at *14 (S.D. Tex. July 13, 2020) (holding that § 1441(b)(2) "does not limit snap removal to cases involving multiple defendants or require that a defendant have been served before effecting removal of a case from state court."); *but see Allen v. GlaxoSmithKline PLC*, No. 07-5045, 2008 U.S. Dist. LEXIS 42491, at *20 (E.D. Pa. May 30, 2008) (holding that a sole forum defendant may

not invoke snap removal). In *Latex Construction Co. v. Nexus Gas Transmission, LLC*, the court held that § 1441(b)(2) permits a resident of the forum state to snap remove a case before that defendant has been served with process, where that defendant is the only named defendant. 2020 U.S. Dist. LEXIS 122244, at *14. Judge Atlas rejected the plaintiff's argument that the statute's plain language allows for snap removal only in cases involving multiple defendants, explaining that "'the plain meanings of the words joined' and 'defendants' that appear in § 1441(b)(2) do not limit snap removal to cases with multiple defendants." *Id.* at *5. The court also rejected the plaintiff's argument that the plain language of the statute requires that at least one defendant be served before snap removal is available. *Id.* at *10. As the Judge Atlas noted, service is not a condition precedent to removal. *Id.* The court adopted the Fifth Circuit's reasoning in *Texas Brine* and found that construing the plain language of § 1441(b)(2) to allow for removal of suits involving a single defendant "is not an absurd result." *Id.* at *13.

The Removal Jurisdiction Clarification Act was introduced in the U.S. House of Representatives in February 2020 to address snap removal. The proposed amendment to 28 USC §1447 would mandate remand if "within 30 days after filing of the notice of removal under section 1446(a), or within the time specified by State law for service of process, whichever is shorter, a defendant described in paragraph (2)(B) is properly served in the manner prescribed by State law to allow for remand as long as a forum defendant is served within a certain period after removal." In other words, the plaintiff would be permitted to block the snap removal if it timely serves the resident defendant after the action is removed. That bill was referred to the House Subcommittee on Courts, Intellectual Property, and the Internet in March 2020 and has not proceeded further as of the date of this article.

3. Waiver of Removal Rights

There are three ways in which a party may waive its removal rights: "'[1] by explicitly stating that it is doing so, [2] by allowing the other party the right to choose venue, or [3] by establishing an exclusive venue within the contract.'" *Ensco Intern., Inc. v. Certain Underwriters at Lloyd's*, 579 F.3d 442, 443-44 (5th Cir. 2009) (*quoting City of New Orleans v. Mun. Admin. Servs., Inc.*, 376 F.3d 501, 504 (5th Cir. 2004)). "For a contractual clause to prevent a party from exercising its right to removal, the clause must give a 'clear and unequivocal' waiver of that right." *Southland Oil Co. v. Miss. Ins. Guar. Ass'n*, 182 F. App'x 358, 359 (5th Cir. 2006). "Such a waiver, however, need not contain "explicit words, such as waiver of right of removal.'" *Id.*

In *Xome Settlement Servs., LLC v. Certain Underwriters at Lloyd's*, 384 F. Supp. 3d 697 (E.D. Tex. 2019), the policyholders moved to remand, arguing that the professional liability insurance policy foreclosed the defendant insurers from removing the lawsuit to the District Court. The policyholders argued that the insurers waived their removal rights under the language of the "Choice of Law and Jurisdiction" provision of the policy, which provided that any disputes arising under the policy "shall be subject to the exclusive jurisdiction of Texas." *Id.* at 701. However, the first sentence of the policy's Choice of Law and Jurisdiction" provision provided that "each party agrees to submit to the exclusive jurisdiction of any competent court within the United States of America." *Id.* at 702. Complicating matters further, the policy's service of suit provision stated that "Underwriters hereon, at the request of the Insured (or Reinsured), will submit to the jurisdiction of a Court of competent jurisdiction within the United States. Nothing in this Clause

constitutes or should be understood to constitute a waiver of Underwriters' rights to commence an action in any Court of competent jurisdiction in the United States, to remove an action to a United States District Court …" *Id.* at 703. As the court explained:

> To summarize, the "of Texas" language suggests the parties agreed to exclusively litigate their claims in Texas state court. The first "any competent court" language found in the Risk Details and Choice of Law and Jurisdiction provisions indicates the parties agreed to litigate their claims in any competent court within the United States—federal or state, within or outside of Texas. Defendants then appear to waive their removal rights in the second "any competent court" language found in the Service of Suit Clause by agreeing to submit to Plaintiffs' venue choice. Yet, the Service of Suit clause then specifically states that no language in the Clause constitutes a waiver of Defendants' removal rights. The Court must attempt to harmonize the provisions.

Id. at 704. The court rejected the parties' proposed attempts to harmonize the conflicting provisions, and ultimately held that the insurers "did not clearly and unequivocally waive their removal rights in the Policy." *Id.* at 706.

4. Improper Joinder

An effective counter to the policyholder's motion to remand is to argue that the non-diverse defendant was improperly joined in the state court proceeding. This maneuver enlists the federal court to reexamine the policyholder's original joinder, in order to uncover any procedural or factual defects.

"A lawsuit involving a non-diverse defendant may be removed if the non-diverse defendant was improperly joined." *Macari v. Liberty Mut. Ins. Co.*, No. H-19-3647, 2019 U.S. Dist. LEXIS 188022, at *3 (S.D. Tex. Oct. 30, 2019). Improper joinder may be proven by either: (1) actual fraud in the pleading of jurisdictional facts; or (2) inability on behalf of the plaintiff to raise a legitimate cause of action against the non-diverse defendant in state court. *Smallwood v. Ill. Cent. R.R. Co.*, 385 F.3d 568, 573 (5th Cir. 2004) (en banc); *SFM Holdings, Ltd. v. Fisher*, 465 Fed. Appx. 820, 821 (11th Cir. 2012). There are very few cases in which a court has found outright fraud committed by a policyholder in order to influence forum selection. *See, e.g.*, *Schur v. L.A. Weight Loss Centers, Inc.*, 577 F.3d 752, 763 (7th Cir. 2009) ("Actual fraud in alleging jurisdictional facts will suffice to invoke the doctrine, but the more typical ground is that a plaintiff brought a claim against a nondiverse defendant 'that simply has no chance of success, whatever the plaintiff's motives.'") (internal citations omitted). *But see Plascencia v. State Farm Lloyds*, Doc. No. 17, at 16 (finding that a "standard form petition developed for use in similar cases" which appears "purposefully designed to defeat federal court jurisdiction" is badge of improper joinder sufficient to defeat remand). Far more often, judicial scrutiny will concentrate on the second prong of the improper joinder analysis.

a. Manipulation of the Pleadings

While the route into federal court through improper joinder is certainly feasible, the requirements to sustain that position are substantial. The Fifth Circuit in *Smallwood* noted that the "defendant

bears a heavy burden of proving that the joinder of the in-state party was improper." *Smallwood*, 385 F.3d at 574. To overcome remand, the removing party must show that "there is absolutely no possibility that the plaintiff will be able to establish a cause of action against the non-diverse defendant in state court." *Griggs v. State Farm Lloyds*, 181 F.3d 694, 699 (5th Cir. 1999); *See also Schur*, 577 F.3d at 763. The Ninth Circuit has described the standard as this: "Joinder is fraudulent "[i]f the plaintiff fails to state a cause of action against a resident defendant, and the failure is obvious according to the settled rules of the state.'" *Hunter v. Philip Morris USA*, 582 F.3d 1039, 1043 (9th Cir. 2009); *Hamilton Materials,* 494 F.3d at 1206 (quoting *McCabe v. Gen. Foods Corp.,* 811 F.2d 1336, 1339 (9th Cir. 1987)) (alteration in original). Clearly, therefore, the level of judicial scrutiny which an insurer must overcome is exacting.

b. 12(b)(6)—Lite

The judicial probe into whether joinder of a non-diverse defendant was improper may involve two distinct lines of inquiry. First, the court might conduct a Rule 12(b)(6)-type analysis. This process will consider whether the complaint on its face asserts a sufficient claim against the in-state defendant, for which recovery might be obtained. As elaborated in *Struder v. State Farm Lloyds*, No. 13-CV-413, 2014 WL 234352, at *3 (E.D. Tex. Jan. 21, 2014), "if there is 'a reasonable basis for predicting that the state law might impose liability on the facts involved,' then there is no fraudulent joinder," and the case must be remanded for lack of diversity. *See also Sid Richardson Carbon & Gasoline Co. v. Interenergy Res., Inc.*, 99 F.3d 746, 751 (5th Cir. 1996); *Crowe v. Coleman*, 113 F.3d 1536, 1542 (11th Cir. 1997).

This begs the question of course as to what constitutes an "arguably reasonable basis," such as the court references. The *Studer* decision addressed this point by commenting that "whether the plaintiff has stated a valid state law cause of action depends upon and is tied to the factual fit between the plaintiff's allegations and the pleaded theory of recovery." *Struder*, 2014 WL 234352, at *4 (citing *King v. Provident Life and Accident Ins. Co.*, No. 09-CV-983, 2010 WL 2730890, at *4 (E.D. Tex. June 4, 2010)). A "factual fit" means "that the state-court petition must allege facts sufficient to establish the essential elements of each asserted cause of action." *Struder*, 2014 WL 234352, at *4 (citing *Tuchman v. DSC Communications Corp.*, 14 F.3d 1061, 1067 (5th Cir. 1994)); *see also Swanson v. Citibank, N.A.,* 614 F.3d 400, 404 (7th Cir. 2010).

Moreover, policyholders are advised that "merely lumping diverse and non-diverse defendants together in undifferentiated liability averments of a petition does not satisfy the requirement to state specific actionable conduct against the non-diverse defendant." *Griggs*, 181 F.3d at 699; *see also Triggs v. John Crump Toyota, Inc.*, 154 F.3d 1284, 1287 (11th Cir. 1998). Insurers should also be alert to point out, when appropriate, that policyholders "asserting a laundry list of statutory violations without factual support as to how a non-diverse defendant violated the statute will not suffice" to establish a valid joinder. *Struder*, 2014 WL 234352, at *4. As federal courts continue to test whether a state resident defendant is joined simply to defeat diversity, more and more scrutiny is given to the factual assertions presented by a particular petition.

When a federal court scrutinizes the joinder of an in-state defendant, a key issue becomes whether to apply the state or federal standard of review. An interesting split between the Texas federal district courts has developed along these lines, which currently remains unresolved. *See Yeldell v. GeoVera Specialty Ins. Co.*, No. 12–CV–1908–M, 2012 WL 5451822, at *2 (N.D. Tex. Nov. 8,

2012). On the one hand, the federal judges in the Eastern District of Texas appear to uniformly adhere to the federal framework. *See Doucet v. State Farm Fire & Cas. Co.*, No. 09–CV–142, 2009 WL 3157478, at *5 (E.D. Tex. Sept. 25, 2009); *First Baptist Church of Mauriceville, Tex. v. Guideone Mut. Ins.Co.*, No. 07-CV-988, 2008 WL 4533729, at *4 (E.D. Tex. Sept. 29, 2008); *King v. Provident Life and Accident Ins. Co.*, No. 09-CV-983, 2010 WL 2730890, at *4 (E.D. Tex. June 4, 2010). By contrast, other federal courts in Texas have held that, when reviewing the sufficiency of joinder in this context, the notice pleading standard under state law should control the determination. *Esteban v. State Farm Lloyds*, No. 13-CV-3501-B, 2014 WL 2134598, at *7 (N.D. Tex. May 22, 2014) ("the Texas pleading standard is more appropriate under these circumstances, given that the federal pleading standard . . . is arguably more stringent, and '[f]undamental fairness compels that the standard applicable at the time the initial lawsuit was filed in state court should govern.'") (citing *Durable Specialties, Inc. v. Liberty Ins. Corp.*, No. 3:11–CV–739–L, 2011 WL 6937377, at *4 (N.D. Tex. 2011)); *Edwea, Inc. v. Allstate Ins. Co.*, No. H-10-2970, 2010 WL 5099607, *8 (S.D. Tex. Dec. 8, 2010). *See also De La Hoya v. Coldwell Banker Mex. Inc.*, 125 F. App'x 533, 537–38 (5th Cir. 2005) (applying the Texas "fair notice" standard in an improper joinder case). This is significant, of course, because of the fundamentally more lenient and permissive elements of notice pleading available under Texas state law. Again, the rubric for notice pleading requires simply that the complaint state a cause of action and give the defendant fair notice of the relief sought.

This issue has obviously not been resolved by Texas federal courts. *Edwea* advises that "the majority of courts have held that a federal court should not look to the federal standard for pleading sufficiency under Rule 8 and 12(b)(6) to determine whether the state court decision provides a reasonable basis for predicting that the plaintiff could recover against the in-state defendant." Yet, this view stands in contrast with the federal district courts in the Eastern District of Texas which appear to uniformly observe the federal pleading-sufficiency standard when analyzing improper joinder. The Northern District of Texas took notice of this tension and has recently held that consideration of Texas Rule of Civil Procedure 91a renders the tension moot. The court recognized the effect of the new Texas Rule 91a when it, while applying the Texas pleading standards, noted that the allegations of the pleading now must be examined "in the context of Rule 91a." *Bart Turner & Assoc. v. Krenke*, Civil Action No. 13-CV-2921-L, 2014 WL 1315896, at *3 (N.D. Tex. Mar. 31, 2014); *see also Sazy v. Depuy Spine Inc.*, No. 13-CV-4379-L, 2014 WL 4652839, at *4 (N.D. Tex. Sept. 18, 2014) ("[t]his new rule [TRCP 91a] now allows a state court to do what a federal court is allowed to do under Federal Rule of Civil Procedure 12(b)(6)").

Whether or not a federal court will follow this trend and rely upon TRCP 91a as the tool to determine if allegations are sufficient against a Texas resident, federal rules require more substance than broadly articulated allegations and legal conclusions. Judicial scrutiny of alleged improper joinder, which more closely parallels the actual strictures of Rule 12(b)(6), will therefore benefit the party seeking to maintain federal court jurisdiction. Specifically, to qualify under the federal standard, a complaint "must contain sufficient factual allegations, as opposed to legal conclusions, to state a claim for relief that is 'plausible on its face.'" *JNT Enterprises v. Nationwide Prop. and Cas. Ins. Co.*, No. H-13-1982, Doc. No. 23, at 6 (S.D. Tex. April 15, 2014) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

Additionally, regardless of how well-pleaded the factual allegations may be, they must demonstrate that the plaintiff is entitled to relief under a valid legal theory. *See Neitzke v. Williams*,

490 U.S. 319, 327 (1989); *McCormick v. Stalder*, 105 F.3d 1059, 1061 (5th Cir. 1997). In some cases, a court may find this procedural review of the policyholder's pleading to be indeterminate for the purposes of settling the issue of improper joinder. Under such circumstances, the federal judge could resort to a summary review of the underlying facts and circumstances of the lawsuit in order to decide whether joining a local defendant should be allowed to defeat removal.

c. Piercing the Pleading

The second, separate test for whether a policyholder has asserted a valid claim against a non-diverse defendant in state court focuses on evidentiary considerations. A federal district court may, at its discretion, "pierce the pleadings" and consider summary judgment-type evidence. *See Ridgeview v. Philadelphia Indem. Ins. Co.* No. 13-CV-1818-B, 2013 WL 5477166 at *3 (N.D. Tex. Sept. 30, 2014). In doing so, the decision maker will "determine whether, under controlling state law, the non-removing party has a valid claim against the non-diverse parties." *Hornbuckle v. State Farm Lloyds*, 385 F.3d 538, 542 (5th Cir. 2004). Through this lens, keeping the case in federal court or remanding it back to the state court level depends "not upon whether the Plaintiff has pleaded causes of action that meet the threshold of stating a [legitimate] claim, . . . but upon whether the Plaintiff has any *evidence* at all that would support any of [its] claims." *Id.* at 545 (emphasis in original). A local defendant would be deemed improperly joined "not only when there is no reasonable basis for predicting that the local law would recognize the cause of action pled against that defendant, but also when, as shown by piercing the pleadings in a summary judgment type procedure, there is no arguably reasonable basis for predicting that the plaintiff would produce sufficient evidence to sustain a finding necessary to recovery against that defendant." *Id.*

While this process imitates somewhat that which is exercised during summary judgment, its parameters in the context of reviewing questions of improper joinder are of course more limited. The court's focus will remain narrowly tailored to assessing whether or not the non-diverse party (such as the insurance broker, agent, or adjuster) has been legitimately joined to the dispute. The court will not engage in a merits inquiry of the policyholder's action, but will consider any "discrete and undisputed facts and legal issues . . . that would preclude recovery against the in-state defendant." *Smallwood*, 385 F.3d at 573-574. Moreover, "a court must view all factual allegations in the light most favorable to the plaintiff, and any contested issues of fact or ambiguities of state law must be resolved" in favor of remand. *Travis*, 326 F.3d at 649. Nonetheless, this summary inquiry may be used to identify certain vulnerabilities upon which the insurer might capitalize.

5. Realignment of the Parties and Consent to Removal

The United States Supreme Court has held that "[d]iversity jurisdiction cannot be conferred upon the federal courts by the parties' own determination of who are plaintiffs and who defendants. It is [the] duty [of the] federal courts, to 'look beyond the pleadings, and arrange the parties according to their sides in the dispute.'" *City of Indianapolis v. Chase Nat'l Bank of City of N.Y.*, 314 U.S. 63, 69 (1941). "It is settled that where … there is no diversity of citizenship based on the initial alignment of the parties in an action commenced in state court, a defendant may nonetheless remove the case to federal court and request realignment of the parties to produce the requisite diversity." *Lott v. Scottsdale Ins. Co.*, 811 F. Supp. 2d 1220, 1223 (E.D. Va. 2011).

In determining the proper alignment of the parties, the Fourth Circuit, for example, applies the "principal purpose" test, which entails two steps: "First, the court must determine the primary issue in the controversy. Next, the court should align the parties according to their positions with respect to the primary issue. If the alignment differs from that in the complaint, the court must determine whether complete diversity continues to exist." *U.S. Fid. & Guar. Co. v. A & S Mfg. Co.*, 48 F.3d 131, 133 (4th Cir. 1995). This determination is made based on "the *present action*, without regard to an underlying civil action involving the parties." *Gabarette v. Emps. Ins. Co. of Wausau*, No. 1:16-CV-355-GBL-TCB, 2016 WL 9346850, at *2 (E.D. Va. May 20, 2016). The Eleventh Circuit employs the similarly named "primary dispute" test for the realignment of parties, which requires that the parties be "aligned in accordance with the primary dispute in the controversy, even where a different, legitimate dispute between the parties supports the original alignment." *James River Ins. Co. v. Arlington Pebble Creek, LLC*, 118 F. Supp. 3d 1302, 1306-08 (N.D. Fla. 2015) (collecting cases); *see also Am. Motorists Ins. Co. v. Trane Co.*, 657 F.2d 146, 149, 149-51 (7th Cir. 1981) (citations omitted) ("Realignment is proper when the court finds that no actual, substantial controversy exists between parties on one side of the dispute and their named opponents, . . . [I]t is the points of substantial antagonism, not agreement, on which the realignment question must turn."); *New Mexico ex rel. Reynolds v. Molybdenum Corp.*, 570 F.2d 1364, 1366 (10th Cir. 1978) ("We must determine the 'principal purpose' of the suit and align the parties accordingly.").

Courts frequently grant realignment in insurance coverage actions to align the underlying tort claimant with the policyholder seeking coverage, or simply disregard the citizenship of the claimant as a "nominal" party. For example, in *Smith v. Nationwide Mut. Fire Ins. Co.*, No. 3:14CV819-HEH, 2015 WL 364585, at *2 (E.D. Va. Jan. 27, 2015), the plaintiff (a Virginia citizen) in an underlying tort suit brought an insurance coverage action against the underlying defendant (also a Virginia citizen) and the underlying defendant's insurer (not a Virginia citizen). *Smith*, 2015 WL 364585, at *2. The Court granted a motion to realign the parties, observing that "[a]ny dispute between [defendant] and [plaintiff] in the underlying tort action is secondary to the present coverage dispute, and it appears to the Court that both [defendant] and [plaintiff] would benefit from a declaration [that there is coverage for the underlying action]." *Id*.

Accordingly, if a policyholder files an action in state court against a diverse insurer and a non-diverse underlying claimant, the matter may still be removable provided that the insurer can establish that the claimant, which has an interest in the policy proceeds, is properly aligned with the policyholder, which likewise has an interest in the policy proceeds. *See, e.g., City of Vestavia Hills v. Gen. Fid. Ins. Co.*, 676 F.3d 1310, 1314 (11th Cir. 2012) (affirming district court's realignment of parties for diversity of jurisdiction because, even though judgment creditor and judgment debtor were from the same state, they shared the same interests against the insurer regarding coverage); *Covil Corp. v. Zurich Am. Ins. Co.*, 18-3291 (D.S.C. June 14, 2019) (because the realignment established diversity jurisdiction, the Court denied the insured's motion for remand).

In a slight twist on the usual realignment scenario, a court recently court denied an insurer's motion to realign other insurers and concluded that it lacked diversity jurisdiction. In *Dean Bros. Pumps, Inc. v. Am. Home Assurance Co.*, No. 19-cv-0411-TWP-MPB, 2020 WL 2393679 (S.D. Ind. May 12, 2020), one of the insurer defendants removed an insurance coverage action concerning asbestos claims to federal court. The insurer that removed the action argued that the other insurer

defendants were not real parties in interest because certain complaint allegations targeted the removing defendant and the other insurer defendants would benefit if the policyholder's coverage and exhaustion arguments prevailed, thus aligning the interests of those insurers with the insured. The court rejected this theory, though, noting that the complaint sought declaratory relief as to all insurer defendants and that the "possible benefit" to the non-diverse insurer defendants did not justify realignment.

Note that consent of all defendants is typically required for removal. 28 U.S.C. § 1446(b)(2)(A). This is known as the "rule of unanimity." However, when a non-diverse defendant is realigned as a plaintiff for the purposes of determining diversity and potential removal, that party need not provide consent as a precondition to the removal. *See, e.g., State of Ohio ex rel. Skaggs v. Brunner*, 588 F. Supp. 2d 819, 827 (S.D. Ohio 2008), *rev'd on other grounds*, 549 F.3d 468 (6th Cir. 2008) (ruling that the "rule of unanimity" was no longer an issue where the court had realigned the non-consenting defendant with the plaintiffs); *Rico v. Flores*, 481 F.3d 234, 239 (5th Cir. 2007) ("[A] moving party need not obtain the consent of a co-defendant that the removing party contends is improperly joined."); *Coyne v. Am. Tobacco Co.*, 183 F.3d 488, 493 (6th Cir. 1999) ("[F]raudulent joinder of non-diverse defendants will not defeat removal on diversity grounds.").

The courts are split as to whether the removing defendant may "vouch" for the non-removing defendants' consent to removal or if a formal attestation of consent is required from each defendant. *Compare, e.g., Mayo v. Bd. of Educ. of Prince George's Cty*., 713 F.3d 735, 740-42 (4th Cir. 2013) (removing defendant may represent to the court the non-removing defendants' consent to removal by signing the notice of removal pursuant to Federal Rule of Civil Procedure 11; the non-removing defendants need not file anything further); *Christiansen v. W. Branch Cmty. Sch. Dist*., 674 F.3d 927, 932-33 (8th Cir. 2012) (removing defendant's indication of consent to removal was sufficient where that defendant filed a motion to dismiss shortly after removal, indicating a willingness to litigate in the federal forum); *Harper v. AutoAlliance Int'l, Inc*., 392 F.3d 195, 201-02 (6th Cir. 2004) (even if removing defendant's notice of removal lacked sufficient evidence of consent, such consent was clear when co-defendant filed an answer and an opposition to the plaintiff's motion to remand) *with Pietrangelo v. Alvas Corp.,* 686 F.3d 62, 66 (2d Cir. 2012) (consent required of non-removing defendants demonstrated by submission of letters to the court within the 30-day removal period); *Roe v. O'Donohue*, 38 F.3d 298, 301 (7th Cir. 1994), *abrogated on other grounds by Murphy Bros. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344 (1999) (each defendant must give consent to removal in writing); *Getty Oil Corp. v. Ins. Co. of N. Am.*, 841 F.2d 1254, 1262 n.11 (5th Cir. 1988) (each defendant must file timely with the court written indication of consent to removal).

6. The First-Filed Rule v. Second Filed But More Comprehensive Action

In cases where both actions are pending in federal court, the first-filed rule often establishes where the action will proceed. For example, in *Continental Casualty Co. v. Phoenix Life Insurance Co. et al.,* No 18-cv-1448 (JAM), 2020 WL 4586699 (D. Conn. Aug. 10, 2020), the primary insurer filed a declaratory judgment action against its insureds in federal court to address the insurance coverage dispute. After it became aware of the federal court action, the first named insured filed a competing action in California state court, naming both the primary and excess insurer, which the insurers then removed to federal court. At the point at which the competing actions both were pending in federal court, the court where the action was first filed denied the insureds' motion to

dismiss, explaining that the first-filed rule, which applies in the Second Circuit, was dispositive. *Id.*, ECF No. 44 (Tr. of Hearing filed Mar. 16, 2020). *See also Pacesetter Sys., Inc. v. Medtronic, Inc.*, 678 F.2d 93, 94–95 (9th Cir. 1982) (the "first-to-file" rule, under which multiple federal courts faced with suits "involving the same parties and issues" will defer to the district which first acquires jurisdiction over one of the suits, promotes "sound judicial administration").

The first-filed rule may not carry the day, though, if the competing action is pending in state court. In the *Phoenix Life* matter, after the Connecticut federal court denied the initial motion to dismiss, the insured prevailed in its effort to remand the second-filed action back to California state court, then returned to the Connecticut federal court where the first-filed action remained pending, and renewed its motion to dismiss. This time around, the first-filed rule would not apply. Nonetheless, in applying the discretionary factors whether to retain jurisdiction, the court denied the renewed motion to dismiss. *Id*. One of the factors considered by the court was the fact that the insurer had brought a "more complete" action by including as parties all of the insured entities that had been named as defendants in the underlying cases. The insured argued that its competing state court action was the more comprehensive action as necessary to finalize the controversy because the insured had named the excess insurers as defendants in that action. The court rejected that argument, stating "'This may be true, but it is beside the point. The first two Dow Jones factors ask whether a declaratory judgment would provide clarity and finality with regard to the issues before the federal court, not the issues before the state court.'" *Id.* (citation omitted). The Connecticut federal court held that, on balance, the factors weighed in favor of retaining jurisdiction and denied the insured's renewed motion to dismiss.

In *TDC Specialty Insurance Co. v. Masonic Homes of Kentucky, Inc*., the insurer likewise first filed a declaratory judgment action in federal court. Many months later, the insured filed a motion in the underlying state court proceeding to bring a third party complaint against the insurer in that underlying action, which the state court granted. In addressing the insured's motion to dismiss the first-filed federal court action, the Kentucky federal court applied the discretionary factors and decided against retaining jurisdiction. No. 19-cv-00619 (W.D. Ky. Aug. 3, 2020). Even though the state court proceeding was not filed until long after the federal court action, the federal court concluded that its "efforts would be duplicative of the contract issues now before the state court—and at a risk of conflicting outcomes" and dismissed the federal action. *Id.*

While in the above-discussed matters, the insurer's first-filed action was in federal court and the insureds filed competing actions in state court, the inverse happens as well, where an insurer, named as a defendant in a state action that cannot be removed, files a competing action in federal court. If that federal court action is filed after the state court action is initiated, the federal court may be reluctant to retain jurisdiction if the matters are substantially identical (indeed, the court in *Masonic Homes* was reluctant to retain jurisdiction even though it had jurisdiction long before the state court action was filed). To enhance the likelihood of retaining federal jurisdiction, the party filing in federal court may file a more comprehensive action by, among other things, including additional insurers or claimants that are not parties to the state court action. The availability of a more comprehensive vehicle for dispute resolution may well result in the dismissal of the first filed state court action based on that fact and other forum non conveniens factors. *See, e.g., AIG Fin. Prods. Corp. v. Penncara Energy LLC*, 922 N.Y.S.2d 288 (App. Div. 2011) (the pendency of a more comprehensive action in a forum that has a direct stake in the resolution of the parties' disputes may render the original jurisdiction an unsuitable forum for litigation); *cf. Cont'l Ins. Co.*

v. Hexcel Corp., No. 12-cv-05352, 2013 WL 1501565 (N.D. Cal. Apr. 10, 2013) (dismissing federal action in favor of "more comprehensive" state court action filed by policyholder naming many more insurers as defendants).

7. Time Constraints

Timing is important for removal. Under 28 U.S.C. § 1446(b), a defendant has 30 days from receipt of the complaint by service or otherwise to remove the action. In multi-defendant actions, there is a split of authority whether the timing for removal runs exclusively from when the first defendant is served, or whether a later-served defendant may remove, regardless whether an earlier-served defendant removed or failed to effectively remove as a result of a defect in its removal papers. The trend appears to be to favor the latter approach. *See Bailey v. Janssen Pharmaceutica Inc.*, 536 F.3d 1202 (11th Cir. 2008) (an earlier-served defendant cannot waive a later-served defendant's right to remove the case to federal court, either by not removing at all or by doing so defectively); *Marano Enters. of Kan. v. Z-Teca Rests., L.P.*, 254 F.3d 753, 755 (8th Cir. 2001) (same); *Brierly v. Alusuisse Flexible Packaging, Inc.*, 184 F.3d 527, 533 (6th Cir. 1999) (same). *But see Brown v. Demco, Inc.*, 792 F.2d 478, 481-82 (5th Cir. 1986) ("The general rule, however, is that "[i]f the first served defendant abstains from seeking removal or does not effect a timely removal, subsequently served defendants cannot remove . . . due to the rule of unanimity among defendants which is required for removal."") (citation omitted).

The statute not the only timing issue and other actions by the plaintiff may affect the timing of when removal must be accomplished. For example, in *PHL Variable Insurance Co. v. Continental Casualty Co.*, the insurer attempted to remove the action based on diversity jurisdiction appearing from the face of the complaint, only to learn that, by the time of the original defendant's removal, which was otherwise timely under the statute, the insured had filed an amended complaint that added non-diverse defendants. The district court held that the amended complaint's addition of non-diverse defendants before removal of the original complaint was effected meant that diversity jurisdiction no longer existed, and removal was unavailable. *See PHL Variable Ins. Co. v. Cont'l Cas. Co.*, No. 19-cv-06799-CRB, 2020 WL 1288454 (N.D. Cal. Mar. 18, 2020). In *Unifoil Corp. v. Southeast Personnel Leasing, Inc.*, No. 18-cv-00018-MCA-SCM, 2018 WL 5288730 (D.N.J. Sept. 28, 2018), the policyholder made an oral request at a status conference in the underlying action to "consolidate" the separate, pending state court coverage action with the underlying action. Even though the parties to the coverage action were not present or even notified about the status conference in the underlying action, the court granted the "consolidation" request with respect to both actions. Since that "consolidation" was effected before the insurer removed the coverage action to federal court, the federal court remanded the otherwise diverse coverage action on the grounds that the original plaintiff and defendant in the underlying action were non-diverse. *See also TDC Specialty Ins. Co. v. Masonic Homes of Ky., Inc.*, No. 9-CV-619-CHB (W.D. Ky. Aug. 3, 2020) (declining to exercise jurisdiction after insured filed a third party complaint against insurer in underlying action).

Previously, the removal rules prohibited removal of a diversity case more than one year after the state court action was filed. Currently, a court may allow removal on diversity grounds after one year if the court "finds that the plaintiff has acted in bad faith in order to prevent a defendant from removing the action." 28 U.S.C. § 1446(c)(1). A plaintiff's deliberate failure "to disclose the

actual amount in controversy to prevent removal" constitutes bad faith under this exception. 28 U.S.C. § 1446(c)(3)(B).

IV. ADDITIONAL SHARPENING

A. Abstention: Stay or Dismissal of Proceedings

1. Background: The *Brillhart* Factors

The Federal Declaratory Judgment Act ("DJA"), 28 U.S.C. § 2201, has since its enactment in 1934 empowered federal courts to award declaratory relief in cases otherwise within their jurisdiction. Where such jurisdiction exists, typically through diversity, the insurer may seek a federal forum in which to pursue declaratory relief. But the federal court's exercise of jurisdiction under the DJA is *discretionary*.[5] Thus, a party who perceives a state court forum to be more favorable (typically the policyholder) may initiate state court proceedings and request that the federal court "abstain" from exercising its discretion and stay (or even dismiss) a federal action while parallel proceedings continue in the state court.

The Supreme Court early on recognized the DJA increased the potential for "uneconomical as well as vexatious" parallel actions in state and federal courts, and urged avoidance of "[g]ratuitous interference with the orderly and comprehensive disposition of a state court litigation." *Brillhart v. Excess Ins. Co.*, 316 U.S. 491, 495 (1942). In *Brillhart*, the Court set forth three major factors to guide a district court in deciding whether to stay, dismiss or retain jurisdiction under the DJA. Specifically, lower courts should

- Avoid needless determination of state law issues;
- Discourage litigants from filing declaratory actions as a means of forum shopping; and
- Avoid duplicative litigation.

Brillhart was reaffirmed in *Wilton v. Seven Falls Co.*, 515 U.S. 277 (1995). The Court in *Wilton* acknowledged other authorities which emphasized the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." *See e.g., Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). Nonetheless, the *Wilton* Court held that *in declaratory judgment actions*, the principle that federal courts should adjudicate claims within their jurisdiction "yields to considerations of practicality and wise judicial administration." *Wilton*, 515 U.S. at 288. The DJA thus gives district courts "unique and substantial discretion" to decide whether to exercise jurisdiction to issue a declaratory judgment. Indeed, a district court's decision to abstain under *Brillhart* is reviewable only for abuse of discretion. *Wilton*, 515 U.S. at 286, 289-90.

[5] The DJA provides: "any court of the United States, upon the filing of an appropriate pleading, *may* declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought …." 28 U.S.C. § 2201 (emphasis added).

The "*Brillhart* factors" were never intended to be comprehensive, and every circuit which has spoken on the issue has articulated in somewhat different language additional considerations a district court should address in considering whether to abstain. By way of example, in the Ninth Circuit, a district court supplements the *Brillhart* factors with the "*Dizol*" considerations:

- whether the declaratory action will settle all aspects of the controversy;
- whether the declaratory action will serve a useful purpose in clarifying the legal relations at issue;
- whether the declaratory action is being sought merely for the purposes of procedural fencing or to obtain a *res judicata* advantage;
- whether the use of a declaratory action will result in entanglement between the federal and state court systems; and
- the convenience of the parties, and the availability and relative convenience of other remedies.

Government Employees. Ins. Co. v. Dizol, 133 F.3d 1220, 1225 n.5 (9th Cir. 1998).[6]

2. Application of *Brillhart* Factors

a. Needless Determination of State Law Issues

A "needless determination of state law" may involve an ongoing parallel state proceeding, or an area of law Congress expressly reserved to the states, or a lawsuit with no compelling federal interest, such as a diversity action. *See Continental Casualty Co. v. Robsac Indus.*, 947 F.2d 1367, 1371 (9th Cir. 1991) (overruled on other grounds by *Dizol*).

i. Parallel Action. The existence of a "parallel" action in state court is one threshold trigger for federal court abstention.

The "parallel" action threshold is generally satisfied when the insurer seeks a coverage determination in the federal court, and the policyholder seeks an opposite coverage determination in the state court. *E.g. N. Pac. Seafoods, Inc. v. Nat'l Union Fire Ins. Co.*, No. C06-795RSM, 2008 U.S. Dist. LEXIS 1714, at *11 (W.D. Wash. Jan. 3, 2008); *State Auto. Mut. Ins. Co. v. Reed*, No. 1:06-cv-1616-DFH-WTL, 2008 U.S. Dist. LEXIS 29712, at *2 (S.D. Ind. Mar. 28, 2008);

[6] While each Court of Appeal which has spoken on the subject has implemented the *Brillhart* factors in different language, "each circuit's formulation addresses the same three aspects of the analysis:" the proper allocation of decision-making between state and federal courts, fairness, and efficiency. *Sherwin-Williams Co. v. Holmes Cty*, 343 F.3d 383, 390 (5th Cir. 2003). There is as yet no indication the differing tests applied by the circuits constitute a substantive split, or would lead to different results under similar facts. Nonetheless, a party seeking to invoke federal DJA jurisdiction might wish to consider the different articulations that would be applied by different federal courts in determining whether to abstain in favor of the state forum. A list of the different articulations is contained in Appendix A.

State Farm Fire & Cas. Co. v. Meridian Indus. Corp., No. C-95-2479 SI, 1995 U.S. Dist. LEXIS 16500, at *10 (N.D. Cal. Oct. 31, 1995).

Federal courts are split as to whether DJA suits are "parallel" to underlying state court actions against the policy holder which gave rise to the coverage dispute. On one hand, the Ninth Circuit has frequently found such DJA suits to be "parallel" to the underlying state court action against the policyholder which gives rise to the coverage dispute. In *Employers Reinsurance Corp. v. Karussos*, 65 F.3d 796 (9th Cir. 1995) (overruled in part on other grounds by *Dizol*), the plaintiff insurer sought declaratory relief from the federal court adjudicating coverage. The insurer was <u>not</u> a party to the underlying state court action, and the state and federal cases raised non-identical factual issues. Nevertheless, the court of appeals held the district court abused its discretion when it retained jurisdiction over the insurance coverage dispute because the resolution of the coverage issues "[turn] on factual questions that overlap with those at issue in the underlying state court litigation." *Id*. at 800. *See also*, *Polido v. State Farm Mut. Auto. Ins. Co*., 110 F.3d 1418, 1423 (9th Cir. 1997) (overruled in part on other grounds by *Dizol*) (rejecting State Farm's argument that the federal declaratory relief action was *not* parallel to an underlying state court proceeding because State Farm was not a party to the state suit: "[D]ifferences in factual and legal issues between the state and federal court proceedings are not dispositive because the insurer could have presented the issues that it brought to federal court in a separate action to the same court that will decide the underlying tort action.") (internal quotations omitted).

Thus, in courts that follow the approach of the Ninth Circuit, a state proceeding is "parallel" to a federal declaratory relief action when: (1) the actions arise from the same factual circumstances; (2) there are overlapping factual questions in the actions; or (3) the same issues are addressed by both actions. *Golden Eagle Ins. Co. v. Travelers Cos.*, 103 F.3d 750, 755 (9th Cir. 1996) (overruled in part on other grounds by *Dizol*); *Employers Reinsurance Corp. v. Karussos*, 65 F.3d 796, 800 (9th Cir. 1995) (overruled in part on other grounds by *Dizol*). These courts construe the term "parallel action" liberally. *Golden Eagle*, 103 F.3d at 754-55 (citing *American Nat'l Fire Ins. Co. v. Hungerford*, 53 F.3d 1012, 1017 (9th Cir. 1995)); *Keown v. Tudor Ins. Co.*, 621 F. Supp. 2d 1025, 1037 (D. Hawaii 2008). For such courts, underlying state actions need not involve the same parties or the same issues to be considered "parallel"; it is enough that the state proceedings "arise from the same factual circumstances." *Golden Eagle,* 103 F.3d at 754-55.

In contrast, other circuits have found abstention to be erroneous in situations similar to those presented in *Employers Reinsurance Corp.* and *Polido*. *Kelly v. Maxmum Specialty Ins. Grp.*, 868 F.3d 274, 287 (3d Cir. 2017), involved a declaratory judgment action seeking a declaration that Maxum was obligated to defend and indemnify its insured, Carman, in a separate state court tort action against Carman, and to which Maxum was not a party. *Id.* at 280. The Eastern District of Pennsylvania concluded that the state court tort action constituted a parallel proceeding to the declaratory judgment action because the tort action "directly implicate[s] Maxum's obligations to defend and indemnify [Carman]." *Id.* at 283. On appeal, the Third Circuit reversed, stating that it was clear the two proceedings were not parallel because "Maxum is not a party to the Tort Action, and the questions of whether Carman's insurance policy with Maxum covers Carman's potential liability and whether Carman is in fact liable to the Kellys are distinct." *Id.* at 287. Like the Third Circuit, the Eighth Circuit has found that a DJA is not necessarily parallel to an underlying state court action against an insured. *See Scottsdale Ins. Co. v. Detco Indus., Inc.*, 426 F.3d 994, 997 (8th Cir. 2005) (concluding that insurer's declaratory judgment action was not parallel to a state

court proceeding against its insured because although "the issues in each proceeding may depend on some of the same facts, that circumstance does not compel a conclusion that the suits are parallel, for the state court proceedings involve parties, arguments, and issues different from those in the federal court proceedings")).

ii. Unsettled issues of state law. Abstention also is appropriate where state law is unclear and there is no strong federal interest in the matter. *Mitcheson v. Harris*, 955 F.2d 235, 238 (4th Cir. 1992) (*reversing* failure to abstain); *Allstate Ins. Co. v. Davis*, 430 F. Supp. 2d 1112, 1120 (D. Haw. 2006) (absent strong countervailing federal interest, federal court "should not elbow its way" to render what may be "uncertain and ephemeral" interpretation of state law).

iii. The federal court's interest in exercising jurisdiction. There is no compelling federal interest in resolving disputes concerning insurance coverage. Because the McCarran-Ferguson Act leaves the substantive law of insurance to the states, states "have a free hand in regulating the dealings between insurers and their policyholders." *Karussos*, 65 F. 3d at 799; *Dizol*, 133 F.3d at 1232 (because insurance industry is "wholly state regulated," federal interest is "minimal"). Where the sole basis of federal subject matter jurisdiction is diversity, the federal interest is "at its nadir." *Robsac*, 947 F.2d at 1371. Federal courts should "decline to assert jurisdiction in insurance coverage and other declaratory relief actions presenting only issues of state law during the pendency of parallel proceedings in state court unless there are circumstances present to warrant an exception to that rule." *American Nat'l Fire Ins. Co. v. Hungerford*, 53 F.3d 1012, 1019 (9th Cir. 1995) (internal quotations omitted).

b. Discourage Forum Shopping

The second *Brillhart* factor addresses forum shopping. Federal courts have a duty to discourage forum shopping and decline to entertain "reactive declaratory actions." *Dizol*, 133 F.3d at 1225. A declaratory judgment action by an insurer during the pendency of state court proceedings presenting the same issues of state law is an "archetype" of such "reactive" litigation. *Robsac*, 947 F.2d at 1372-1373 ("Reactive litigation can occur in response to a claim an insurance carrier believes to be not subject to coverage even though the claimant has not yet filed his state court action: the insurer may anticipate that its insured intends to file a non-removable state court action, and rush to file a federal action before the insured does so…. permitting [a reactive lawsuit] to go forward when there is a pending state court case presenting the identical issue would encourage forum shopping in violation of the second *Brillhart* principle.").

A number of courts have characterized an insurer's declaratory relief action filed during the pendency of parallel underlying proceedings as "reactive" in this way—*i.e.*, unwarranted forum shopping—and found abstention proper. *See, e.g., Federated Servs. Ins. Co. v. Les Schwab Warehouse Ctr., Inc.*, 2004 U.S. Dist. LEXIS 9252, at *11-14 (D. Or. Feb. 9, 2004) (court would impermissibly encourage forum shopping if it exercised jurisdiction over suit that raised some of same issues pending in underlying state court actions); *Great Am. Assur. Co. v. Bartell*, 2008 U.S. Dist. LEXIS 38720, at **11-12 (D. Ariz. Apr. 28, 2008) (Plaintiff was forum shopping by filing in federal court because it could have filed its action in state court, where action could have been coordinated with pending state court actions); *AMCO Ins. Co. v. AMK Enters.*, 2006 U.S. Dist. LEXIS 50806, at *12 (N.D. Cal. July 13, 2006) (exercising jurisdiction would encourage forum

shopping because insurer could have brought action in state court, where underlying action pending).

c. Avoidance of Duplicative Litigation

The third *Brillhart* factor aims to avoid duplicative litigation. If the federal coverage litigation seeks to adjudicate matters which have yet to be addressed in the underlying dispute, or which can or may be addressed in state court coverage proceedings, the party seeking abstention may have a strong argument. Where the state and federal claims are "inherently intertwined," a stay is indicated. *Burlington Ins. Co. v. Panacorp, Inc.*, 758 F. Supp. 2d 1121, 1142 (D. Haw. 2010); *see also Phoenix Assur. PLC v. Marimed Found. for Island Health Care Training*, 125 F. Supp. 2d 1214, 1222 (D. Haw. 2000) (avoidance of duplicative litigation favored stay where district court would have to decide many of same issues to be decided in pending state court litigation). And where duplicative litigation runs the risk of providing inconsistent factual findings and judgments, a stay or dismissal of proceedings is particularly appropriate. *See, e.g., One Beacon Ins. Co. v. Parker, Kern, Nard & Wenzel*, 2009 U.S. Dist. LEXIS 88043 *15 (E.D. Cal. Sept. 9, 2009).

3. Stay or Dismissal?

Where a district court declines to exercise DJA jurisdiction, it may stay or dismiss the action in the sound exercise of its discretion. *Wilton*, 515 U.S. at 288. That said, "a stay will often be the preferable course, because it assures that the federal action can proceed without risk of a time bar if the state case, for any reason, fails to resolve the matter in controversy." *Id.* at 288 n.2. *Int'l. Ass'n. of Entrepreneurs of Am. v. Angoff*, 58 F.3d 1266, 1271 (8th Cir. 1995) (stay preferable when "further federal proceedings may prove necessary").

On the other hand, where the state court has disposed of the issue in dispute and there is no need for further proceedings, dismissal is appropriate. *E.g., Nationwide Mut. Ins. Co. v. C.R. Gurule, Inc.*, No. CIV 15-0199 JB/KBM, 2015 U.S. Dist. LEXIS 162689, at *61-62 (D.N.M. Oct. 31, 2015).

4. Application of *Brillhart* Where the Federal Suit Seeks Declaratory *and* Coercive Relief?

If the federal courts have broad discretion under the DJA to exercise their jurisdiction or abstain from exercising it, what happens if an insurer joins a claim for "coercive" relief—*i.e.*, damages or rescission—with a plea for a declaratory judgment? The circuits are split as to whether the discretionary standard of *Brillhart* and *Wilton*, or the "unflagging obligation" standard of *Colorado River*, applies in such a situation. *See State Farm Mut. Auto. Ins. Co. v. Physicians Grp. of Sarasota, L.L.C.*, 9 F. Supp. 3d 1303, 1308 (M.D. Fla. 2014) (summarizing circuit split); *Regions Bank v. Commonwealth Land Title Ins. Co*., No. 11-23257-CIV-SCOLA, 2012 U.S. Dist. LEXIS 47466, at *7 (S.D. Fla. Apr. 4, 2012) (same).

In the Second, Fourth, Fifth, and Tenth Circuits, the *Wilton* standard does not apply where non-declaratory claims are joined with declaratory ones, and any abstention decision must be reached by reference to the "exceptional cases" standard of *Colorado River*. *vonRosenberg v. Lawrence*, 781 F.3d 731, 735 (4th Cir. 2015) ("The *Colorado River* standard applies to all mixed claims -- even where the 'claims for coercive relief are merely 'ancillary' to [a party's] request for

declaratory relief.'") (quoting *Black Sea Inv., Ltd. v. United Heritage Corp.*, 204 F.3d 647, 652 (5th Cir. 2000); *New England v. Barnett*, 561 F.3d 392, 395 (5th Cir. 2009) ("a declaratory action that also seeks coercive relief is analyzed under the *Colorado River* standard"); *United States v. City of Las Cruces*, 289 F.3d 1170, 1181-82 (10th Cir. 2002); *Village of Westfield v. Welch's*, 170 F.3d 116, 125 n.5 (2d Cir. 1999) ("*Wilton* does not apply here. Although Welch did seek a declaration of rights…the federal action did not seek purely declaratory relief").[7]

The Third, Seventh, and Ninth Circuits have declined to apply *Brillhart* where the coercive claims are "independent" of any claim for purely declaratory relief. *Rarick v. Federated Serv. Ins. Co.*, 852 F.3d 223 (3d Cir. 2017) ("We hold that the independent claim test is the applicable legal standard for review of a complaint that seeks both legal and declaratory relief."); *R.R. St. & Co. v. Vulcan Materials Co.*, 569 F.3d 711, 716-17 (7th Cir. 2009) ("Where state and federal proceedings are parallel and the federal suit contains claims for both declaratory and non-declaratory relief, the district court should determine whether the claims seeking non-declaratory relief are independent of the declaratory claim. If they are not, the court can exercise its discretion under *Wilton/Brillhart* and abstain from hearing the entire action. But if they are, the *Wilton/Brillhart* doctrine does not apply and, subject to the presence of exceptional circumstances under the *Colorado River* doctrine, the court must hear the independent non-declaratory claims."); *Gov't Emps. Ins. Co. v. Dizol*, 133 F.3d 1220, 1226 n.6 (9th Cir. 1998) ("Because claims of bad faith, breach of contract, breach of fiduciary duty and rescission provide an independent basis for federal diversity jurisdiction, the district court is without discretion to remand or decline to entertain these causes of action").[8]

The Eighth Circuit and certain district courts have taken yet a different approach and look to the "essence" of the lawsuit. If the "essence" of the lawsuit is a declaratory judgment action, *Brillhart* applies. *See Royal Indem. Co. v. Apex Oil Co.*, 511 F.3d 788, 793-94 (8th Cir. 2008) ("a court may still abstain in a case in which a party seeks damages as well as a declaratory judgment so long as the further necessary or proper relief would be based on the court's decree so that the essence of the suit remains a declaratory judgment action"). *See also* Nissan *N. Am., Inc. v. Andrew Chevrolet, Inc.*, 589 F.Supp.2d 1036, 1040 (E.D. Wis. 2008) ("The third approach, which the Court will apply in the instant case, looks to the 'heart of the action' to determine if the standard of *Wilton* or that of *Colorado River* should apply") (quoting *Lexington Ins. Co. v. Rolison*, 434 F. Supp. 2d 1228, 1236 (S.D. Ala. 2006)).

In sum, pending clarification from the Supreme Court, a party to an insurance dispute seeking a federal forum finds itself in an ironic situation. It may file a declaratory relief action in the federal court in the hope of securing what it perceives to be a substantively more sympathetic forum. It may, in anticipation of a request for abstention from the opponent, join a request for coercive relief in the hope of discouraging federal court abstention. But the extent to which the request for coercive relief will change the result and assist the party to secure the federal forum it deems

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[7] One Fifth Circuit case suggests courts should determine whether coercive claims are "frivolous" before determining whether *Brillhart* or *Colorado River* applies. *Kelly Inv. v. Cont'l Common Corp.*, 315 F.3d 494, 497 n.4 (5th Cir. 2002).

[8] To determine whether coercive claims are "independent" these courts ask whether, if the declaratory relief claim were dropped, subject-matter jurisdiction would continue to exist. *Dizol*, 133 F.3d at 1226 n.6; *R.R. St.*, 569 F.3d at 717.

substantively advantageous will depend, in potentially significant measure, on the *procedural* abstention analysis of the circuit in which it files.

B. Transfer to Another Venue

Under 28 U.S.C. § 1404(a), a federal court may transfer a case not only to a district where the case "might have been brought" (which was all that was permitted before changes to the rule in 2012), but also "to any district or division to which all parties have consented." Through transfer after removal, the removing party may obtain not only its preferred forum in federal court, but also a more convenient federal court or a federal court that already has before it one or more related matters.

28 U.S.C. § 1404(a) can also be used to transfer to the forum identified in an insurance policy's forum selection clause. For example, in *Union Elec. Co. v. Energy Ins. Mutual Ltd*., No. 4:10-cv-1153 (CEJ), 2014 WL 4450467, at *2, *6 (E.D. Mo. Sept. 10, 2014), the court decided a venue transfer was appropriate in light of recent United States Supreme Court jurisprudence limiting discretion to disregard forum selection clauses, notwithstanding the court's earlier reluctance to enforce such a clause. The policyholder initially filed the action in federal court in Missouri. The insurer moved to dismiss the action under Fed. R. Civ. P. 12 because the policy contained a forum selection clause, providing that "the United States District Court for the Southern District of New York shall have exclusive jurisdiction" over disputes between the insurer and the policyholder that are not subject to arbitration. The Missouri federal court initially granted the dismissal, but that decision was reversed by the appellate court. On remand and in light of the instructions from the appellate court, the Missouri district court determined that the forum selection clause was unenforceable because it required arbitration and Missouri public policy prohibited enforcement of mandatory arbitration provisions in insurance contracts.

The insurer then moved to transfer venue pursuant to 28 U.S.C. § 1404(a). The insurer relied on the Supreme Court's then-recent decision in *Atlantic Marine Construction Co. v. U.S. District Court for the Western District of Texas*, 134 S. Ct. 568 (2013), which held that a proper application of § 1404(a) requires that a forum selection clause be "given controlling weight in all but the most exceptional cases." *Id.* at 579, 583 (internal citation omitted). This time around, the Missouri district court concluded that the requisite Section 1404(a) analysis could not be defeated by a single state policy prohibiting mandatory arbitration provisions in insurance contracts. Moreover, the insurer's waiver of its right to seek arbitration mooted the public policy concerns about arbitration.

V. CONCLUSION

Counsel in coverage disputes must sharpen their axes at the very outset of a matter before taking down the tree by determining whether the dispute might be susceptible to resolution under the law of more than one state; whether any potentially applicable law favors the client; whether the dispute is susceptible to resolution in more than one forum and, if so which forum is most likely to apply the favorable law under its own conflict of laws principles; and, finally, how this matrix of considerations meshes with the various procedural advantages or disadvantages of potentially available state and federal forums. Only after addressing these considerations can counsel tailor a litigation strategy to maximize the chances of securing a potentially case-dispositive forum.

APPENDIX A (Differing Articulations of How to Apply the *Brillhart* Abstention Standard)

Third Circuit: The Third Circuit adds the following factors to those set forth in *Brillhart*: "(1) the likelihood that a federal court declaration will resolve the uncertainty of obligation which gave rise to the controversy; (2) the convenience of the parties; (3) the public interest in settlement of the uncertainty of obligation; (4) the availability and relative convenience of other remedies; (5) a general policy of restraint when the same issues are pending in a state court; (6) avoidance of duplicative litigation; (7) prevention of the use of the declaratory action as a method of procedural fencing or as a means to provide another forum in a race for res judicata; and (8) (in the insurance context), an inherent conflict of interest between an insurer's duty to defend in a state court and its attempt to characterize that suit in federal court as falling within the scope of a policy exclusion." *Reifer v. Westport Ins. Corp.*, 751 F.3d 129, 146 (3d Cir. 2014). Additionally, in insurance cases, courts should consider "(1) A general policy of restraint when the same issues are pending in a state court; (2) An inherent conflict of interest between an insurer's duty to defend in a state court and its attempt to characterize that suit in federal court as falling within the scope of a policy exclusion; [and] (3) Avoidance of duplicative litigation." *State Auto Ins. Cos. v. Summy*, 234 F.3d 131, 134 (3d Cir. 2000).

Fourth Circuit: The Fourth Circuit has re-stated the *Brillhart* factors as follows: (1) whether the state has a strong interest in having the issues decided in its courts; (2) whether the state courts could resolve the issues more efficiently than the federal courts; (3) whether the presence of "overlapping issues of fact or law" might create unnecessary "entanglement" between the state and federal courts; and (4) whether the federal action is mere "procedural fencing," in the sense that the action is merely the product of forum-shopping. *United Capitol Ins. Co. v. Kapiloff*, 155 F.3d 488, 494-95 (4th Cir. 1998); *see also Nautilus Ins. Co. v. Winchester Homes, Inc.*, 15 F.3d 371, 376 (4th Cir. 1994).

Fifth Circuit: The Fifth Circuit uses the factors laid down in *St. Paul Ins. Co. v. Trejo*, 39 F.3d 585, 590-91 (5th Cir. 1994): (1) whether there is a pending state action in which all the matters in the controversy may be litigated; (2) whether the declaratory judgment plaintiff filed suit "in anticipation" of a lawsuit to be filed by the declaratory judgment defendant; (3) whether the declaratory judgment plaintiff engaged in "forum shopping" in bringing the declaratory judgment action; (4) whether possible inequities exist in allowing the declaratory judgment plaintiff to gain precedence in time or to change forums-analyze whether the plaintiff is using the declaratory judgment process to gain access to a federal forum on improper or unfair grounds; (5) whether the federal court is a convenient forum for the parties and witnesses and whether retaining the lawsuit would serve judicial economy-primarily address efficiency considerations; and (6) whether the federal court is being called on to construe a state judicial decree involving the same parties and entered by the court before whom the parallel state suit between the same parties is pending. *Sherwin-Williams Co. v. Holmes Cty.*, 343 F.3d 383, 390 (5th Cir. 2003).

Sixth Circuit: (1) Whether the judgment would settle the controversy; (2) whether the declaratory judgment action would serve a useful purpose in clarifying the legal relations at issue; (3) whether the declaratory remedy is being used merely for the purpose of "procedural fencing" or "to provide an arena for a race for res judicata"; (4) whether the use of a declaratory action would increase the friction between our federal and state courts and improperly encroach on state jurisdiction; (5) whether there is an alternative remedy that is better or more effective; (6) whether

the underlying factual issues are important to an informed resolution of the case; (7) whether the state trial court is in a better position to evaluate those factual issues than is the federal court; and (8) whether there is a close nexus between the underlying factual and legal issues and state law and/or public policy, or whether federal common or statutory law dictates a resolution of the declaratory judgment action. *Scottsdale Ins. Co. v. Roumph*, 211 F.3d 964, 968 (6th Cir. 2000); *see also Omaha Property & Casualty Ins. Co. v. Johnson*, 923 F.2d 446, 447-48 (6th Cir. 1991); *Allstate Ins. Co. v. Mercier*, 913 F.2d 273, 277 (6th Cir. 1990); *Grand Trunk W. R.R. v. Consolidated Rail Corp*., 746 F.2d 323, 326 (6th Cir. 1984).

Seventh Circuit: "[1] whether the declaratory suit presents a question distinct from the issues raised in the state court proceeding, [2] whether the parties to the two actions are identical, [3] whether going forward with the declaratory action will serve a useful purpose in clarifying the legal obligations and relationships among the parties or will merely amount to duplicative and piecemeal litigation, and [4] whether comparable relief is available to the plaintiff seeking a declaratory judgment in another forum or at another time." *Nationwide Ins. v. Zavalis*, 52 F.3d 689, 692 (7th Cir. 1995).

Eighth Circuit: Whether the state court proceeding presents "same issues, not governed by federal law, between the same parties," and "whether the claims of all parties in interest can satisfactorily be adjudicated in that proceeding, whether necessary parties have been joined, [and] whether such parties are amenable to process in that proceeding." *Royal Indem. Co. v. Apex Oil Co.*, 511 F.3d 788, 793 (8th Cir. 2008).

Ninth Circuit: Whether exercising jurisdiction over a declaratory judgment suit would: (1) needlessly determine state law issues; (2) discourage litigants from filing declaratory actions as a means of forum shopping; (3) avoid duplicative litigation; and (4) conflict or overlap with parallel state proceedings. *Gov't Employees Ins. Co. v. Dizol*, 133 F.3d 1220, 1225 (9th Cir. 1998). The pertinent factors can also include (5) whether the declaratory judgment action will settle the controversy or clarify the legal issues; (6) whether the declaratory action is sought only for "procedural fencing," including an unfair advantage in achieving res judicata; and (7) whether deciding the declaratory judgment would improperly entangle the federal and state court systems; and the availability and convenience of other remedies. Id. at 1225 n.5; *see also Huth v. Hartford Ins. Co.*, 298 F.3d 800, 803 (9th Cir. 2002).

Tenth Circuit: "[1] whether a declaratory action would settle the controversy; [2] whether it would serve a useful purpose in clarifying the legal relations at issue; [3] whether the declaratory remedy is being used merely for the purpose of procedural fencing or to provide an arena for a race to res judicata; [4] whether use of declaratory action would increase friction between our federal and state courts and improperly encroach upon state jurisdiction; and [5] whether there is an alternative remedy which is better or more effective." *United States v. City of Las Cruces*, 289 F.3d 1170, 1187 (10th Cir. 2002).

Eleventh Circuit: "(1) the strength of the state's interest in having the issues raised in the federal declaratory action decided in the state courts; (2) whether the judgment in the federal declaratory action would settle the controversy; (3) whether the federal declaratory action would serve a useful purpose in clarifying the legal relations at issue; (4) whether the declaratory remedy is being used merely for the purpose of "procedural fencing" - that is, to provide an arena for a

race for res judicata or to achieve a federal hearing in a case otherwise not removable; (5) whether the use of a declaratory action would increase the friction between our federal and state courts and improperly encroach on state jurisdiction; (6) whether there is an alternative remedy that is better or more effective; (7) whether the underlying factual issues are important to an informed resolution of the case; (8) whether the state trial court is in a better position to evaluate those factual issues than is the federal court; and (9) whether there is a close nexus between the underlying factual and legal issues and state law and/or public policy, or whether federal common or statutory law dictates a resolution of the declaratory judgment action." *Ameritas Variable Life Ins. Co. v. Roach*, 411 F.3d 1328, 1331 (11th Cir. 2005).

First Circuit: The First Circuit has not weighed in, but its district courts appear to ask: "(1) whether the same parties are involved in both cases; (2) whether the claims made in the declaratory judgment action can be adjudicated in the state court action; (3) whether resolution of the declaratory judgment action turns on factual questions that will be litigated in the state court action; (4) whether the issues presented are governed by state or federal law; and (5) what effect the declaratory judgment action is likely to have on potential conflicts of interest between the insurer and the insured." *Essex Ins. Co. v. Gilbert Enters.*, No. 13-432ML, 2013 U.S. Dist. LEXIS 135766, at *14 (D.R.I. Sep. 3, 2013); *see also Liberty Ins. Underwriters Inc.*, 2011 U.S. Dist. LEXIS 112634, 2011 WL 4527330, at *6 (D.R.I. Sept. 29, 2011); *Hartford Fire Ins. Co. v. Gilbane Bldg. Co.*, 2011 U.S. Dist. LEXIS 64082, 2011 WL 2457638, at *2 n.2 (D.R.I. June 16, 2011).

Second Circuit: The Second Circuit also has not spoken on a specific formulation of the *Brillhart* factors, but its district courts appear to examine: "(1) the scope of the pending state proceeding and the nature of the defenses available there; (2) whether the claims of all parties in interest can satisfactorily be adjudicated in that proceeding; (3) whether the necessary parties have been joined; and (4) whether such parties are amenable to process in that proceeding; (5) avoiding duplicative proceedings; (6) avoiding forum shopping; (7) the relative convenience of the fora; (8) the order of filing; and (9) choice of law." *Glenclova Inv. Co. v. Trans-Resources, Inc.*, 874 F. Supp. 2d 292, 307 (S.D.N.Y. 2012) (internal citations omitted); *see also Managing Dirs.' Long Term Incentive Plan v. Boccella*, 2015 U.S. Dist. LEXIS 59432, at *13 (S.D.N.Y. May 5, 2015).

D.C. Circuit: District courts in the D.C. Circuit have considered whether the parallel pending state action is equivalent to the federal action before it, including "(1) whether all the claims brought in the federal action may be considered in the parallel state action, (2) whether necessary parties may be joined, and (3) whether such parties are amenable to process." *Md. Ins. Co. v. Newpark Towers Assoc.*, No. 89-0649-LFO, 1990 U.S. Dist. LEXIS 15317, at *17 (D.D.C. Nov. 5, 1990); *see also Holman v. Cook*, 879 F. Supp. 113, 114 (D.D.C. 1995).

APPENDIX B (Select Opinions of Hon. Nancy F. Atlas, U.S. District Court for the Southern District of Texas, Houston, TX, Addressing Removal Issues)

1. *Latex Constr. Co. vs. Nexus Gas Transmission*, 4:20-cv-01788, Doc. 25 (July 13, 2020) (pages B-001 through B-017) (Snap Removal; Remand Denied)

2. *Garcia vs. The Travelers Indem. Co. of Am.,* 4:18-cv-01092, Doc. 11 (June 18, 2018) (pages B-018 through B-028) (Improper Joinder Standard; Declaratory Judgment Action; Remand Ordered)

3. *Macari vs. Liberty Mutual Ins. Co.*, 4:19-cv-03647, Doc. 15 (October 30, 2019) (pages B-029 through B-033) (Election under Chapter 542A of the Texas Insurance Code after Lawsuit Filed; Remand Ordered)

4. *Vargas vs. Rigid Global Builders, LLC*, 4:19-cv-04208, Doc. 8 (November 25, 2019) (pages B-034 through B-037) (Removal under § 1441(a) of the Federal Arbitration Act; Remand Ordered)

5. *Bradshaw vs. Johnson & Johnson*, 4:19-cv-01455, Doc. 12 (July 16, 2019) (B-038 through B-048) (Removal under 28 U.S.C. § 1452 as Related to Bankruptcy Case; Contractual Indemnity Rights; Remand Ordered)

6. *Jackson vs. Alsco, Inc.,* 4:19-cv-01101, Doc. 9 (May 24, 2019) (B-049 through B-055) (Removal More Than 1 Year After Commencement of Action; Bad Faith Exception; Remand Ordered)

7. *Solaija Enterprises LLC vs. Amguard Ins. Co.,* 4:19-cv-00929, Doc. 13 (May 31, 2019) (pages B-056 through B-061) (Removal More Than 1 Year After Commencement of Action; Bad Faith Exception; Remand Ordered)

8. *Recif Resources, LLC vs. Juniper Capital Advisors, L.P.,* 4:19-cv-02953, Doc. 46 (October 24, 2019) (pages B-062 through B-069) (Copyright Act Counterclaim; Untimely Removal; Good Faith Exception under § 1446(b)(3); Supplemental Jurisdiction Over State Law Claims; Remand Denied)

9. *Ewell vs. Centauri Spec. Ins. Co.,* 4:19-cv-01415, Doc. 12 (June 17, 2019) (pages B-070 through B-075) (Election under Chapter 542A of the Texas Insurance Code as to Adjuster Before Lawsuit Filed; Voluntary-Involuntary Rule; Remand Denied)

10. *Paschal vs. Allstate Fire & Cas. Ins. Co.,* 4:20-cv-03283, Doc. 8 (October 21, 2020) (pages B-076 through B-081) (Amount in Controversy; Binding Stipulation After Removal (included); Remand Ordered)

United States District Court
Southern District of Texas
ENTERED
July 13, 2020
David J. Bradley, Clerk

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

LATEX CONSTRUCTION COMPANY, Plaintiff,	§	
v.	§	CIVIL ACTION NO. 4:20-1788
NEXUS GAS TRANSMISSION, LLC, Defendant.	§	

MEMORANDUM AND ORDER

Before the Court is Latex Construction Company's ("Plaintiff's") Motion to Remand ("Motion") [Doc. # 15] this case to state court. Defendant Nexus Gas Transmission, LLC ("Defendant") has timely responded,[1] and Plaintiff has replied.[2] The Motion is ripe for decision. Based on the parties' briefing, pertinent matters of record, and relevant legal authorities, the Court **denies** Plaintiff's Motion.

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[1] Defendant Nexus Gas Transmission, LLC's Opposition to Plaintiff's Motion to Remand [Doc. # 19] ("Defendant's Opposition").

[2] Plaintiff's Reply in Support of Motion to Remand [Doc. # 22] ("Plaintiff's Reply").

I. BACKGROUND

Plaintiff sued Defendant in Texas state court on May 15, 2020 for breach of contract.[3] Plaintiff seeks monetary relief of at least $1,000,000, plus interest, costs, and attorneys' fees.[4] Plaintiff is a Georgia corporation with its principal place of business in Georgia.[5] Defendant is a Delaware limited liability company which, through its corporate structure, is a citizen of Texas.[6] None of the corporations, individuals, or entities with an interest in Defendant is a citizen of or maintains a principal place of business in Georgia.[7] Thus, there is complete diversity among the parties.

Defendant does not maintain a registered agent in Texas and declined to waive formal service of process. Plaintiff therefore was required to make service through

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3 Plaintiff's Original Petition, filed in the 270th Judicial District Court for Harris County, Case No. 20-29663 [Doc. # 1-2] ("State Court Petition").

4 *Id.* ¶ 3.

5 Notice of Removal of Action under 28 U.S.C. § 1441 [Doc. # 1] ("Notice of Removal") ¶ 5.

6 *Harvey v. Grey Wolf Drilling Co.*, 542 F.3d 1077, 1080 (5th Cir. 2008) ("[T]he citizenship of [an] LLC is determined by the citizenship of all of its members."). The Court has confirmed this claim of citizenship from the comprehensive disclosures of the membership of Defendant, an LLC, its members, those entities' members, and related general and limited partners. .

7 Notice of Removal ¶ 9.

the Texas Secretary of State.[8] The parties mediated the matter on May 21, 2020, but were unable to resolve the dispute.[9] On May 22, 2020, Defendant removed the case to this Court.[10] The Texas Secretary of State received service on behalf of Defendant on June 1, 2020.[11] Plaintiff filed its Motion to Remand on June 19, 2020.[12]

II. LEGAL STANDARD

"Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (citations omitted). A defendant may remove a civil case brought in state court to the federal district court in which the case could have been brought if the district

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[8] *See* Declaration of R. Lee Mann III [Doc. # 15-1] ("Mann Decl.") ¶ 8; *see also* Fed. R. Civ. P. 4(d) ("An individual, corporation, or association that is subject to service under Rule 4(e), (f), or (h) has a duty to avoid unnecessary expenses of serving the summons. The plaintiff may notify such a defendant that an action has been commenced and request that the defendant waive service of a summons.").

On May 19, 2020, Plaintiff asked if Defendant's counsel would accept service on Defendant's behalf. Mann Decl. ¶¶ 5-8. Defendant's counsel declined, explaining he was not authorized by Defendant to do so. Declaration of Julie Hardin [Doc. # 19-1] ("Hardin Decl.") ¶ 5. On May 21, 2020, Plaintiff filed a Request for Issuance of Service with the Harris County District Court Clerk for service on Defendant by certified mail to the Texas Secretary of State. Mann Decl. ¶ 8.

[9] *Id.* ¶ 6.

[10] *See* Notice of Removal.

[11] Hardin Decl. ¶ 8.

[12] *See* Plaintiff's Motion.

court would have original jurisdiction. *See* 28 U.S.C. § 1441(a). This, however, raises "significant federalism concerns" because removal effectively "deprive[s] the state court of an action properly before it." *Gasch v. Hartford Acc. & Indem. Co.*, 491 F.3d 278, 281 (5th Cir. 2007). As a result, the removal statute must be strictly construed, and "any doubt about the propriety of removal must be resolved in favor of remand." *Id.* at 281–82. On the other hand, where "the text is unambiguous . . . the rule in *Gasch* does not apply." *Texas Brine Co., L.L.C. v. Am. Arb. Assoc.*, 955 F.3d 482, 485 (5th Cir. 2020) (citing *Gasch*, 491 F.3d at 281); *see also Encompass Ins. Co. v. Stone Mansion Restaurant*, 902 F.3d 147, 153 n.3 (3d Cir. 2018) (stating that the "general rule" that the removal statute be strictly construed "is 'not sufficient to displace the plain meaning' of the statute.") (quoting *Delalla v. Hanover Ins.*, 660 F.3d 180, 189 (3d Cir. 2011)).

In diversity cases, there is an additional procedural limitation on removal, known as the "forum-defendant rule." The rule provides that

> [a] civil action otherwise removable solely on the basis of the jurisdiction under [28 U.S.C. § 1332(a)] may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

§ 1441(b)(2). The plain text of § 1441(b)(2) prohibits removal of a diversity action after a forum defendant has been "properly joined and served." The Fifth Circuit, along with other appellate courts, have held that § 1441(b)(2) allows for "removal prior to service on all defendants," also known as "snap removal." *See, e.g.*, *Texas*

Brine, 955 F.3d at 485; *Gibbons v. Bristol-Myers Squibb, Co.*, 919 F.3d 699, 705 (2d Cir. 2019); *Encompass*, 902 F.3d at 153; *McCall v. Scott*, 239 F.3d 808, 813 n.2 (6th Cir. 2001). Snap removal allows cases that would otherwise not be removable because they involve one or more forum defendants to be removed to federal court if removal occurs before any forum defendant has been served. *Id.*

As with any statute, in considering the meaning of § 1441(b)(2) the Court "begin[s] with the text of the statute." *United States v. Lauderdale Cnty. Miss.*, 914 F.3d 960, 961 (5th Cir. 2019). "We look for both plain meaning and absurdity." *Texas Brine*, 955 F.3d at 486. "[W]hen the plain language of a statute is unambiguous and does not lead to an absurd result, [the Court's] inquiry begins and ends with the plain meaning of that language." *Dunn-McCampbell Royalty Interest, Inc. v. Nat'l Park Serv.*, 630 F.3d 431, 438 (5th Cir. 2011).

III. <u>DISCUSSION</u>

Whether § 1441(b)(2) allows a forum defendant to remove to federal court an action in which it is the sole defendant prior to being served is an unsettled issue. The Fifth Circuit has not considered the question, and other courts have come to varying conclusions.[13] The Court must consider both the statutory provision's text

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[13] The Second and Third Circuits have held that an unserved forum defendant can properly remove a case to federal court. *See Gibbons*, 919 F.3d at 705; *Encompass*, 902 F.3d at 153. These courts reasoned that the plain language of § 1441(b)(2) allows a forum defendant "in limited circumstances [to] remove actions filed in state

and whether the resulting interpretation leads to an "absurd result" under the procedural circumstances presented.

A. Plain Language Analysis of § 1441(b)(2)

The Fifth Circuit recently held the text of § 1441(b)(2) is unambiguous and by its plain meaning allows for snap removal. "By its text . . . Section 1441(b)(2) is inapplicable until a home-state defendant has been served in accordance with state law; until then, a state court lawsuit is removable under Section 1441(a) so long as a federal district court can assume jurisdiction over the action." *Texas Brine*, 955 F.3d at 486 (quoting *Gibbons*, 919 F.3d at 705).

The novel question presented in this case is whether § 1441(b)(2) allows for snap removal by a forum defendant when only a single defendant is named. Plaintiff argues that the statute's plain language allows for snap removal only in cases involving multiple defendants. Alternatively, Plaintiff argues that the plain language

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court on the basis of diversity of citizenship," *Gibbons*, 919 F.3d at 706, and that this result did not "rise[] to the level of the absurd or bizarre," *Encompass*, 902 F.3d at 154. Although informative and persuasive, these opinions are not binding authority on this Court. *See United States v. Penaloza-Carlon*, 842 F.3d 863, 864 & n.1 (5th Cir. 2016).

District courts in California, Kansas, and Pennsylvania have reached the opposite conclusion, holding that a sole forum defendant may not invoke snap removal. *Tourigny v. Symantec Corp.*, 110 F. Supp. 3d 961 (N.D. Cal. 2015); *FTS Int'l Servs., LLC v. Caldwell-Baker Co.*, No. 13-2039-JWL, 2013 WL 1305330 (D. Kan. Mar. 27, 2013); *Allen v. GlaxoSmithKline PLC*, No. CIV.A. 07-5045, 2008 WL 2247067 (E.D. Pa. May 30, 2008).

of the statute requires that at least one defendant be served before snap removal is available.

1. Does the Plain Language of § 1441(b)(2) Require Multiple Defendants?

Plaintiff argues that the use of the words "joined" and "defendants" in § 1441(b)(2) shows that the statute does not apply in cases involving a single defendant. This line of argument presents several problems for Plaintiff. First, the plain meanings of the words "joined" and "defendants" that appear in § 1441(b)(2) do not limit snap removal to cases with multiple defendants. Second, if § 1441(b)(2) is limited to multi-defendant cases, there would be no prohibition on pre-service removal in single defendant cases such as this.

a. "Joined"

Plaintiff argues that § 1441(b)(2)'s use of the word "joined" limits the statute's application to cases with multiple parties. In support of this argument, Plaintiff cites to the district court cases of *Tourigny v. Symantec Corp.*, 110 F. Supp. 3d 961 (N.D. Cal. 2015), *FTS Int'l Servs., LLC v. Caldwell–Baker Co.*, No. 13–2039–JWL, 2013 WL 1305330 (D. Kan. Mar. 27, 2013), and *Allen v. GlaxoSmithKline PLC*, No. CIV.A. 07-5045, 2008 WL 2247067 (E.D. Pa. May 30, 2008). *Tourigny* and *Allen* reasoned that "[b]ecause the operative phrase is 'joined and served' and not 'named and served' or simply 'served,' the statute contemplates a situation in which one defendant is joined to another defendant, presumably an in-

state defendant joined to an out-of-state defendant. The 'joined and served' language therefore can only apply where there are multiple, named defendants." *Tourigny*, 110 F. Supp. 3d at 964 (quoting *Allen*, 2008 WL 2247067, at *5). Similarly, the *FTS* court reasoned that "the use of the word 'joined' contemplates a situation in which one defendant is joined to another defendant, presumably an in-state defendant joined to an out-of-state defendant, suggesting further that the removal is appropriate only when there are multiple, named defendants, such that a single, unserved forum defendant could not remove a case under 1441(b)." 2013 WL 1305330, at *3 (internal citations and quotation marks omitted). The Court is unpersuaded.

The verb "join," and its past tense and present participle forms, are used in various places in the Federal Rules of Civil Procedure and in other authorities to mean formally included in a suit, not that there must be multiple parties of the same category, *i.e.*, plaintiffs or defendants, in a suit. *See, e.g.*, FED. R. CIV. P. 4 Advisory Committee Notes to 1993 Amendments ("[A] summons must be served whenever a person is *joined as a party* against whom a claim is made.") (emphasis added); FED. R. CIV. P. 19(a)(2) Advisory Committee Notes to 1966 Amendments ("[T]he court can make a legally binding adjudication only between the parties *actually joined in*

the action.") (emphasis added).[14] Accordingly, Section 1441(b)(2)'s use of the word "joined" does not limit its application to suits against multiple defendants. Defendants are joined to a lawsuit, not to their co-defendants. If Congress wished to limit the snap removal exception to only allow for removal by non-forum defendants in multi-defendant cases, it could have done so through clear and simple language like that suggested by the court in *FTS*. *See* 2013 WL 1305330, at *3 (reading § 1441(b)(2)'s use of "joined" to mean that "removal is appropriate only when there are multiple, named defendants . . ."). Instead, Congress used broad

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[14] *See* FED. R. CIV. P. 19(a)(2) ("A person who refuses to *join as a plaintiff* may be made either a defendant or, in a proper case, an involuntary plaintiff.") (emphasis added); *id.* Advisory Committee Notes to 1966 Amendment ("[P]ersons materially interested in the subject of an action . . . should be *joined as parties* so that they may be heard and a complete disposition made") (emphasis added); *id.* ("The subdivision (a) definition of persons to be joined is not couched in terms of the abstract nature of their interests—'joint,' 'united,' 'separable,' or the like."); FED. R. CIV. P. 71.1 ("If a defendant dies, becomes incompetent, or transfers an interest after being joined, the court may, on motion and notice of hearing, order that the proper party be substituted."); *PPL Montana, LLC v. Montana*, 565 U.S. 576, 587 (2012) ("the State *joined the lawsuit*, for the first time seeking rents for [defendant's] riverbed use.") (emphasis added); *Local 28 of Sheet Metal Workers' Intern. Ass'n v. E.E.O.C.*, 478 U.S. 421, 428 n.3 (1986) ("The New York State Division of Human Rights (State), although *joined as a third- and fourth-party defendant in this action*, realigned itself as a plaintiff.") (emphasis added); *Neveaux v. Central Gulf S. S. Corp.*, 503 F.2d 961, 962 (5th Cir. 1974) ("the United States Government, which had been *joined by [defendant] as the third party defendant* . . .") (emphasis added); *Ventress v. Radiator Spec. Co.*, 2012 WL 1247205, at *1 (E.D. La. Apr. 13, 2012) ("[subcontractors] are third party defendants *joined to this action via [defendant's] Third Party Complaint*.").

unambiguous language which shows no intent to limit the statute's application to multi-defendant cases.

b. "Parties"

Plaintiff argues that § 1441(b)(2)'s use of the plural noun "parties" indicates that Congress intended for the statute to apply in cases with multiple defendants. Plaintiff asserts that if Congress intended for § 1441(b)(2) to control in cases with one defendant it could have written "party in interest" or "party or parties in interest."

"In determining the meaning of any Act of Congress, unless the context indicates otherwise . . . words importing the plural include the singular." 1 U.S.C. § 1 (the "Dictionary Act"); *see also In re Cell Tower Records Under 18 U.S.C. 2703(D)*, 90 F. Supp. 3d 673, 677 (S.D. Tex. 2015) ("[T]hus the default rule of interpretation is to include both singular and plural, absent a contrary indication in the statute."). The Court finds no indication in § 1441(b)(2) of any Congressional intent to depart from the basic rules of statutory interpretation codified in the Dictionary Act. The Court interprets the plural "parties in interest" to also include the singular "party in interest."[15]

[15] Plaintiff also contends here that, in the context of the forum defendant rule, "parties in interest" should exclude the singular because a "defendant could never be properly 'joined' in a case involving a single defendant." Motion at 10. As previously discussed, the Federal Rules of Civil Procedure and binding cases use the phrase "joined" to describe a party's relation to a suit, not a co-party.

c. Limiting § 1441(b)(2) to Multi-Defendant Cases

Plaintiff argues in its reply that § 1441(b)(2) should apply generally in single and multi-defendant cases, but that the snap removal, *i.e.*, pre-service removal, exception to that statute should only apply in multi-defendant cases.[16]

Plaintiff does not cite any authority for this tortured reading of § 1441(b)(2). Plaintiff would have the Court apply certain parts of the forum-defendant rule to this case, while entirely disregarding an exception grounded in the rule's unambiguous text. *See Texas Brine*, 955 F.3d at 487. Plaintiff's proposed construction adds needless complexity and case-specific inquiry to a statute that was meant to be an easily-administrable "bright-line rule keyed on service." *Id.* at 486 (quoting *Gibbons*, 919 F.3d at 706). As previously discussed, the words used in § 1441(b)(2) do not evidence congressional intent to limit certain parts of the statute to multi-defendant cases.

2. Does the Plain Language of § 1441(b)(2) Require Service Before Removal?

Plaintiff argues that the "snap removal" exception to the forum defendant rule does not apply in circumstances where no defendant has yet been served. Plaintiff acknowledges that § 1441(b)(2) does not expressly require service on at least one defendant prior to removal, but maintains that the language "any of the parties in

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16 *See* Plaintiff's Reply at 4-5.

interest properly joined and served" implies a requirement that at least one party have been served prior to removal.

The Fifth Circuit's holding in *Delgado v. Shell Oil Company* makes clear that "service of process is not an absolute prerequisite to removal." 231 F.3d 165, 177 (5th Cir. 2000). The *Delgado* court explained:

> Section 1446(b)[[17]] expressly provides for removal of a civil action or proceeding within thirty days after the receipt by the defendant, "through service or otherwise, of a copy of an amended pleading, motion, or order or other paper from which it may first be ascertained that the case is one which is or has become removable." We read § 1446(b) and its "through service or otherwise" language as consciously reflecting a desire on the part of Congress to require that an action be commenced against a defendant before removal, but not that the defendant have been served.

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[17] Removal based on diversity of citizenship (including snap removal) "shall be made in accordance with section 1446 of this title . . ." 28 U.S.C. § 1441(e)(1).

Id.[18] Service accordingly is not a condition precedent to removal and Plaintiff's argument to the contrary is rejected.[19] The Court holds that the plain language of § 1441(b)(2) allows defendants that have not been served with process to remove from courts of their home states suits in which they are the sole defendants.

Plaintiff claims the issue here is different from that addressed in *Delgado*, arguing that even if service is not normally an absolute prerequisite to removal, § 1441(b)(2)'s use of the phrase "*any of* the parties in interest properly joined and served" requires that at least one defendant have been served before removal.[20] Plaintiff argues that the phrase "any of" is surplusage if the statute in fact applies where no defendant has been served.[21] The Court is not persuaded.

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[18] Plaintiff relies on *Recognition Communication, Inc. v. American Automotive Association, Inc.*, No. 3:97-CV-0945-P, 1998 WL 119528, at *3 (N.D. Tex. Mar. 5, 1998) to argue that service on at least one defendant is a prerequisite to removal. The *Recognition Communication* court remanded the action "because none of the [three non-forum defendants or the one forum defendant] had been served by Plaintiff at the time of removal." Reliance on this non-precedential ruling, which preceded the Circuit's *Delgado* decision, is unavailing. There was no holding that service was a prerequisite to removal. Rather, the court relied on the fact that the forum defendant did not join the notice of removal, stating that "[s]ince no Defendant had been served or entered a voluntary appearance . . . all of the Defendants should have participated in the Notice of Removal." *Id.* at *3 n.3.

[19] *Delgado* requires that "an action be commenced against a defendant before removal, but not that the defendant have been served." 231 F.3d at 177. Under Texas law, an action has commenced when a petition is filed. *See* TEX. R. CIV. P. 22.

[20] Plaintiff's Motion at 12; Plaintiff's Reply at 8.

[21] *Id.*

The Fifth Circuit has held "service of process is not an absolute prerequisite to removal." *Delgado*, 213 F.3d at 177. Plaintiff nevertheless asks the Court to hold that service *is* required for removal in certain instances. The decisions cited by Plaintiff in support of this argument are not dispositive. They are by courts outside the Fifth Circuit, pre-date *Delgado*, and/or focus on other issues.[22] Moreover, reading § 1441(b)(2) to allow for removal prior to service does not render the phrase "any of" as surplusage. The phrase "any of" addresses the possibility that more than one defendant has been joined and served, but does not require it.

In summary, § 1441(b)(2) was meant to be a bright-line rule keyed on whether a forum defendant has been served. *See Texas Brine*, 955 F.3d at 486. Plaintiff offers no persuasive authority why the Court should depart from *Delgado* and the plain text of the statute in order to add a layer of complexity to this statute by limiting its application to instances in which a non-forum defendant has already been served.

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[22] As discussed, *Recognition Communication*, 1998 WL 119528, was decided two years before *Delgado* and turned on the court's belief that all defendants needed to have joined in the removal. Plaintiff argues that *Davis v. Cash*, No. CIV. 3:01-CV-1037-H, 2001 WL 1149355 (N.D. Tex. Sept. 27, 2001), decided after *Delgado* shows that service may be a prerequisite to removal in certain circumstance. This argument misses the mark. In *Davis*, the district court held that removal by an un-served defendant was proper because that defendant entered an appearance by filing an answer in state court. *Id.* at *1.

Plaintiff also cites *Hawkins v. Cottrell, Inc.*, 785 F. Supp. 2d 1361 (N.D. Ga. 2011), and *Holmstrom v. Harad*, No. 05–C–2714, 2005 WL 1950672 (N.D. Ill. Aug. 11, 2005), both of which relied on *Recognition Communication* and are out-of-circuit district court decisions not binding on this Court.

B. <u>"Absurd Result" Analysis</u>

Having concluded that the plain language of § 1441(b)(2) allows snap removal by a forum defendant in a single defendant case, the Court turns to whether this interpretation is absurd.

"In statutory interpretation, an absurdity is not mere oddity. The absurdity bar is high, as it should be. The result must be preposterous, one that 'no reasonable person could intend.'" *Texas Brine*, 955 F.3d at 486 (quoting Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 237 (2012)) ("Scalia & Garner"). "[A] 'drafter's failure to appreciate the effect of certain provisions . . . by itself does not constitute an absurdity." *Id.* (quoting Scalia & Garner, at 238).

The Fifth Circuit recently held that applying § 1441(b)(2) to allow snap removal by a non-forum defendant was "at least rational" and was not an absurd result. *Texas Brine*, 955 F.3d at 486. Although the Fifth Circuit explained that diversity jurisdiction and removal "exist to protect out-of-state defendants from in-state prejudices" and it was "[o]f some importance that the removing party [was] not a forum defendant," the Fifth Circuit relied on cases allowing for snap removal by a forum defendant, including a case in which the removing party was the sole defendant. *Texas Brine*, 955 F.3d at 486 (citing *Encompass*, 902 F.3d at 153); *see also Gibbons*, 919 F.3d at 706. The Fifth Circuit referenced with approval the Third

Circuit's reasoning in *Encompass* that a plain reading of § 1441(b)(2) allowing for snap removal by a forum resident who is the sole defendant in the case "gives meaning to each word and abides by the plain language." *Texas Brine*, 955 F.3d at 486-87 (citing *Encompass*, 902 F.3d at 153).

The plain language of § 1441(b)(2) allows for removal of suits involving a single defendant who is a resident of the forum state and such construction is not an absurd result. This application "provide[s] a bright-line rule keyed on service" and is not a result that "no reasonable person could intend." *Texas Brine*, 955 F.3d at 486 (quoting *Gibbons*, 919 F.3d at 706, then Scalia & Garner, at 237). The doctrine that courts must "strictly construe the removal statute and favor remand" does not counsel remand in the circumstances at bar because the statute's unambiguous text dictates a different result. *See Texas Brine*, 955 F.3d at 486 (citing *Gasch*, 491 F.3d at 281-82).

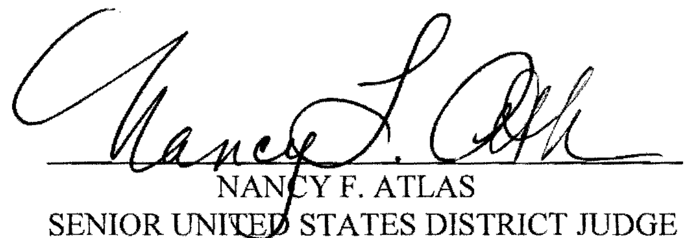
IV. <u>CONCLUSION</u>

The plain language of § 1441(b)(2) does not limit snap removal to cases involving multiple defendants or require that a defendant have been served before effecting removal of a case from state court. Construing § 1441(b)(2) to permit a resident of the forum state to snap remove a case before that defendant has been served with process, where that defendant it is the only named defendant, is not an absurd result. It is therefore

ORDERED that Plaintiff's Motion to Remand [Doc. # 15] is **DENIED**. It is further

ORDERED that the parties through counsel must appear at the initial pretrial conference previously set for **July 14, 2020, at 10:30 am**. The conference will be held by telephone. Counsel must call 713-250-5290; Conference ID: 45601#; PIN: 13579#.

SIGNED at Houston, Texas, this 13th day of **July, 2020.**



NANCY F. ATLAS
SENIOR UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DONNY & JOANN GARCIA, Plaintiffs,	§ § §	
v.	§	CASE NO. 4:18-CV-01092
THE TRAVELERS INDEMNITY COMPANY OF AMERICA, PERRY OFFICE PRODUCTS, INC., and PAUL J. MOORE, Defendants.	§ § § § § §	

MEMORANDUM AND ORDER

This case is before the Court on Plaintiffs Donny Garcia ("D. Garcia") and Joann Garcia's ("J. Garcia") Motion to Remand (the "Motion") [Doc. # 4]. Defendant Travelers Indemnity Company ("Travelers") filed a timely response (the "Response") [Doc. # 8].[1] After considering the parties' briefing, all pertinent matters of record, and the applicable legal authorities, the Court **grants** the Motion.

I. BACKGROUND

Plaintiffs are residents of Brazos County, Texas. On June 7, 2016, Defendant Paul Moore allegedly failed to yield at a stop sign and crashed his commercial vehicle into D. Garcia's automobile (the "Accident"). Plaintiffs allege

[1] Plaintiffs neither filed a reply, nor moved to extend the deadline to do so under the Court's local procedures.

that Moore was operating the vehicle in his capacity as an employee of Defendant Perry Office Products Inc. ("Perry Office" and together with Moore, the "Perry Defendants"). As a result of the Accident, D. Garcia suffered severe injuries.

Travelers insures Perry Office. After the Accident, Tiffany Baker, a representative of Travelers, contacted Plaintiffs multiple times in an attempt to reach a settlement regarding potential claims relating to the Accident. Plaintiffs allege they were adamant about not agreeing to settle their claims against any Defendants. However, according to Plaintiffs, they eventually did reach an agreement with Baker whereby Travelers would pay Plaintiffs for the "inconvenience" they had suffered as a result of the Accident. Plaintiffs assert that it was agreed and understood that this "inconvenience" payment was not intended to serve as consideration for a settlement of their potential claims against any party involved in the Accident.

To document their agreement, on November 18, 2016, Travelers sent Plaintiffs a fax containing a letter accompanied by a release (the "Release"). The letter specifically stated that Travelers would promptly issue a $25,000 check to Plaintiffs for their "inconvenience and discomfort" related to the Accident upon receipt of an executed copy of the Release. The Release stated in relevant part:

> Donny Garcia do[es] hereby release and forever [discharges] Paul Moore, Perry Office Products Inc., and the Travelers Indemnity Co. of America … from any and all past, present and future actions, causes of actions, claims, demands, damages, costs, loss of services,

> expenses, compensation, third-party actions, suits at law or in equity, in tort … or whatever nature, and all consequential damages on account of, or in any way growing out of any and all known and unknown personal injuries, death and/or property damage resulting or to result from an accident that occurred on or about the 7th day of June 2016, at or near Bryan, Texas.

Plaintiff's Original Petition (the "Petition") [Doc. # 4-2], ¶ 18.[2] Plaintiffs signed the Release and assert that since doing so, all Defendants have taken the position that the Release absolves them of any further liability with respect to the Accident.

On March 8, 2018, Plaintiffs initiated this lawsuit in the 127th Judicial District Court, Harris County, Texas. In their Petition, Plaintiffs assert four causes of action: (1) declaratory judgment under the Texas Declaratory Judgment Act against all Defendants limiting the scope of the Release;[3] (2) a fraud claim against Travelers; (3) a negligence claim against the Perry Defendants; and (4) a negligent hiring claim against Perry Office.

Travelers timely removed this case to federal court on the basis of diversity

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2 The Release also stated that the parties thereto "understand that this settlement is the compromise of a doubtful and disputed claim, and that the payment is not to be construed as an admission of liability on the part of the persons, firms, and corporations hereby released by whom liability is expressly denied." *Id.,* ¶ 18.

3 Specifically, Plaintiffs seek declarations that the Release "limits Travelers['] liability from June 7, 2016 to November 18, 2016 to $50,000 but does not resolve any medical claim after that date," that the $25,000 payment from Travelers to Plaintiffs was "an advance on future settlement based on known inconvenience existing on the date" of the Release, and that "no other claims or remedies were part" of the Release. Petition [Doc. # 4-2], ¶ 25.

jurisdiction pursuant to 28 U.S.C. §§ 1332. There is no dispute that the amount in controversy in this case exceeds the $75,000 statutory threshold. However, the parties disagree whether there is complete diversity among all Plaintiffs and Defendants. Specifically, Travelers argues that the Perry Defendants, both of whom are Texas citizens, were improperly joined to Plaintiff's declaratory judgment claim and that their Texas citizenship should be disregarded for evaluating whether complete diversity exists.[4] According to Travelers, Plaintiff's declaratory relief claim pertains solely to its actions and not any actions of the Perry Defendants. Consequently, Travelers asserts that the Perry Defendants were improperly joined to Plaintiff's declaratory judgment claim because Plaintiffs have failed to allege adequately that a justiciable controversy exists between Plaintiffs and the Perry Defendants with respect to that cause of action.

Plaintiffs respond that the Perry Defendants were parties to the Release, and that their declaratory judgment claim creates a justiciable controversy with the Perry Defendants because the relief sought in that claim affects the Perry Defendants' rights thereunder, namely, their ability to assert the Release as a defense to Plaintiffs' negligence claims. For reasons explained hereafter, the Court

[4] Plaintiffs do not contest that Travelers, which is incorporated in Connecticut and has its principal place of business in that state, is a citizen of the state of Connecticut and is diverse for jurisdictional purposes.

concludes that Plaintiffs' declaratory judgment claim is adequately pleaded against the Perry Defendants, and complete diversity among Plaintiffs and Defendants is lacking. Accordingly, this dispute must be remanded back to Texas state court for lack of subject matter jurisdiction.[5]

II. APPLICABLE LEGAL STANDARDS

A. Removal Standard

"Federal courts are courts of limited jurisdiction." *Gunn v. Minton*, 568 U.S. 251, 256 (2013) (quoting *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)); *Hotze v. Burwell*, 784 F.3d. 984, 999 (5th Cir. 2015); *Scarlott v. Nissan N. Am., Inc.*, 771 F.3d 883, 887 (5th Cir. 2014). The party invoking this Court's removal jurisdiction bears the burden of establishing federal jurisdiction. *See Frank v. Bear Stearns & Co.*, 128 F.3d 919, 921-22 (5th Cir. 1997) (citation omitted). Any state court civil action over which the federal courts would have original jurisdiction may be removed by the defendant to federal court. *See* 28 U.S.C. § 1441(a); *Barker v. Hercules Offshore, Inc.*, 713 F.3d 208, 228 (5th Cir. 2013).

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[5] Travelers also asserts the Perry Defendants' citizenship should be disregarded because Plaintiffs fraudulently or improperly joined their negligence claims against the Perry Defendants with their fraud claim against Travelers. Because the Court concludes that Plaintiffs' declaratory judgment claim is asserted sufficiently against both Travelers and the Perry Defendants, and thus that the parties here are not completely diverse, the Court does not reach Defendants' fraudulent misjoinder of claims argument.

District courts have both federal question jurisdiction and diversity jurisdiction. Federal question jurisdiction exists over "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. A district court also has diversity jurisdiction over civil actions where the matter in controversy exceeds $75,000, and is between citizens of different States. 28 U.S.C. § 1332(a)(1). Diversity jurisdiction requires complete diversity—that is, the citizenship of each plaintiff must be diverse from the citizenship of each defendant. *See, e.g., Int'l Energy Ventures Mgmt., L.L.C. v. United Energy Group, Ltd.*, 818 F.3d 193, 200 (5th Cir. 2016). The burden of proving that complete diversity exist rests upon the party who seeks to invoke the court's diversity jurisdiction. *Stafford v. Mobil Oil Corp.*, 945 F.2d 803, 804 (5th Cir. 1991).

B. Improper Joinder Standard

"A defendant is improperly joined if the moving party establishes that (1) the plaintiff *has* stated a claim against a diverse defendant that he fraudulently alleges is nondiverse, or (2) the plaintiff *has not* stated a claim against a defendant that he properly alleges is nondiverse." *Int'l Energy Ventures Mgmt.*, 818 F.3d at 199 (5th Cir. 2016) (emphasis in original) (citing *Smallwood v. Ill. Cent. R.R. Co.*, 385 F.3d. 568, 573 (5th Cir. 2004) (en banc), *cert. denied*, 544 U.S. 992 (2005)); *Mumfrey v. CVS Pharm. Inc.*, 719 F.3d 392, 401 (5th Cir. 2013); *Kling Realty Co. v. Chevron USA, Inc.*, 575 F.3d 510, 513 (5th Cir. 2009) (citing *Campbell v. Stone*

Ins., Inc., 509 F.3d 665, 669 (5th Cir. 2007)). The Fifth Circuit repeatedly has explained that a defendant seeking to defeat a motion to remand on the basis of improper joinder must demonstrate "that there is no possibility of recovery by the plaintiff against an in-state defendant, which stated differently means that there is no reasonable basis for the district court to predict that the plaintiff might be able to recover against an in-state defendant." *Smallwood*, 385 F.3d at 573.

The party asserting improper joinder bears a heavy burden of persuasion. *See, e.g.*, *Kling Realty*, 575 F.3d at 514. "[A]ny doubt about the propriety of removal must be resolved in favor of remand." *Gasch v. Hartford Acc. & Indem. Co.*, 491 F.3d 278, 281–82 (5th Cir. 2007). "In this inquiry the motive or purpose of the joinder of in-state defendants is not relevant." *Smallwood*, 385 F.3d. at 574. "Any contested issues of fact and any ambiguities of state law must be resolved in [the plaintiff's] favor." *Travis v. Irby*, 326 F.3d 644, 649 (5th Cir. 2003) (citing *Griggs v. State Farm Lloyds*, 181 F.3d 694, 699 (5th Cir. 1999), *abrogated in part on other grounds by Smallwood*, 385 F.3d at 573); *accord B., Inc. v. Miller Brewing Co.*, 663 F.2d 545, 549 (5th Cir. 1981).

To determine whether an in-state defendant has been improperly joined, the Court usually "conduct[s] a Rule 12(b)(6)-type analysis, looking initially at the allegations of the complaint to determine whether the complaint states a claim under state law against the in-state defendant." *Smallwood*, 385 F.3d at 573. The

Fifth Circuit recently held that federal courts' determinations regarding improper joinder should be made on the basis of federal pleading standards, rather than state standards. *Int'l Energy Ventures,* 800 F.3d at 202. Accordingly, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Gines v. D.R. Horton, Inc.*, 699 F.3d 812, 816 (5th Cir. 2012) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

III. DISCUSSION

Travelers asserts that the Perry Defendants were improperly joined in Plaintiffs' declaratory judgment claim and that their citizenship should be disregarded for diversity jurisdiction purposes. According to Travelers, Plaintiffs failed to plead sufficient facts supporting a reasonable inference of the existence of any justiciable controversy between Plaintiffs and the Perry Defendants. Travelers' arguments in this regard are unpersuasive.

Plaintiffs' declaratory judgment claim is expressly asserted against all Defendants. Plaintiffs seek a judicial declaration that the Release limits the liability of Travelers to $50,000 for the period of June 7, 2016 to November 18, 2016, and that "no other claims or remedies were part of" the Release. Petition

[Doc. # 4-2], ¶¶ 21-25. The Release specifically identifies the Perry Defendants as parties that Plaintiffs are releasing from all potential claims relating to the Accident. Therefore, the judicial declaration Plaintiffs seek by this suit directly conflicts with the Perry Defendants' purported rights under the Release. At a minimum, the Perry Defendants are necessary parties to Plaintiffs' declaratory judgment claims because that claim inescapably affects the Perry Defendants' rights under the Release, and Plaintiffs cannot obtain the relief they seek without the Perry Defendants being party to that claim.[6]

The necessity of the Perry Defendants being party to Plaintiffs' declaratory judgment claim is further underscored by Plaintiffs' negligence claims against the Perry Defendants and negligent hiring claim against Perry Office. Each of those claims, which incorporate Plaintiffs' declaratory judgment allegations by reference, inherently depend on Plaintiffs' ability to reduce or eliminate the Perry Defendants' rights under the Release through their declaratory judgment claim. Accordingly, there is a clear justiciable controversy between Plaintiffs and the Perry Defendants regarding the latter's rights under the Release, as reflected in

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[6] The Texas Declaratory Judgment Act requires parties seeking complete relief via declaratory judgment to join all potentially interested parties to that claim. *See e.g.*, TEX. CIV. PRAC. & REM. CODE §§ 37.0006(a) ("When declaratory relief is sought, all persons who have or claim any interest that would be affected by the declaration must be made parties. A declaration does not prejudice the rights of a person not a party to the proceeding.")

Plaintiff's declaratory judgment claim and the relief Plaintiff seeks through that claim.

The Court is unpersuaded by Travelers' assertion that, based on the allegations in the Petition, Plaintiffs nevertheless cannot obtain the declaratory relief they seek against the Perry Defendants. As an initial matter, Travelers' argument appears to address the merits of Plaintiffs' declaratory judgment claim, which is not suitable for resolution on a motion to remand.[7] In any event, while true that Plaintiffs' declaratory judgment allegations expressly focus on the conduct of Travelers, Travelers cites no authority for the proposition that its conduct alone cannot provide a basis for a declaratory judgment that affects the Perry Defendants' rights. Travelers has failed to carry its "heavy burden" of demonstrating that there is "no reasonable basis for the district court to predict that [Plaintiffs] might be able to recover against [the Perry Defendants]," *Smallwood*, 385 F.3d at 573, with respect to their declaratory judgment claim, even assuming that relief would be based primarily or even entirely on the conduct of Travelers.

Accordingly, the Court concludes the Perry Defendants were not improperly joined in Plaintiffs' declaratory judgement claim. Complete diversity among all

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[7] *See Smallwood*, 385 F.3d at 573 ("Since the purpose of the improper joinder inquiry is to determine whether or not the in-state defendant was properly joined, the focus of the inquiry must be on the joinder, not the merits of the plaintiff's case.").

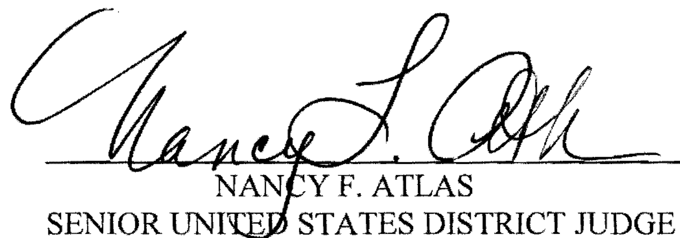
Plaintiffs and Defendants is lacking in this case.[8]

IV. CONCLUSION AND ORDER

There is a possibility that Plaintiffs could be granted the declaratory relief they seek against the non-diverse Perry Defendants. This Court therefore lacks subject matter jurisdiction. Remand of this case to 127th Judicial District Court, Harris County, Texas, is required. It is therefore

ORDERED that Plaintiffs Donny Garcia and Joann Garcia's Motion to Remand [Doc. # 4] is **GRANTED**. The Court will issue a separate Remand Order.

SIGNED at Houston, Texas, this 18th day of **June 2018**.



NANCY F. ATLAS
SENIOR UNITED STATES DISTRICT JUDGE

[8] In the Motion, Plaintiffs seek an award of attorney's fees in the event the Court remands this case back to Texas state court. This request is **denied**. An award of attorney's fees may be appropriate when the removing party lacked an objectively reasonable basis for seeking removal. *Decatur Hosp. Auth. v. Aetna Health*, *Inc.*, 854 F.3d 292, 298 (5th Cir. 2017). Because of the manner in which Plaintiffs pleaded their declaratory judgment claim, Defendants had an objectively reasonable, albeit ultimately unpersuasive, basis for seeking removal based on an improper joinder theory.

United States District Court
Southern District of Texas
ENTERED
October 30, 2019
David J. Bradley, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JAMES A. MACARI, *et al.*,	§	
Plaintiffs,	§	
	§	
v.	§	CIVIL ACTION NO. H-19-3647
	§	
LIBERTY MUTUAL INSURANCE	§	
COMPANY, *et al.*,	§	
Defendants.	§	

MEMORANDUM AND ORDER

This insurance case is before the Court on the Motion to Abstain and Remand ("Motion") [Doc. # 10] filed by Plaintiffs James A. and Gail M. Macari, to which Defendant Liberty Insurance Company ("Liberty") [Doc. # 14] filed a Response [Doc. # 14]. Based on the Court's review of the record and applicable legal authorities, the Court **grants** Plaintiffs' Motion.

I. BACKGROUND

Plaintiffs own property in Harris County, Texas. The property was insured under a homeowner's policy issued by Liberty. Plaintiffs filed a claim with Liberty for damage to the property allegedly caused by a plumbing leak on December 7, 2018. Defendant David James Meaders was assigned as the adjuster for Plaintiffs' claim. Plaintiffs allege that Liberty failed to pay any amount in connection with their insurance claim.

Plaintiffs filed this lawsuit in Texas state court on August 15, 2019, naming both Liberty and Meaders as Defendants. Plaintiffs served Meaders on August 28, 2019, and served Liberty on August 30, 2019. On September 19, 2019, Liberty gave written notice of its election pursuant to Chapter 542A of the Texas Insurance Code to assume any liability Meaders might have to Plaintiffs. *See* Election of Legal Responsibility, Exh. C to Notice of Removal [Doc. # 1]. Liberty filed a timely Notice of Removal on September 26, 2019.

Plaintiffs filed a Motion to Remand, arguing that the Court lacks subject matter jurisdiction because Plaintiffs and Defendant Meaders are citizens of Texas. Liberty argues in response that Meaders was improperly joined and, therefore, his citizenship should be disregarded for purposes of diversity jurisdiction. The Motion to Remand has been briefed and is now ripe for decision.

II. MOTION TO REMAND

Any "civil action brought in a State court of which the district courts . . . have original jurisdiction, may be removed by the defendant . . .." 28 U.S.C. § 1441(a). Federal district courts have original jurisdiction over lawsuits between citizens of different states where the matter in controversy exceeds $75,000.00, exclusive of interest and costs. *See* 28 U.S.C. § 1332(a)(1).

A lawsuit involving a non-diverse defendant may be removed if the non-diverse defendant was improperly joined. *See Hornbuckle v. State Farm Lloyds*, 385 F.3d 538, 542 (5th Cir. 2004). A non-diverse defendant is improperly joined if "there is no reasonable basis for the district court to predict that the plaintiff might be able to recover" against the non-diverse defendant in state court. *Cumpian v. Alcoa World Alumina, L.L.C.*, 910 F.3d 216, 219 (5th Cir. 2018) (quoting *Smallwood v. Ill. Cent. R.R. Co.*, 385 F.3d 568, 573 (5th Cir. 2004) (*en banc*)). "[T]he burden on the removing party is to prove that the joinder of the in-state parties was improper – that is, to show that sham defendants were added to defeat jurisdiction." *Smallwood*, 385 F.3d at 575. "Thus, in conducting improper-joinder inquiries, the focus must remain on whether the nondiverse party was properly joined when joined." *Yarco Trading Co., Inc. v. United Fire & Cas. Co.*, __ F. Supp. 2d __, 2019 WL 3024792, *8 (S.D. Tex. July 11, 2019) (internal quotations and citation omitted).

Under the Texas Insurance Code, an insurer may "elect to accept whatever liability an agent might have to the claimant for the agent's acts or omissions related to the claim by providing written notice to the claimant." TEX. INS. CODE § 542A.006(a). Where the election is made after the lawsuit is filed, "the court shall dismiss the action against the agent with prejudice." TEX. INS. CODE § 542A.006(c).

In this case, Liberty made its § 542A election after the lawsuit was filed. Therefore, Plaintiffs' claims against Meaders were not barred by § 542A.006 at the time he was joined to this suit. Liberty's election, made after the lawsuit was filed, does not retroactively render Meaders an improperly joined party. *See, e.g., Yarco Trading*, 2019 WL 3024792 at *9; *Greatland Inv., Inc. v. Mt. Hawley Ins. Co.*, 2019 WL 2120854, *2 (S.D. Tex. May 15, 2019) (stating that if the insurer makes a § 542A election after the plaintiff has filed suit, the agent-defendant is not improperly joined).

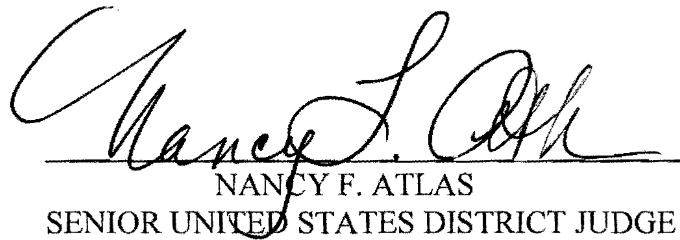
Plaintiffs are residents and citizens of Texas. Meaders is also a citizen of Texas. Therefore, the parties are not completely diverse and the Court lacks subject matter jurisdiction pursuant to 28 U.S.C. § 1332(a).

IV. CONCLUSION AND ORDER

At the time this lawsuit was filed and Meaders was named a Defendant, Liberty had not made its election pursuant to § 542A.006. Therefore, Meaders was not improperly joined when the lawsuit was filed. He and Plaintiffs are citizens of Texas and, as a result, the Court lacks diversity jurisdiction over this dispute. It is hereby

ORDERED that Plaintiffs' Motion to Remand [Doc. # 10] is **GRANTED**. By separate order, the Court will remand this case to the 333rd Judicial District Court of Harris County, Texas, for lack of subject matter jurisdiction.

SIGNED at Houston, Texas, this **30th** day of **October, 2019**.



NANCY F. ATLAS
SENIOR UNITED STATES DISTRICT JUDGE

United States District Court
Southern District of Texas
ENTERED
November 25, 2019
David J. Bradley, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ANTONIO VARGAS, Plaintiff,	§ § §	
v.	§	CIVIL ACTION NO. H-19-4208
RIGID GLOBAL BUILDINGS, LLC, Defendant.	§ § §	

MEMORANDUM AND ORDER

This case is before the Court on the Motion to Remand ("Motion") [Doc. # 5] filed by Plaintiff Antonio Vargas. Defendant Rigid Global Buildings, LLC ("Rigid") neither filed an opposition to the Motion nor requested an extension of time to do so. Based on the record and governing legal authorities, as well as the lack of any opposition, the Court **grants** Plaintiff's Motion.

I. BACKGROUND

Plaintiff was employed by Defendant, a nonsubscriber to the Texas Workers' Compensation system. Plaintiff and Defendant arbitrated a personal injury dispute arising out of a workplace accident in which Plaintiff's foot was crushed by a steel beam. The arbitrator dismissed Plaintiff's claim because the parties' arbitration provision contained a one-year limitations period.

On October 4, 2019, Plaintiff filed a Petition to Vacate Arbitration Award in Texas state court. Plaintiff argued, *inter alia*, that the one-year limitations period in the arbitration agreement is void because it is shorter than the Texas two-year statute of limitations for personal injury claims. Defendant filed a Notice of Removal, asserting that the case was removable pursuant to 28 U.S.C. § 1441(a) "in that it arises under the [*sic*] 9 U.S.C. §§ 1 *et seq.*, 28 U.S.C. §§ 2071, 2073, and the Federal Rules of Evidence." *See* Notice of Removal [Doc. # 1], ¶ 3. Plaintiff filed his Motion to Remand, which is now ripe for decision.

II. MOTION TO REMAND

The burden to establish federal jurisdiction is on the "party asserting jurisdiction." *Energy Mgmt. Servs., LLC v. City of Alexandria*, 739 F.3d 255, 257 (5th Cir. 2014). A civil action filed in State court may be removed to federal court if it is a case over which the federal district courts "have original jurisdiction . . .." 28 U.S.C. § 1441(a). None of the bases identified by Defendant in the Notice of Removal is a legal basis for removal to federal court under § 1441(a).

Title 28, United States Code, § 2071 sets forth the federal courts' rule-making authority. Section 2073 sets forth the method of prescribing and publishing the federal rules of civil procedure and federal rules of evidence. Defendant has cited no legal authority to support the statement that either of these two statutes, or the Federal

Rules of Evidence, supports removal jurisdiction under § 1441(a), and this Court's research has revealed none.

The only other basis asserted to support removal under § 1441(a), the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1 *et seq.*, "is not an independent source of jurisdiction." *Rio Grande Underwriters, Inc. v. Pitts Farms, Inc.*, 276 F.3d 683, 685 (5th Cir. 2001). A federal court has jurisdiction under the FAA "only when the underlying civil action would otherwise be subject to the court's federal question or diversity jurisdiction." *Id.* (citing 9 U.S.C. § 4); *see also FIA Card Servs., N.A. v. Gachiengu*, 2008 WL 336300, *5 (S.D. Tex. Feb. 5, 2008) (Rosenthal, J.) ("Federal question jurisdiction cannot be based on the FAA."). In this case, it is undisputed that the parties are both citizens of Texas, and the personal injury dispute that was the subject of arbitration did not involve any federal questions. Therefore, the FAA does not provide a basis for removal jurisdiction.

IV. CONCLUSION AND ORDER

Defendant has failed to demonstrate that this case is removable pursuant to 28 U.S.C. § 1441(a). As a result, absent a basis for federal subject matter jurisdiction, it is hereby

ORDERED that Plaintiff's Motion to Remand [Doc. # 5] is **GRANTED**. By separate order, the Court will remand this case to the 127th Judicial District Court of Harris County, Texas, for lack of subject matter jurisdiction. It is further

ORDERED that Defendant's Motion to Dismiss [Doc. # 4] is **DENIED without prejudice** to being reurged, if appropriate, following remand of this case to state court.

SIGNED at Houston, Texas, this **25th** day of **November, 2019**.

NANCY F. ATLAS
SENIOR UNITED STATES DISTRICT JUDGE

United States District Court
Southern District of Texas
ENTERED
July 16, 2019
David J. Bradley, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

KRISTINA BRADSHAW, *et al.*, Plaintiffs,	§ § §	
v.	§	CIVIL ACTION NO. H-19-1455
JOHNSON & JOHNSON, *et al.*, Defendants.	§ § §	

MEMORANDUM AND ORDER

This product liability case is before the Court on the Motion for Remand [Doc. # 5] filed by Plaintiffs Kristina Bradshaw, Individually and as Anticipated Representative of the Estate of Mary Lou Lewis, Deceased, Larry Lewis, Jr., and Stephanie Lewis. Plaintiffs seek remand because (1) the removal was untimely, (2) the Court lacks subject matter jurisdiction; (3) if there is jurisdiction, mandatory abstention applies; or (4) if mandatory abstention does not apply, equitable considerations warrant remand. Defendants Johnson & Johnson and Johnson & Johnson Consumer Inc. (collectively, "J&J") filed an Opposition [Doc. # 10], arguing that the Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1334(b) because the lawsuit is "related-to" the bankruptcy case filed by a former co-defendant. J&J argues also that removal was timely and that abstention is not appropriate.

The Court has carefully reviewed the full record and the applicable legal authorities. Based on that review, the Court concludes that it lacks subject matter jurisdiction over this dispute.[1] As a result, the Court **grants** the Motion for Remand and **remands** this case to the 11th Judicial District Court of Harris County, Texas.

I. BACKGROUND

Mary Lou Lewis suffered from malignant mesothelioma, which led to her death on May 20, 2018. Plaintiffs allege that this cancer was caused by her exposure to asbestos in talc used in J&J's baby powder and other companies' talcum powders. Imerys Talc America, Inc. ("Imerys") supplied talc for J&J's baby powder.

On April 23, 2018, Ms. Lewis and her husband, Larry Lewis,[2] filed this lawsuit against J&J, Imerys, and others in the 333rd Judicial District Court for Harris County, Texas. On April 27, 2018, the case was transferred to the multidistrict litigation case, *In re: Asbestos Litigation*, Cause No. 2019-00401, in the 11th Judicial District Court of Harris County, Texas. After Ms. Lewis's death, her daughter Kristina Bradshaw appeared individually and as a representative of the estate of Ms. Lewis. Larry Lewis, Jr. and Stephanie Lewis are also named Plaintiffs in this lawsuit.

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[1] Because the Court lacks subject matter jurisdiction, it need not address whether the removal was timely or whether abstention is required or otherwise appropriate.

[2] Larry Lewis died on September 15, 2018.

On February 13, 2019, Imerys filed a Chapter 11 bankruptcy petition in the United States Bankruptcy Court for the District of Delaware. On February 15, 2019, Imerys was dismissed as a defendant in Plaintiffs' lawsuit.

On April 19, 2019, J&J filed a Notice of Removal [Doc. # 1]. J&J asserted in the Notice of Removal that the case was removable pursuant to 28 U.S.C. § 1452 as related to the Imerys bankruptcy case. Plaintiffs filed a timely Motion to Remand, which has been briefed and is ripe for decision.

II. STANDARD FOR MOTION TO REMAND

The United States Supreme Court has "often explained that '[f]ederal courts are courts of limited jurisdiction.'" *Home Depot U.S.A., Inc. v. Johnson*, __ U.S. __, 139 S. Ct. 1743, 1745 (May 28, 2019) (quoting *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)); *Rasul v. Bush*, 542 U.S. 466, 489 (2004); *Gonzalez v. Limon*, 926 F.3d 186, 188 (5th Cir. 2019). "'They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree.'" *Rasul*, 542 U.S. at 489 (quoting *Kokkonen*, 511 U.S. at 377); *Gonzalez*, 926 F.3d at 188. The court "must presume that a suit lies outside this limited jurisdiction, and the burden of establishing federal jurisdiction rests on the party seeking the federal forum." *Id*. (quoting *Howery v. Allstate Ins. Co.*, 243 F.3d 912, 916 (5th Cir.

2001)); *Settlement Funding, L.L.C. v. Rapid Settlements, Limited*, 851 F.3d 530, 537 (5th Cir. 2017).

Title 28, United States Code, § 1452 allows removal of claims where federal jurisdiction arises under 28 U.S.C. § 1334. *See* 28 U.S.C. § 1452(a); *In re TXNB Internal Case*, 483 F.3d 292, 298 (5th Cir. 2007). Section 1334(b) grants federal jurisdiction over proceedings that are "related to" cases arising under Title 11, the Bankruptcy Code. *See* 28 U.S.C. § 1334(b); *In re TXNB Internal Case*, 483 F.3d at 298. The Fifth Circuit reads "this jurisdictional grant broadly, stating that the test for whether a proceeding properly invokes federal 'related to' jurisdiction is whether the outcome of the proceeding could conceivably affect the estate being administered in bankruptcy." *Id.* (citing *Arnold v. Garlock, Inc.*, 278 F.3d 426, 434 (5th Cir. 2001)). "Certainty is unnecessary; an action is 'related to' bankruptcy if the outcome could alter, positively or negatively, the debtor's rights, liabilities, options, or freedom of action or could influence the administration of the bankrupt estate." *Id.* (citing *Feld v. Zale Corp. (In re Zale Corp.)*, 62 F.3d 746, 752 (5th Cir. 1995)).

III. ANALYSIS

J&J argues that Plaintiffs' claims against it are related to the Imerys bankruptcy case because (1) Imerys is contractually obligated to indemnify J&J for its liability to Plaintiffs and for defense costs J&J incurs in Plaintiffs' lawsuit; (2) there is "shared

insurance between J&J and [Imerys] which threatens to deplete the pool of assets in the estate available for creditors"; and (3) there exists a unity of identity between Imerys and J&J.

A. <u>Contractual Indemnity</u>

Contractual indemnity rights can create related-to jurisdiction under § 1334(b) even where those rights have not yet accrued. *See Lone Star Fund V (U.S.), L.P. v. Barclays Bank PLC*, 594 F.3d 383, 386-87 (5th Cir. 2010) (citing *In re Stonebridge Techs., Inc.*, 430 F.3d 260, 266 (5th Cir. 2005)). J&J argues that Imerys is contractually obligated to indemnify it for liability and defense costs in connection with Plaintiffs' lawsuit. J&J cites the January 6, 1989 Talc Supply Agreement ("1989 Agreement") and the April 15, 2001 Supply Agreement ("2001 Agreement") as the sources of Imerys's contractual indemnification obligations. *See* Opposition [Doc. # 10], p. 12. However, the language in the Agreements fails to support J&J's argument for contractual indemnity.

The 1989 Agreement imposes an indemnity obligations on Imerys.[3] Specifically, Imerys agrees in the 1989 Agreement to indemnify J&J "from and against all liabilities arising out of any violation by [Imerys] of any law, ordinance,

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[3] For simplicity, the Court will refer to Imerys's predecessors, the signatories of the relevant Agreements, as "Imerys" when discussing the Agreements.

regulation or rule or the order of any court or administrative agency . . .." *See* 1989 Agreement [Doc. # 8-1], § 10. Imerys's indemnification obligation under the 1989 Agreement is limited, however, and Imerys affirmatively does "***not*** indemnify [J&J] for any such liabilities to the extent that such liabilities arise from: (i) the acts or omissions of [J&J]; or (ii) the acts or omissions of [Imerys] which were directed by [J&J]." *See id.* (emphasis added). Plaintiffs assert claims against J&J in this lawsuit solely based on the acts or omissions of J&J and, therefore, are not claims for which Imerys agreed to indemnify J&J under the 1989 Agreement.

The 2001 Agreement imposes an obligation on Imerys to indemnify J&J "for any cost, loss, damage or expense suffered" by J&J arising from either (A) the talc not meeting J&J's specifications or (B) Imerys failing to sample and test the talc as required by the 2001 Agreement. *See* 2001 Agreement [Doc. # 8-1], § 7(a)(i). Plaintiffs' claims against J&J do not arise out of Imerys delivering non-conforming talc or its failure to sample and test the talc as required by the 2001 Agreement. Therefore, Plaintiffs' claims against J&J in this lawsuit do not implicate contractual indemnification obligations of Debtor Imerys under the 2001 Agreement.

The 2001 Agreement further imposes an obligation on Imerys, similar to the obligation in the 1989 Agreement, to indemnify J&J "from and against all liabilities arising out of any violation by [Imerys] of any law, ordinance, regulation or rule or

the order of any court or administrative agency . . .." *See* 2001 Agreement [Doc. # 8-1], § 7(a)(iv). Imerys's indemnification obligation under the 2001 Agreement is also similarly limited, with the 2001 Agreement providing specifically that Imerys does "***not*** indemnify [J&J] for any such liabilities to the extent that such liabilities arise from: (i) the acts or omissions of [J&J]; or (ii) the acts or omissions of [Imerys] which were directed by [J&J]." *See id.* (emphasis added). As noted above, Plaintiffs' claims against J&J in this lawsuit are based on the acts or omissions of J&J. Therefore, Plaintiffs' claims are not ones for which Imerys provides contractual indemnity to J&J under the 2001 Agreement.

Plaintiffs are suing J&J in this lawsuit for selling baby powder that caused Ms. Lewis's cancer. Plaintiffs' allegations are based on J&J's own alleged acts and omissions. Neither the 1989 Agreement nor the 2001 Agreement imposes contractual indemnification on Imerys for liability and defense costs arising from the claims asserted by Plaintiffs against J&J in this lawsuit. Indeed, the two Agreements provide specifically that Imerys does ***not*** indemnify J&J for such claims. As a result, there is no "related-to" jurisdiction under § 1334(b) based on a contractual indemnity obligation.

B. <u>Shared Insurance</u>

J&J argues that "related-to" jurisdiction also exists because it and Imerys have shared insurance. In support of this argument, J&J states that it has "insurance coverage for talc litigation through Middlesex Assurance Company Limited, a wholly owned subsidiary of Johnson & Johnson . . .." *See* Opposition, p. 10 n.12. The only insurance policy provided by J&J in response to the Motion to Remand, however, is a policy issued by Aetna Casualty and Surety Company ("Aetna Policy"). The "Persons Insured" section of the Aetna Policy identifies J&J and its affiliates as insureds, as well as its officers, directors, stockholders or employees while acting on J&J's behalf. *See* Aetna Policy, Section II(a) and (b). The "Persons Insured" section provides further that a "Vendor" is an insured "but only with respect to Bodily Injury or Property Damage arising out of the distribution or sale in the regular course of the Vendor's business of [J&J's] Products . . .." *See id.*, Section II(c). Imerys does not distribute or sell J&J's products in the regular course of its business. Therefore, J&J has not shown that the Aetna Policy provides mutual insurance for both J&J and Imerys.

There is nothing in the record to establish that J&J and Imerys have shared insurance. J&J cites to Imerys's representation to the Bankruptcy Court that it has a right to "seek proceeds" from various insurance policies issued to J&J and its

subsidiaries. *See* Opposition, p. 14. That Imerys ***claims*** to have a right ***to seek*** proceeds from J&J's insurance does not demonstrate shared insurance for purposes of "related-to" jurisdiction under § 1334(b).

C. <u>Unity of Identity</u>

J&J argues that there exists a "unity of identity" between itself and Imerys that creates "related-to" jurisdiction for purposes of § 1334(b). *See* Opposition, pp. 14-15 (citing *Arnold v. Garlock, Inc.*, 278 F.3d 426 (5th Cir. 2001)). In *Garlock*, the Fifth Circuit noted that the Sixth Circuit had found "related-to" jurisdiction where "each of the co-defendants was closely involved in using the same material, originating with the debtor, to make the same, singular product, sold to the same market and incurring substantially similar injuries." *Garlock*, 278 F.3d at 440 (citing *In re Dow Corning Corp.*, 86 F.3d 482 (6th Cir. 1996)).

J&J argues that the various talc-related claims arise out of a single type of product, then admits there are "two products total." *See id.* at 15. J&J asserts that the talc is supplied exclusively by Imerys, but Plaintiffs counter that Imerys has not always been J&J's talc supplier. Neither party presents evidence to support these statements. J&J states that the products are "sold to a uniform market of consumers" but does not present evidence that the market for its powders is any market other than all adult consumers. J&J has simply quoted the language from *Garlock* and asserted,

with no supporting evidence, that the same "unity of identity" exists in this case. J&J's conclusory, unsupported argument regarding "unity of identity" is unpersuasive.

Plaintiffs assert claims against J&J that are based on J&J's own alleged acts and omissions. Plaintiffs do not assert any claims against Imerys or its bankruptcy estate. Imerys is no longer a defendant in this case. J&J has failed to demonstrate that it shares a unity of identity with Imerys such that the two companies share the same interest. The *Garlock* unity of identity basis for § 1334(b) jurisdiction does not exist in this case.

D. Conclusion

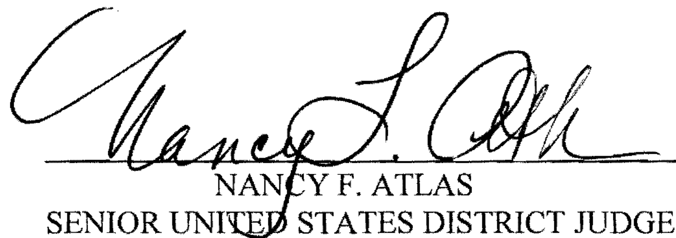
This lawsuit involves a non-debtor suing non-debtors in connection with a dispute that, based on Plaintiffs' complaint and the evidence of record, does not involve the debtor's bankruptcy estate. J&J has not shown that the debtor has any contractual indemnity obligations that would apply to Plaintiffs' claims in this lawsuit. J&J has not presented evidence of any insurance policies under which it and Imerys are both insureds. There is no evidence that establishes that J&J and Imerys have a unity of identity that would support "related-to" jurisdiction under § 1334(b). Therefore, absent subject matter jurisdiction, the case must be remanded to the Texas state court from which it was removed.

IV. CONCLUSION AND ORDER

Based on the foregoing, Plaintiffs' lawsuit against J&J is not related to the pending Imerys bankruptcy case for purposes of 28 U.S.C. § 1334(b). As a result, this Court lacks federal subject matter jurisdiction over the lawsuit, and it is hereby

ORDERED that Plaintiffs' Motion for Remand [Doc. # 5] is **GRANTED**. The Court will remand this case to the 11th Judicial District Court of Harris County, Texas, by separate order.

SIGNED at Houston, Texas, this 16th day of **July, 2019**.



NANCY F. ATLAS
SENIOR UNITED STATES DISTRICT JUDGE

United States District Court
Southern District of Texas
ENTERED
May 24, 2019
David J. Bradley, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MALLORY JACKSON,	§	
Plaintiff,	§	
	§	
v.	§	CIVIL ACTION NO. H-19-1101
	§	
ALSCO, INC.,	§	
Defendant.	§	

MEMORANDUM AND ORDER

This case is before the Court on the Motion to Remand ("Motion") [Doc. # 6] filed by Plaintiff Mallory Jackson, to which Defendant Alsco, Inc. ("Alsco") filed a Response [Doc. # 8]. Having reviewed the full record and applicable legal authorities, the Court finds that the Notice of Removal was untimely pursuant to 28 U.S.C. § 1446(c)(1). On that basis, the Court **grants** the Motion to Remand.

I. BACKGROUND

Plaintiff worked for Defendant as a Route Service Representative. Plaintiff alleges that in January 2016, he suffered a serious knee injury when he slipped and fell at work. Plaintiff's employer was a nonsubscriber to the Texas Workers' Compensation Insurance System.

Plaintiff filed the Original Petition in Texas state court on January 7, 2017, naming "Admiral Linen and Uniform Service, Inc. by Alsco" as the Defendant. *See*

Original Petition, Exh. A to Motion. On November 29, 2017, Plaintiff filed his First Amended Petition, changing the name of the Defendant to "Admiral Linen and Uniform Service, Inc." ("Admiral Linen"). *See* First Amended Petition, Exh. B to Motion. In both the Original Petition and the First Amended Petition, there was only a single defendant.

On December 18, 2017, Defendant sent Plaintiff's counsel a copy of the Motion to Abate and to Compel Arbitration ("Motion to Abate") filed in the state court lawsuit by Admiral Linen. *See* Motion to Abate, Exh. C to Motion. The state court judge denied the Motion to Abate on March 27, 2018. *See* Order, Exh. D to Motion.

On August 20, 2018, Admiral Linen served its Response to Plaintiff's Request for Disclosure in the state court lawsuit. The first request was for the correct name of the parties in the lawsuit, to which Admiral Linen answered "The parties have been correctly named." *See* Response to Request for Disclosure, Exh. E to Motion, p. 3.

On December 5, 2018, Admiral Linen filed a First Amended Answer, stating that "Plaintiff has sued the wrong entity" because Admiral Linen had been acquired by Alsco in April 2015. *See* First Amended Answer, Exh. G to Motion. That same day, Admiral Linen filed an Amended Response to Plaintiff's Request for Disclosure, stating:

> Admiral Linen & Uniform Service, Inc. is not the proper party. In April 2015, ALSCO, Inc. purchased Admiral Linen & Uniform Service, Inc.,

> and at all pertinent times ALSCO, Inc. was the employer of the Plaintiff Mallory Jackson.

Amended Response to Request for Disclosure, Exh. H to Motion, p. 3.

On March 5, 2019, counsel for the parties entered into an agreement for Plaintiff to substitute Alsco for Admiral Linen as the Defendant in the state court lawsuit. *See* Letter Agreement, Exh. I to Motion. In return, Defendant's counsel agreed to accept service on Alsco's behalf, and agreed "not to raise the defense of statute of limitations and agree[d] that the amended petition ***relates back to the date of original filing***." *See id.* (emphasis added). On March 18, 2019, Plaintiff filed the Second Amended Petition, naming Alsco, Inc. as the Defendant. *See* Second Amended Petition, Exh. J to Motion. On March 25, 2019, Alsco filed its Notice of Removal.

On April 19, 2019, within thirty days after the Notice of Removal was filed, Plaintiff filed his Motion to Remand. Plaintiff argues that the removal was untimely and, therefore, the case should be remanded to state court. The Motion to Remand has been briefed and is now ripe for decision.

II. ANALYSIS

Where, as here, removal is based on diversity of citizenship, the case may not be removed "more than 1 year after commencement of the action, unless the district

court finds that the plaintiff has acted in bad faith in order to prevent a defendant from removing the action." 28 U.S.C. § 1446(c)(1).

Alsco notes correctly that § 1446(c)(1) applies only to cases that are not originally removable. *See Johnson v. Heublein Inc.*, 227 F.3d 236, 241 (5th Cir. 2000) (citing *New York Life Ins. Co. v. Deshotel*, 142 F.3d 873, 886 (5th Cir. 1998)). The Original Petition and the First Amended Petition each named only one Defendant, named first as "Admiral Linen and Uniform Service, Inc. by Alsco" and later as "Admiral Linen and Uniform Service, Inc." In each pleading, Plaintiff alleged that the lone defendant was a Texas corporation. It is undisputed that Plaintiff and Admiral Linen are both citizens of Texas. As a result, the lawsuit filed in state court was not originally removable.

Section 1446(c)(1) requires that the Notice of Removal be filed within one year after the commencement of the state court lawsuit. *See* 28 U.S.C. § 1446(c)(1). "A civil action is commenced by filing a complaint with the court." FED. R. CIV. P. 3; *New York Life*, 142 F.3d at 885; *Perez v. Lancer Ins. Co.*, 2006 WL 2850065 (S.D. Tex. Oct. 4, 2006). Plaintiff filed the Original Petition in state court on January 7, 2017, more than one year before the Notice of Removal was filed. On March 5, 2019, before Plaintiff filed the Second Amended Petition, counsel entered into a written agreement under which Plaintiff would amend the petition to name Alsco as the

defendant and the amended petition would "relate[] back to the date of original filing." *See* Letter Agreement, Exh. I to Motion. Plaintiff filed his Second Amended Complaint on March 18, 2019. Pursuant to the parties' Letter Agreement, the Second Amended Complaint naming Alsco as the correct defendant relates back to the date of original filing, January 7, 2017. The Notice of Removal was filed March 25, 2019, well more than one year after the commencement of the action. Therefore, Alsco's Notice of Removal was untimely pursuant to § 1446(c)(1).

As noted above, § 1446(c)(1) contains an exception to the one-year removal requirement where the plaintiff "has acted in bad faith in order to prevent a defendant from removing the action." 28 U.S.C. § 1446(c)(1). Alsco argues that Plaintiff acted in bad faith because he knew that Alsco was his employer. The removing defendant has the burden of showing that plaintiffs acted in bad faith to prevent removal. *See Jones v. Ramos Trinidad*, __ F. Supp. 3d __, 2019 WL 2022534, *3 (E.D. La. May 8, 2019).

Section 1446(c)(1) essentially codified the equitable tolling principle previously recognized by the Fifth Circuit in *Tedford v. Warner-Lambert Co.*, 327 F.3d 423 (5th Cir. 2003). *See Sampson v. Miss. Valley Silica Co.*, 268 F. Supp. 3d 918, 926 (S.D. Miss. 2017). In *Tedford*, the Fifth Circuit held that "[w]here a plaintiff has attempted to manipulate the statutory rules for determining federal removal jurisdiction, thereby

preventing the defendant from exercising its rights, equity may require that the one-year limit in § 1446(b) be extended." *Tedford*, 327 F.3d at 428-29. Although the Fifth Circuit has not defined "bad faith" in the context of § 1446(c)(1), courts within the circuit have opined that the standard for showing bad faith is comparable to the standard for establishing equitable tolling under *Tedford*. *See id.* (and cases cited therein).

Alsco has failed to present evidence of bad faith. Plaintiff named Admiral Linen as the originally-named Defendant. Admiral Linen filed a Motion to Abate in its own name, and responded to a request for disclosure by stating that the parties "have been correctly named." It was not until December 5, 2018, that Admiral Linen first stated that it was not, in fact, the correctly named defendant. Plaintiff filed his Second Amended Petition shortly thereafter, subject to the parties' Letter Agreement, naming the correct Defendant. Although there is evidence that Plaintiff knew before filing suit that there was a relationship between Admiral and Alsco, there is no evidence that Plaintiff manipulated the state court lawsuit in an attempt to preclude Alsco from removing the case within one year from the date it was filed. Therefore, Alsco has failed to establish the "bad faith" exception to the one-year requirement of § 1446(c)(1).

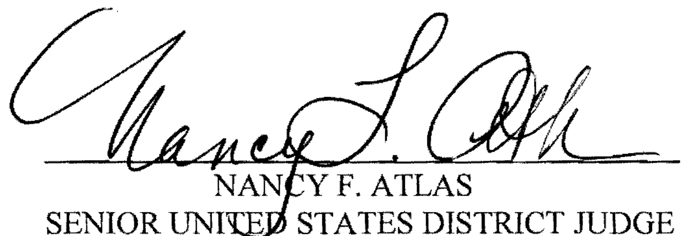
III. CONCLUSION AND ORDER

The Notice of Removal was filed more than one year after the commencement of the lawsuit. As a result, removal was untimely pursuant to 28 U.S.C. § 1446(c)(1). Absent a showing that Plaintiff acted in bad faith in order to prevent timely removal, it is hereby

ORDERED that the Motion to Remand [Doc. # 6] is **GRANTED** and this case is **REMANDED** to the 11th Judicial District Court of Harris County, Texas. The Court will issue a separate Order of Remand. It is further

ORDERED that Defendant's Motion to Compel Arbitration [Doc. # 3] is **DENIED** without prejudice to being reurged, if appropriate, following remand.

SIGNED at Houston, Texas, this 24th day of **May, 2019**.



NANCY F. ATLAS
SENIOR UNITED STATES DISTRICT JUDGE

United States District Court
Southern District of Texas
ENTERED
May 31, 2019
David J. Bradley, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SOLAIJA ENTERPRISES LLC,	§	
d/b/a TG's Cravings,	§	
Plaintiff,	§	
	§	
v.	§	CIVIL ACTION NO. H-19-0929
	§	
AMGUARD INSURANCE	§	
COMPANY,	§	
Defendant.	§	

MEMORANDUM AND ORDER

This case is before the Court on the Motion to Remand ("Motion") [Doc. # 8] filed by Plaintiff Solaija Enterprises LLC, d/b/a TG's Cravings ("Solaija"), to which Defendant Amguard Insurance Company ("Amguard") filed a Response [Doc. # 11]. Having reviewed the full record and applicable legal authorities, the Court **grants** the Motion to Remand.

I. BACKGROUND

In February 2016, Amguard issued an insurance policy (the "Policy") to Solaija, covering a restaurant Solaija was operating in Sugar Land, Texas. Plaintiff alleges that the Policy was sold to Solaija by Amguard's agent, Ronnie Patel.

On the morning of April 18, 2016, the building housing Plaintiff's restaurant suffered a major roofing failure, causing a portion of the roof to collapse into the

restaurant. Solaija filed a claim under the Policy with Amguard. When Amguard failed to pay the claim for Policy proceeds, Solaija filed a lawsuit in Fort Bend County, Texas, against Amguard and Patel on May 4, 2017. Solaija and Patel are citizens of Texas. Amguard is a foreign insurance company, but it maintains a registered agent in Texas for service of process.

Plaintiff dismissed its claims against Patel in late February 2019. Remaining Defendant Amguard filed a Notice of Removal on March 14, 2019. Plaintiff filed a Motion to Remand on April 15, 2019, arguing that the Notice of Removal was untimely.[1] The Motion to Remand has been briefed and is now ripe for decision.

II. ANALYSIS

Where, as here, removal is based on diversity of citizenship, the case may not be removed "more than 1 year after commencement of the action, unless the district court finds that the plaintiff has acted in bad faith in order to prevent a defendant from removing the action." 28 U.S.C. § 1446(c)(1). "A civil action is commenced by filing a complaint with the court." FED. R. CIV. P. 3; *New York Life Ins. Co. v. Deshotel*, 142 F.3d 873, 885 (5th Cir. 1998); *Perez v. Lancer Ins. Co.*, 2006 WL 2850065 (S.D.

[1] A motion to remand "on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days" after the notice of removal is filed. *See* 28 U.S.C. § 1447(c). Thirty days after March 14, 2019, was April 13, 2019, a Saturday. As a result, the Motion to Remand filed Monday, April 15, 2019, was timely. *See* FED. R. CIV. P. 6(a)(1)(C).

Tex. Oct. 4, 2006). Plaintiff filed the Original Petition in state court on May 4, 2017, more than one year before the Notice of Removal was filed. Plaintiff named both Amguard and Patel as Defendants in the lawsuit.

Section 1446(c)(1) contains an exception to the one-year removal requirement where the plaintiff "has acted in bad faith in order to prevent a defendant from removing the action." 28 U.S.C. § 1446(c)(1). Amguard argues that Plaintiff acted in bad faith by failing to undertake significant activity in the lawsuit during the one-year period after the case was filed. The removing defendant has the burden of showing that the plaintiff acted in bad faith to prevent removal. *See Jones v. Ramos Trinidad*, __ F. Supp. 3d __, 2019 WL 2022534, *3 (E.D. La. May 8, 2019).

Section 1446(c)(1) essentially codified the equitable tolling principle previously recognized by the Fifth Circuit in *Tedford v. Warner-Lambert Co.*, 327 F.3d 423 (5th Cir. 2003). *See Sampson v. Miss. Valley Silica Co.*, 268 F. Supp. 3d 918, 926 (S.D. Miss. 2017). In *Tedford*, the Fifth Circuit held that "[w]here a plaintiff has attempted to manipulate the statutory rules for determining federal removal jurisdiction, thereby preventing the defendant from exercising its rights, equity may require that the one-year limit in § 1446(b) be extended." *Tedford*, 327 F.3d at 428-29. Although the Fifth Circuit has not defined "bad faith" in the context of § 1446(c)(1), courts within the circuit have opined that the standard for showing bad faith is comparable to the

legal standard for establishing equitable tolling under *Tedford*. *See Jones*, 2019 WL 2022534, at *3 (and cases cited therein).

Amguard has failed to present evidence of bad faith. In June 2017, the month after the lawsuit was filed, the law firm that filed suit on behalf of Plaintiff was dissolved. Plaintiff retained counsel's new law firm to represent it in the state court lawsuit. Between June 2017 and October 2017, Plaintiff's counsel and Amguard's adjuster were corresponding about Plaintiff's claim. In August 2017, the business personal property portion of Plaintiff's claim was resolved and paid. Based on the ongoing, successful efforts by Plaintiff's counsel and Amguard's adjuster to resolve the dispute, Plaintiff did not immediately serve either of the two named Defendants.

By April 2018, Plaintiff believed that negotiations with Amguard, primarily through an Amguard accountant, regarding Plaintiff's claim for loss of business income were not making progress. Therefore, on April 13, 2018, Plaintiff obtained service on both Defendants. Included with the state court Petition were Requests for Disclosure for both Defendants.

The deadline for filing an answer to the Petition and for responding to the Requests for Disclosure expired. Plaintiff discovered through a check of the state court's website that Amguard and Patel had each filed an answer. Plaintiff's counsel had not received a copy of the filings, and he believed there may have been a problem

with email addresses caused by the change of law firms in June 2017. Additionally, although Amguard and Patel had filed responses to the Requests for Disclosure in June 2018, Plaintiff alleges that it failed to receive notification from the state court electronic filing system or from Amguard's attorney.

In early January 2019, Patel's counsel contacted Plaintiff's counsel to request and discuss dismissal of Patel from the lawsuit. Following these discussions, Plaintiff agreed to dismiss Patel voluntarily. The state court order dismissing Patel was entered February 21, 2019. At that time, there was complete diversity of citizenship between the remaining parties and the case became removable.

Amguard has failed to demonstrate that Plaintiff manipulated the state court lawsuit to prevent Amguard from exercising its right of removal. The lawsuit progressed very slowly in state court, initially because of successful negotiations between Plaintiff's counsel and Amguard's adjuster, and later because Plaintiff's counsel experienced difficulties obtaining Defendants' discovery responses.[2] Plaintiff eventually served Defendant Patel, and Patel filed an answer. Plaintiff requested and ultimately received initial discovery responses from Patel. Subsequently, after a portion of Plaintiff's claim had been paid and after discussions with Patel's attorney,

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[2] The Court does not find that Amguard or its counsel were responsible for the difficulties obtaining discovery.

Plaintiff agreed to dismiss Patel from the state court lawsuit. At that time, the state court lawsuit had been pending for more than 21 months, well beyond the one-year limit for removal. This is not a case where a plaintiff names a non-diverse resident defendant, never serves that defendant, and dismisses that defendant as soon as the one-year limitation in § 1446(c) expires. Moreover, there is no evidence that Plaintiff would have dismissed Patel within one year of filing the lawsuit but for an intent to prevent Amguard from removing the case to federal court. Amguard has failed to establish the "bad faith" exception to the one-year requirement of § 1446(c)(1).

III. CONCLUSION AND ORDER

The Notice of Removal was filed more than one year after the commencement of the lawsuit, and Amguard has failed to demonstrate that Plaintiff acted in bad faith in order to prevent timely removal. As a result, it is hereby

ORDERED that the Motion to Remand [Doc. # 8] is **GRANTED**. This case will be remanded to the 434th Judicial District Court of Fort Bend County, Texas, by separate Remand Order.

SIGNED at Houston, Texas, this **31st** day of **May, 2019**.

NANCY F. ATLAS
SENIOR UNITED STATES DISTRICT JUDGE

United States District Court
Southern District of Texas
ENTERED
October 24, 2019
David J. Bradley, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RECIF RESOURCES, LLC,	§	
Plaintiff,	§	
	§	
v.	§	CIVIL ACTION NO. H-19-2953
	§	
JUNIPER CAPITAL ADVISORS, L.P.,	§	
et al.,	§	
Defendants.	§	

MEMORANDUM AND ORDER

This case is before the Court on the Motion to Remand and Request for Attorneys' Fees ("Motion") [Doc. # 17] filed by Plaintiff Recif Resources, LLC ("Recif"). Defendant Juniper Capital Advisors, LP ("Juniper") filed a Response [Doc. # 24], Recif filed a Reply [Doc. # 31], Juniper filed a Sur-Reply [Doc. # 38], and Recif filed a Sur-Sur-Reply [Doc. # 43]. Having reviewed the full record and the applicable legal authorities, the Court **denies** the Motion.

I. BACKGROUND

In 2017, Recif and Juniper discussed jointly pursuing a prospective oil and gas opportunity. In connection with the discussions, Juniper signed a confidentiality agreement. Each party made its intellectual property and other proprietary information available to the other. Recif alleges that Juniper "backed out of the deal in May 2018." *See* Motion, p. 2. Recif alleges that it learned Juniper "was developing

the [opportunity] without them in violation of the parties' confidentiality agreement." *Id.*

Recif filed this lawsuit in Texas state court, asserting only Texas law causes of action.[1] On August 8, 2019, Juniper filed a counterclaim against Recif, including a claim for copyright infringement.[2] That same day, Juniper filed a Notice of Removal [Doc. # 1].

Recif moved to remand, arguing that the Notice of Removal was untimely. Recif argues that, even if the Court retains the copyright infringement counterclaim, Recif's state law claims and Juniper's state law counterclaims should be remanded. The Motion has been fully briefed and is now ripe for decision.

II. TIMELINESS OF NOTICE OF REMOVAL

It is undisputed that this lawsuit as originally filed by Recif was not removable. Therefore, Juniper's Notice of Removal was timely if "filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended

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1 In the original state court Petition, Recif asserted causes of action for breach of contract, fraudulent inducement, fraudulent misrepresentation, trade secret misappropriation, detrimental reliance/promissory estoppel, and unjust enrichment. *See* Original Petition, Exh. 2 to Notice of Removal.

2 In addition to the copyright infringement counterclaim, Juniper asserted state law counterclaims for malicious prosecution and "bad faith claim of misappropriation." *See* First Amended Answer and Counterclaim, Exh. 10 to Notice of Removal.

pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable." 28 U.S.C. § 1446(b)(3).

Juniper bases its removal of this case on its Copyright Act counterclaim. To state a claim for relief under the Copyright Act, a plaintiff must allege: "(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original." *BWP Media USA, Inc. v. T & S Software Assocs., Inc.*, 852 F.3d 436, 439 (5th Cir.), *cert. denied*, 138 S. Ct. 236 (2017) (quoting *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991)); *see also Baisden v. I'm Ready Productions, Inc.*, 693 F.3d 491, 499 (5th Cir. 2012).

Recif has established and, indeed, Juniper has admitted, that by March 26, 2019, Juniper had received a discovery response that "made clear that Recif had cut and pasted [Juniper's] maps and well log interpretations into a PowerPoint document." *See* Response [Doc. # 24], p. 8. At that point, Juniper had received "other paper" from which it could ascertain that Recif had copied elements of a work as to which Juniper claims copyright protection. The Notice of Removal, filed August 8, 2019, was untimely pursuant to § 1446(b)(3).

Juniper argues that it could not ascertain that it had a copyright infringement counterclaim until August 8, 2019, when it received a deposition transcript containing testimony regarding Recif's use of the PowerPoint containing copies of Juniper's

work. "Use" of the allegedly infringing document, here the PowerPoint, is not a required element of a copyright infringement claim. One who makes a copy of a copyrighted work infringes even if he does not sell or otherwise distribute the copy. *See Alcatel USA, Inc. v. DGI Techs., Inc.*, 166 F.3d 772, 788 n.54 (5th Cir. 1999). Copyright infringement can occur even if the unauthorized copy is "solely for the private purposes of the reproducer." *Id.* Therefore, the deposition testimony regarding Recif's use of the allegedly unauthorized copy did not constitute "other paper" from which Juniper could first ascertain that there were copyright infringement issues that made the case removable.

The Notice of Removal was filed August 8, 2019, more than thirty days after Juniper's March 26, 2019 receipt of "other paper" that indicated the existence of a copyright infringement counterclaim against Recif. Consequently, removal was untimely pursuant to § 1446(b)(3).

III. <u>EXISTENCE OF GOOD CAUSE FOR UNTIMELY REMOVAL</u>

A civil action asserting a claim for relief under United States copyright law is removable pursuant to 28 U.S.C. § 1454(a). Therefore, the time limitation contained in § 1446(b)(3) "may be extended at any time for cause shown." 28 U.S.C. § 1454(b)(2). In determining whether a removing party has shown cause under § 1454(b)(2), district courts in Texas look to Federal Rule of Procedure 6(b)(1)(B) for

guidance. *See Hill Country Tr. v. Silverberg*, 2018 WL 6267880, *8 (W.D. Tex. Nov. 28, 2018), and cases cited therein. Relevant factors include (1) the potential for prejudice to the other parties, (2) the length of the delay and its impact on the case, (3) the reason for the delay and whether it was within the removing party's control, and (4) whether the removing party has acted in good faith. *See id.* (citing *Salts v. Epps*, 676 F.3d 468, 474 (5th Cir. 2012)). The Court has "broad discretion to grant or deny an extension." *Salts*, 676 F.3d at 474.

The Court finds that there is little potential for prejudice to Recif. It is uncontested that the case is removable, and this Court clearly has subject matter jurisdiction over the copyright infringement counterclaim. This Court will permit the parties to use in this case any discovery obtained while the case was pending in state court, and will likely adopt any state court rulings on discovery disputes where those rulings are memorialized in a written order or transcript.

The delay between the removal deadline of April 26, 2019, and removal on August 8, 2019, was not substantial. Recif argues that the delay had an adverse impact on its ability to obtain documents relating to Juniper's partnership with EOG Resources, Inc. The hearing on this discovery dispute was not scheduled in state court until August 30, 2019, and the dispute is currently being considered by this Court.

Therefore, there has been no adverse impact on Recif's ability to obtain discovery to which it is entitled and, at most, there has been minimal delay.

Juniper argues that any delay in the filing of the Notice of Removal was the result of Recif's failure to comply with its discovery obligations while the case was pending in state court. It appears, however, that the delay was caused by Juniper's failure to recognize that Recif's March 26, 2019 production of the PowerPoint into which elements of Juniper's work had been "cut and pasted" raised copyright infringement issues that caused the case to become removable. This factor, unlike the other factors, weighs against extending the deadline for removal.

The Court finds that Juniper has acted in good faith in connection with the removal timing. Indeed, there is nothing that demonstrates bad faith on Juniper's part in deciding when to file the Notice of Removal.

Based on the foregoing, and taking all circumstances into account, the Court finds that Juniper has shown good cause for extending the removal deadline. Therefore, the Court extends the time for filing the Notice of Removal to and including the August 8, 2019, filing date.

IV. <u>EXERCISE OF SUPPLEMENTAL JURISDICTION</u>

In the Notice of Removal, Juniper asserts correctly that the Court has supplemental jurisdiction over Recif's state law causes of action and over Juniper's

counterclaims that are based on Texas state law, citing 28 U.S.C. § 1367(a). Recif argues in conclusory fashion that the Court should decline to exercise its supplemental jurisdiction because the state law claims substantially predominate over the federal claim. *See* Motion, p. 12 (citing 28 U.S.C. § 1367(c)(2)). The Court finds Recif's position unpersuasive.

The state law claims and counterclaims are closely related to the copyright infringement counterclaim. The parties' respective claims arise out of their discussions, and their exchange of proprietary information, in connection with the same original oil and gas opportunity. Although other nearby oil and gas opportunities may be relevant factually, the parties' initial exchange of intellectual property and other proprietary information, and the alleged misuse of that information, is the genesis of the claims in this lawsuit, both the state law claims and the federal copyright claim. The rights the parties assert in their respective intellectual property and other proprietary information – rights that form the basis for the state law claims and counterclaims – are similar in nature. At this early stage of this case, the Court cannot find factually that the state law claims predominate over the federal copyright counterclaim. Therefore, the Court will exercise its supplemental jurisdiction at this time.

V. CONCLUSION AND ORDER

Juniper's Notice of Removal was untimely pursuant to 28 U.S.C. § 1446(b)(3). Pursuant to 28 U.S.C. § 1454(b)(2), however, Juniper has shown good cause for extending the deadline for removal. Therefore, the Motion to Remand the entire case to state court is denied.

The Court cannot find that the state law claims and counterclaims predominate over the Copyright Act counterclaim. As a result, the Court will exercise supplemental jurisdiction over the state law claims. The Court notes that should the Copyright Act counterclaim be dismissed prior to trial, the Court at that time may decline to exercise supplemental jurisdiction pursuant to 28 U.S.C. § 1367(c)(3). Based on the foregoing, it is hereby

ORDERED that Recif's Motion to Remand and Request for Attorneys' Fees [Doc. # 17] is **DENIED**.

SIGNED at Houston, Texas, this **24th** day of **October, 2019**.

NANCY F. ATLAS
SENIOR UNITED STATES DISTRICT JUDGE

United States District Court
Southern District of Texas
ENTERED
June 17, 2019
David J. Bradley, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ROBERT EWELL,	§	
Plaintiff,	§	
	§	
v.	§	CIVIL ACTION NO. H-19-1415
	§	
CENTAURI SPECIALTY	§	
INSURANCE COMPANY, *et al.*,	§	
Defendants.	§	

MEMORANDUM AND ORDER

This insurance case is before the Court on the Motion to Dismiss [Doc. # 5] filed by Defendant Steven Wiley. Plaintiff Robert Ewell did not file a response to the Motion to Dismiss. Instead, Plaintiff filed a Motion to Abstain and Remand ("Motion to Remand") [Doc. # 10], to which Defendant Centauri Specialty Insurance Company ("Centauri") filed an Opposition [Doc. # 11]. Plaintiff failed to file a reply in support of his Motion to Remand, and did not request an extension of the reply deadline. Based on the Court's review of the record and applicable legal authorities, the Court **grants** Wiley's Motion to Dismiss and **denies** Plaintiff's' Motion to Remand.

I. BACKGROUND

Plaintiff owns property in Fort Bend County, Texas. The property was insured under a homeowner's policy issued by Centauri. Plaintiff filed a claim with Centauri for damage to the property allegedly caused by a severe storm on August 25, 2017.

Defendant Wiley was assigned as the adjuster for Plaintiff's claim. Centauri failed to pay the full amount of Plaintiff's insurance claim.

On February 11, 2019, Centauri gave Plaintiff written notice of its election pursuant to Chapter 542A of the Texas Insurance Code to assume any liability Wiley might have to Plaintiff. *See* Letter, Exh. B to Motion to Dismiss. Plaintiff filed this lawsuit on March 15, 2019, naming both Wiley and Centauri as Defendants. Plaintiff served Centauri on March 20, 2019, and Centauri filed a timely Notice of Removal on April 18, 2019.

Wiley filed his Motion to Dismiss, and Plaintiff filed a Motion to Remand. Both motions are now ripe for decision.

II. MOTION TO DISMISS

Wiley argues that the Texas Insurance Code requires dismissal of Plaintiff's claims against him. Under the Texas Insurance Code, an insurer may "elect to accept whatever liability an agent might have to the claimant for the agent's acts or omissions related to the claim by providing written notice to the claimant." TEX. INS. CODE § 542A.006(a). Where, as here, an insurer makes such an election before the plaintiff files suit, "no cause of action exists against the agent related to the claimant's claim, and, if the claimant files an action against the agent, the court ***shall*** dismiss that action with prejudice." TEX. INS. CODE § 542A.006(b) (emphasis added).

It is uncontested that Centauri made the Chapter 542A election to accept any liability Wiley may have to Plaintiff. Therefore, pursuant to § 542A.006(b), Wiley's Motion to Dismiss is **granted**.

III. MOTION TO REMAND

Any "civil action brought in a State court of which the district courts . . . have original jurisdiction, may be removed by the defendant . . .." 28 U.S.C. § 1441(a). Federal district courts have original jurisdiction over lawsuits between citizens of different states where the matter in controversy exceeds $75,000.00, exclusive of interest and costs. *See* 28 U.S.C. § 1332(a)(1).

A lawsuit involving a non-diverse defendant may be removed if the non-diverse defendant was improperly joined. *See Hornbuckle v. State Farm Lloyds*, 385 F.3d 538, 542 (5th Cir. 2004). A non-diverse defendant is improperly joined if "there is no reasonable basis for the district court to predict that the plaintiff might be able to recover" against the non-diverse defendant in state court. *Cumpian v. Alcoa World Alumina, L.L.C.*, 910 F.3d 216, 219 (5th Cir. 2018) (quoting *Smallwood v. Ill. Cent. R.R. Co.*, 385 F.3d 568, 573 (5th Cir. 2004) (*en banc*)).

In this case, Centauri made an election under Chapter 542A of the Texas Insurance Code before Plaintiff filed this lawsuit and, therefore, "no cause of action exists against [Wiley] related to the claimant's claim . . .." TEX. INS. CODE

§ 542A.006(b). Because there is no reasonable basis to predict that Plaintiff might be able to recover against Wiley in state court, he was improperly joined as a defendant in this suit.[1] The remaining parties are completely diverse and, therefore, the Court has subject matter jurisdiction and removal was proper.

Plaintiff argues that Centauri's Chapter 542A election was not a voluntary act of the Plaintiff and, therefore, "the voluntary-involuntary rule makes this case not removable." *See* Motion to Remand, p. 5. Plaintiff relies on *Massey v. Allstate Vehicle & Prop. Ins. Co.*, 2018 WL 3017431, *2 (S.D. Tex. June 18, 2018) (Miller, J.), to support his argument. In *Massey*, the district court noted that the voluntary-involuntary rule provides that "an action nonremovable when commenced may become removable thereafter only by the voluntary act of the plaintiff." *Id.* (citing *Crockett v. R.J. Reynolds Tobacco Co.*, 436 F.3d 529, 532 (5th Cir. 2006) (quoting *Weems v. Louis Dreyfus Corp.*, 380 F.2d 545, 547 (5th Cir. 1967)). There is an exception to the voluntary-involuntary rule, however, "where a claim against a nondiverse or in-state defendant is dismissed on account of fraudulent joinder." *See*

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[1] Plaintiff argues he has alleged a factual basis for his claims against an adjuster, and Plaintiff cites *Int'l Energy Ventures Mgmt., L.L.C. v. United Energy Group, Ltd.*, 818 F.3d 193, 200-01 (5th Cir. 2016). In that case, the Fifth Circuit held that federal pleading requirements apply to the improper joinder analysis. *See id.* at 208. The case did not involve a Chapter 542A election or other Texas law that eliminates a claim against a non-diverse defendant. Regardless of how well-pleaded Plaintiff's factual allegations are against Wiley as an adjuster, at the time the lawsuit was filed, there was no possibility that Plaintiff could recover against him in state court.

Massey, 2018 WL 3017431 at *2; *see also Vyas v. Atain Specialty Ins. Co.*, 2019 WL 2119733, *4 (S.D. Tex. May 15, 2019) (Rosenthal, J.); *Greatland Inv., Inc. v. Mt. Hawley Ins. Co.*, 2019 WL 2120854, *2 (S.D. Tex. May 15, 2019) (Miller, J.). Here, Centauri gave Plaintiff notice of its Chapter 542A election before Plaintiff filed this lawsuit. Therefore, at the time the lawsuit was filed, Plaintiff had no viable claim against Wiley.[2] Because Wiley was improperly joined at the time the lawsuit was filed, the voluntary-involuntary rule is inapplicable.

Plaintiff is a resident and citizen of Texas. Centauri is a Florida corporation with its principal place of business in Florida. Wiley was improperly joined and, as a result, his citizenship is not considered in the jurisdictional analysis. The amount in controversy exceeds $75,000.00, exclusive of interest and costs. As a result, the Court has diversity jurisdiction and removal was proper. The Motion to Remand is denied.

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[2] Plaintiff notes that "evidence of the agent's acts or omissions may be offered at trial and, if supported by sufficient evidence, the trier of fact may be asked to resolve fact issues as if the agent were a defendant, and judgment against the insurer must include any liability that would have been assessed against the agent." Motion to Remand, p. 9 (citing TEX. INS. CODE § 542A.006(g)). Centauri does not dispute that it has assumed any liability Wiley may have to Plaintiff. Centauri's assumption of liability does not, however, make Wiley a party to the lawsuit. Indeed, § 542A.006(g) applies only when the insurer makes the Chapter 542A election and, therefore, "the agent is ***not a party*** to the action." *See* TEX. INS. CODE § 542A.006(g) (emphasis added).

IV. CONCLUSION AND ORDER

Plaintiff cannot, and could not at the time of removal, recover against Defendant Wiley in this case. As a result, Defendant Wiley was improperly joined and all claims against him are dismissed. It is hereby

ORDERED that Defendant Wiley's Motion to Dismiss [Doc. # 5] is **GRANTED**. It is further

ORDERED that Plaintiff's Motion to Remand [Doc. # 10] is **DENIED**.

SIGNED at Houston, Texas, this **17th** day of **June, 2019**.

NANCY F. ATLAS
SENIOR UNITED STATES DISTRICT JUDGE

United States District Court
Southern District of Texas
ENTERED
October 21, 2020
David J. Bradley, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

PAUL JACOB PASCHAL, *et al.*, Plaintiffs,	§ § §	
v.	§	CIVIL ACTION NO. H-20-3283
ALLSTATE FIRE AND CASUALTY INSURANCE COMPANY, Defendant.	§ § § §	

REMAND ORDER

Defendant Allstate Fire and Casualty Insurance Company removed this case from the County Court at Law for Walker County, Texas, asserting diversity jurisdiction under 28 U.S.C. § 1332. Plaintiffs Paul Jacob Paschal and Aubree Paschal filed a Motion to Remand [Doc. # 3] asserting that the amount in controversy does not satisfy the jurisdiction minimum of $75,000.00. Defendant filed a Response [Doc. # 6].

In the Original Petition filed in state court, Plaintiffs affirmatively asserted that "they are seeking less than $75,000.00 in damages." *See* Original Petition [Doc. # 1-3], ¶ 1.2. Additionally, Plaintiffs have filed a Binding Stipulation [Doc. # 5], reaffirming that their total recovery, including attorneys' fees, cannot exceed $75,000.00. Therefore, the record demonstrates that now and at the time of removal the amount in controversy did not satisfy the jurisdictional minimum. It is hereby

ORDERED that Plaintiffs' Motion to Remand [Doc. # 3] is **GRANTED** and this case is **REMANDED** to the County Court at Law, Walker County, Texas, for lack of subject matter jurisdiction.

SIGNED at Houston, Texas, this 21st day of **October, 2020**.

NANCY F. ATLAS
SENIOR UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

PAUL JACOB PASCHAL AND AUBREE PASCHAL, **Plaintiffs.** **V.** **ALLSTATE FIRE AND CASUALTY INSURANCE COMPANY,** **Defendant.**	§ § § § § § § § § § §	**CIVIL ACTION NO. 4:20-CV-03283**

PLAINTIFFS' BINDING STIPULATION

TO THE HONORABLE COURT:

COME NOW, PAUL JACOB PASCHAL AND AUBREE PASCHAL, hereinafter referred to as Plaintiffs and file their Binding Stipulation, and would show the Court as follows:

I.

Plaintiffs stipulate that there is no genuine issue with respect to the following fact:

1. Plaintiffs' total recovery, including attorneys' fees, cannot exceed $75,000.00.

Plaintiffs hereby agree that their total recovery in this case cannot exceed $75,000.00. Plaintiffs agree they are bound by this stipulation and their recovery in state court cannot exceed $75,000.00.

II.

Plaintiffs therefore request that the above-described stipulation is deemed conclusively established without need to present further evidence in support thereof, in connection with the request to remand this case to state court.

Respectfully submitted,

HANEY.MOORMAN.PASCHAL, P.C.

By: */s/ P. Jacob Paschal*
P. JACOB PASCHAL
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Huntsville, Texas 77340
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jpaschal@hmp-attorneys.com

ATTORNEY FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify on this 8th day of October, 2020, a true and correct copy of the foregoing document was delivered to opposing counsel by electronically filing same in accordance with the service rules to:

Kimberly N. Blum
Susan L. Florence & Associates
811 Louisiana, Suite 2400
Houston, Texas 77002
Tel: (713) 336-2812
Fax: (877) 684-4165
HoustonLegal@allstate.com
Attorney for Defendant

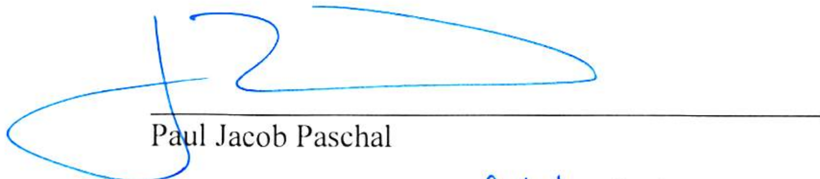
/s/ P. Jacob Paschal
P. JACOB PASCHAL

VERIFICATION

STATE OF TEXAS §
§
COUNTY OF WALKER §

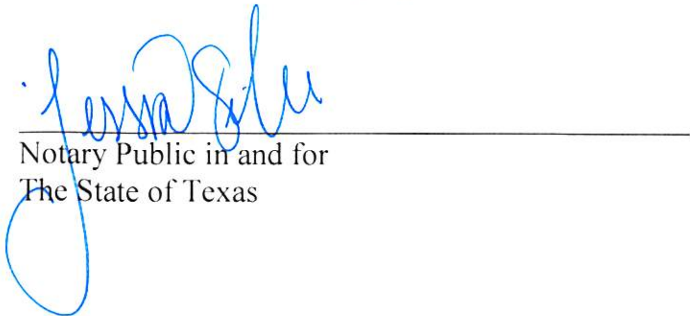
Before me, the undersigned notary, on this day personally appeared Paul Jacob Paschal, the affiant, whose identify is known to me. After I administered an oath, affiant testified as follows:

"My name is Paul Jacob Paschal. I am capable of making this verification. I have read the Plaintiffs' Binding Stipulation. The facts stated in it are within my personal knowledge and are true and correct."



Paul Jacob Paschal

Sworn to and subscribed before me by Paul Jacob Paschal on October 1, 2020.



Notary Public in and for
The State of Texas

VERIFICATION

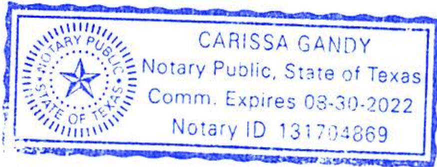
STATE OF TEXAS §
§
COUNTY OF WALKER §

Before me, the undersigned notary, on this day personally appeared Aubree Paschal, the affiant, whose identify is known to me. After I administered an oath, affiant testified as follows:

"My name is Aubree Paschal. I am capable of making this verification. I have read the Plaintiffs' Binding Stipulation. The facts stated in it are within my personal knowledge and are true and correct."

Aubree Paschal
Aubree Paschal

Sworn to and subscribed before me by Aubree Paschal on 7th October, 2020.



Carissa Gandy
Notary Public in and for
The State of Texas