How to Pick Your Battlefield:

Strategies Employed by Insurers and Policyholders to Secure and Protect the Most Advantageous Forum

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THE UNIVERSITY OF TEXAS SCHOOL OF LAW
2014 INSURANCE LAW INSTITUTE
NOVEMBER 13, 2014

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"And therefore, those skilled in war bring the enemy to the field of battle and are not brought there by him." – Sun Tzu

I. INTRODUCTION

Tacticians of all stripes have long understood that the competitive setting where adversaries engage can be as crucial as any factor in determining the result of their encounter. In litigation particularly, it is appreciated that either side gains real advantages over the other by determining the forum in which a dispute will take place. As a basic rule, plaintiffs will generally prefer state courts, while defendants tend to prefer that their cases be litigated in federal courts.

Claims arising out of insurance disputes follow these same general preferences. As plaintiffs, policyholders will generally receive more favorable treatment when litigating in the state court system; whereas, insurance carriers will almost invariably steer towards the federal courts when defending such actions. The following discussion explains the statutory and procedural bases for these perceived trends. Furthermore, recent case law from Texas state and federal courts serves to highlight both the practical considerations and tactical foci that litigators on both sides of the "v" should bear in mind when picking their battlefield.

II. PROCEDURAL DIMENSIONS—STATE FORUMS AND THE HOME FIELD ADVANTAGE

Established and even more subtle aspects of motion practice, discovery, trial procedures and timing tend to work in favor of policyholders suing in state courts. For one, the standard applied when deciding whether an initial claim has sufficient merit to proceed beyond the pleading stage is relatively lenient under Texas procedural law. 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 either litigated or dismissed, this "fair notice" standard imposes a somewhat 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 also 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). Further, 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).

Beyond the forgiving criteria of notice pleading, plaintiffs will benefit from the broader interpretive latitude usually afforded by state court judges. An original petition should 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 state court 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.

In addition to pleading requirements, other areas of distinction between state and federal court proceedings may shape the outcome of insurance disputes. In jury trials, for example, Texas state courts call for twelve jurors and require agreement among only ten to issue a verdict. Tex. R. Civ. P. 292(b). Federal juries, by contrast, will consist of between six and twelve members, whose decisions must be unanimous. Fed. R. Civ P. 48. By and large, attorneys will enjoy more autonomy when conducting voir dire in state courts, whereas many federal judges assert far greater control over the jury selections process.

Quite often, litigation between a policyholder and its insurance carrier over disputed coverage amounts will involve parties domiciled in separate states. Section 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. Thus, initially at least, insurers who are defending actions brought by their customers would seem to hold the upper hand as far as presenting their case in the preferred federal forum. More and more frequently, however, attorneys for policyholders have demonstrated resourceful methods for preserving state court adjudication.

III. TACTICAL DIMENSIONS

A. *Joinder of Non-Diverse Defendants*

One proven tactic for eliminating complete diversity has been to join into the suit non-diverse persons or entities involved in the placement of the policy or adjustment of the claim. The Texas Insurance Code (TIC) can assist in this process. For example, §541.151 of the TIC enables those who sustain actual damages to bring an action against any person who causes such damages while "engaging in . . . an unfair or deceptive act or practice *in the business of insurance*." (emphasis added). A "person," for these purposes, includes "an individual, corporation, association, partnership, reciprocal or inter-insurance exchange, Lloyd's plan, fraternal benefit society, or other legal entity engaged in the business of insurance, including an agent, broker, [or] adjuster . . . ." §541.002. By filing suit against the insurance company and joining non-diverse persons in the business of insurance, policyholders can potentially preclude federal jurisdiction over their claim.

1. 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. 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 within the meaning of the TIC. The *Vail* opinion also expressly states that the "adjustment of claims and losses qualifies as the business of insurance." *Id. See also Western 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).

Nonetheless, an adjuster's own direct actions are the most relevant factors in determining TIC liability, and this holds true irrespective of 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, Texas federal court authority occasionally reveals the judiciaries' understanding that an adjuster who is a Texas 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 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).

The Texas Supreme Court's decision in *Natividad v. Alexsis, Inc*., 875 S.W.2d 695 (1994), is 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.[1]

Insurance carriers often argue that, according to *Natividad*, policyholders cannot sue an independent adjuster under any theory of law when contractual privity is lacking. By and large, however, 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 fairly narrow exception. Leaving good faith aside, the TIC appears to establish a broad basis on which to hold third-parties liable for unfair and/or deceptive acts and practices.

2. 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. Section 541.002 of the TIC clearly establishes that both agents and brokers are likewise "persons" within the meaning of the

[1] 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.")

statute. Thus, brokers and agents can be held similarly liable for "unfair or deceptive acts or practices [committed] in the business of insurance."

Further, "[TIC] does not appear to 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). Nonetheless, while the statute encompasses adjusters, agents and brokers inclusively, the respective functions of each in placing policies and adjusting claims are of course fundamentally different. As such, whereas adjuster liability stems mostly from actions undertaken after the policyholder has submitted its claim, lawsuit against agents and brokers often concerns alleged misconduct occurring closer to the point of sale.

Due to the particular roles of insurance agents and brokers, some of the more notable cases addressing joinder focus on misrepresentations made to purchasers. Section 541.061 of the TIC considers misrepresenting an insurance policy to constitute an unfair method of competition, or an unfair or deceptive act or practice in the business of insurance, which is further defined as: (1) making an untrue statement of material fact; (2) failing to state a material fact necessary to make other statements made not misleading, considering the circumstances under which the statements were made; or (3) making a statement in a manner that would mislead a reasonably prudent person to a false conclusion of a material fact. *See*, TEX. INS. CODE § 541.061(1), (2) and (3).

This language became a key focus of the Texas Supreme Court's decision in *Liberty Mutual Ins. Co. v. Garrison Contractors, Inc*. 966 S.W.2d 482, 486-87 (Tex. 1998). There, the Court determined that recovery was permissible against an agent for misrepresenting the amount of premium payments due under a policy that had been sold to the plaintiff. *Id.* at 486-7. In an earlier 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." 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*. This precedent

has informed a number of more recent lower court opinions, which conclude that joinder was not improper when the plaintiff suffered harm as a direct result of misrepresentations made during the policy transaction process. *See Myers v. Allstate Tex. Lloyd's*, No. 10-CV-172, 2011 WL 846083 (E.D. Tex. March 08, 2011). *See also*, *Edwea, Inc. v. Allstate Ins. Co.*, No. H-10-2970, 2010 WL 5099607, *8 (S.D. Tex. Dec. 8, 2010) (quoting *Hernden v. State Farm Lloyds*, No. SA-05-CA-1103-RF, 2006 WL 870663, at *3 (W.D. Tex. March 2, 2006)).

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. *Insurers' Counter*

1. The Mechanics of Removal

When orchestrating displacement to more favorable ground and altering momentum in the dispute, removal is perhaps the most potent procedural tool at the insurer's disposal. Section 1332(a) provides the legal basis for removal when diversity of citizenship exists. This statute has been interpreted to require complete diversity; in other words, every plaintiff must claim citizenship in a state that is diverse from every defendant. *Lincoln Prop. Co. v. Roche*, 126 S. Ct. 606, 613 (2005). In order to trigger removal, the insurer's counsel will invoke §1441(a), which provides that any civil action commenced in state court may be removed to federal court, so long as subject matter jurisdiction is established.

Under § 28 U.S.C. 1441(b)(2), removal is precluded when "any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." Which is to say, even in cases where diversity of citizenship is present, a suit would not qualify for removal if it is brought in the home state of any individual defendant. In combination, therefore, sections 1332 and 1441 permit removal only under circumstances involving complete diversity and where no one defendant is a citizen of the state in which the suit is filed.

2. Time Constraints and Procedural Implications

a) *Deadlines*

The timetable for removal is set forth under § 1446(b), which requires the defendant (the insurer in our scenarios) to submit its notice of removal within 30 days following receipt of the initial pleading. In instances when the claim stated in the policyholder's initial pleading is not subject to removal, the insurer may file notice within thirty days after receiving a "copy of an amended pleading, motion, order or other paper, from which it may first be ascertained that the case is one which is or has become removable." A key limitation to this option, however, is established by §1446(c)(1). When based on diversity of citizenship, removal is improper "more than one 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." *Id*. *But see Tedford v. Warner–Lambert Co.,* 327 F.3d 423, 427–28 (5th Cir. 2003) (recognizing an equitable exception to the one-year limit when a plaintiff attempts to manipulate the rules and prevent a plaintiff from exercising its removal rights); *Lawson v. Parker Hannifin Corp.,* No. 13-CV-923-O, 2014 WL 1158880 (N.D. Tex. March 20, 2014) (where, among other things, the plaintiff failed to conduct any discovery against the non-diverse defendant and nonsuited him from the case shortly after the one year removal deadline had passed, the court concluded that remand was not appropriate because sufficient evidence of forum manipulation existed to warrant application of the bad faith exception to the one-year removal period).

b) *The "Unanimity Rule"*

Civil actions removed under §1441(a) are further governed by §1446(b)(2)(A), which stipulates that "all defendants who have been properly joined and served must join in or consent to the removal of the action." At one point, some discrepancy existed among different federal jurisdictions regarding their treatment of notice deadlines in such circumstances. The Fifth Circuit has held that the 30-day period for removal begins when the first defendant is served. *New York Life Ins. Co. v. Deshotel*, 142 F.3d 873, fn 4 (5th Cir. 1998). The Federal Courts Jurisdiction and Venue Clarification Act of 2011, which took effect on January 6, 2012, revised the law pertaining to the removal of cases to federal court venues. The Clarification Act adopted the later-served defendant rule and provides that each defendant has 30 days from the date it is served to file a notice of removal. 28 U.S.C. § 1446(b)(2)(B); H.R. Rep. No. 112-10, at 14

(2011). Likewise, if a later-served defendant files a notice of removal, any earlier-served defendant can consent to the removal even though that defendant did not previously initiate or consent to removal. 28 U.S.C. § 1446(b)(2)(C).

c) *The Voluntary—Involuntary Rule*

Yet another procedural wrinkle that litigants should be cognizant of underlies § 1446(b). As opposed to what an intuitive reading of the statute might suggest, the 30-day removal window is not necessarily renewed in the event that the sole in-state defendant is dismissed from the case. Under these circumstances, even if complete diversity is established between the remaining parties for the first time, the permissibility of removal might still be precluded. The basis for this limitation is a vestige of judicial fiat known as the "voluntary/involuntary rule," which predates congress' enactment of the statue in 1949.

Over a century ago, the United States Supreme Court decreed that once complete diversity is ruled out through joining a non-diverse defendant, removal via later-established diversity of citizenship is permissible only if it results from a voluntary action of the plaintiff. *Whitcomb v. Smithson*, 175 U.S. 635 (1900); *see also*, *Weems v. Louis Dreyfus Corp.,* 380 F.2d 545 (5th Cir. 1967). In other words, removal by a diverse defendant could proceed if commenced after the plaintiff *voluntarily* withdraws its suit against the sole in-state defendant. Alternatively, if the non-diverse defendant were to be released from the dispute through a contested action that is contrary to the plaintiff's preferred ruling, dismissal would be considered *involuntary* and hence removal would be foreclosed.

Outwardly at least, there is little question that the procedural aspects of insurance litigation create an uphill challenge for insurers seeking removal. Taken together, the strict one-year limit codified in § 1446(b) and the voluntary/ involuntary rule substantially interfere with cases being removed, unless the policyholder drops its suit against any non-diverse defendant within the statutory timeframe. Therefore, even after initiating removal of the proceedings, insurers must remain mindful of the specific requirements of the removal statute in order to maintain proper federal jurisdiction.

IV. EXCHANGING FIRE

A. *Remand*

1. Insurer's Bear a High Burden to Prove Proper Removal

Following any removal, plaintiff policyholders will likely respond by moving for the case to be remanded back to state court. This action shifts the burden to the defendant insurer, which must then demonstrate that removal was appropriate. *Manguno v. Prudential Prop. and Cas. Ins. Co.*, 276 F.3d 720, 723 (5th Cir. 2002). Under § 28 U.S.C. 1447(c), a motion for remand submitted "on the basis of any procedural defect other than lack of subject matter jurisdiction must be made within thirty days after the filing of the notice of removal." However, a motion for remand that calls federal subject matter jurisdiction into question may be filed at any point. *Id*. Furthermore, prior to issuing a final judgment, if a federal district court determines that it indeed cannot claim subject matter jurisdiction for whatever reason, the case must be returned to state court. *Id*.

When deciding whether removal was proper, the federal court will refer to the original claims in the policyholder's state court petition as they stood at the time of removal. *De Jongh v. State Farm Lloyds*, 555 Fed. Appx. 435, 437 (5th Cir. Feb. 20, 2014); *Doucet v. State Farm Fire and Casualty*, No. 09-CV-142, 2009 WL 3157478, *4 (E.D. Tex. Sept. 25, 2000). Notably, courts in the Fifth Circuit have held that if there exists "any doubt as to the propriety of removal, [such questions] should be resolved in favor of remand." *See, e.g., Gutierrez v. Flores*, 543 F.3d 248, 251 (5th Cir. 2008); *Coffman v. Dole Fresh Fruit Co.,* 927 F. Supp. 2d 427, 431 (E.D. Tex. 2013).

2. Amount in Controversy

One way in which policyholders have sought to shift this balance in their favor is by fixing the amount in controversy at less than the federal threshold of $75,000. It is important to remember, however, that the amount in controversy is met by the value of the policyholder's claim, not the amount of available insurance coverage provided by the insurers. *Hartford Ins. Co. v. Lou-Con, Inc*., 293 F.3d 908, 911 (5th Cir. 2002). Moreover, "federal courts permit individual plaintiffs, who are the masters of their complaints, to avoid removal to federal court, and to obtain remand to state court, by stipulating to amounts at issue that fall below the federal

jurisdictional requirement." *Standard Fire Ins. Co. v. Knowles*, ___ U.S. ___, 133 S. Ct. 1345, 1350 (2013). This particular tactic, and the requirements for making it work, are discussed in *Williams v. Companion Prop. & Cas. Ins. Co*., No. H-13-733, 2013 WL 2338227 (S.D. Tex. May 27, 2013):

> "[A] Texas plaintiff must be able to show to a 'legal certainty' that she 'will not be able to recover more than the damages for which he has prayed in the state court complaint.' The plaintiff may do so by filing a legally 'binding stipulation or affidavit' with their state court complaint, stating that she affirmatively seeks less than the jurisdictional threshold *and* further stating that she will not accept an award that exceeds that threshold."

Id. at *2 (citing *Washington—Thomas v. Dial Am. Mktg., Inc.,* No. EP-12-CV-00340-DCG, 2012 WL 5287043, at *2 (W.D. Tex. Oct. 23, 2012)). The *Williams* court also observed that, under Fifth Circuit precedent, "once the district court's jurisdiction is established, subsequent events that reduce the amount in controversy to less than $75,000 generally do not divest the court of diversity jurisdiction." *Id.* at *3 (citing *Gebbia v. Wal–Mart Stores, Inc.,* 233 F.3d 880, 883 (5th Cir. 2000)).

From the outset of the proceedings, the *Williams* plaintiff stipulated that "neither [she], nor her attorney, will accept an amount that exceeds $75,000.00, exclusive of interest and costs." *Id.* at *2. This stipulation apparently preempts damages revisions made after-the-fact and, according to the *Williams* court, would effectively preclude removal. Significantly, the stipulation in *Williams* was filed before the suit was removed and, therefore, was not deemed a "post-removal" attempt to divest the federal court of jurisdiction. *Id.* at *3.

3. 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.

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); *Houle v. Unum Group, et al.*, No. 13-CV-1689-B, Doc. No. 28, at

4 (N.D. Tex. August 12, 2013). There are very few cases in which a court has found outright fraud committed by a policyholder in order to influence forum selection. *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 "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). Judge Boyle clarified the *Griggs* standard in *Houle* by explaining that "'no possibility of recovery' against an in-state defendant 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.'" *Houle,* Doc. 28, at 4 (citing *Smallwood,* 385 F.3d at 573, and *Travis v. Irby,* 326 F.3d 644, 648 (5th Cir. 2003)). 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 Resources, Inc.*, 99 F.3d 746, 751 (5th Cir. 1996).

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)).

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. 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. It should be appreciated, however, that while trends are noted among federal courts in favor of requiring plaintiffs to include specific facts supporting a viable claim against a Texas resident defendant, there remains some lack of uniformity among Texas federal district courts with respect to the applicable standard of review component for this 12(b)(6)—style inquiry. Attorneys for both policyholders and insurers must anticipate this crucial variable and adjust accordingly.

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 district courts has developed along these lines, which currently remains unresolved. *See Yeldell v. GeoVera Speciality 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 and 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 Specialities, 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). S*ee 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 contract 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. Judge Lindsay recognized the effect of the new Texas Rule 91a when he, 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. March 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. Importantly, 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. Importantly from the policyholder's perspective, "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.

d) *S. O. L.*

Insurance carriers may find the statute of limitations to be a timely ally when asserting that a non-diverse defendant has been improperly joined to the action. For example, the operable time restriction for filing a cause of action under the TIC is set forth in §541.162(a), which states:

> A party must bring an action pursuant to the Texas Insurance Code "before the second anniversary of the following: (1) the date the unfair method of competition or unfair or deceptive act or practice occurred; or (2) the date the person discovered or, by the exercise of reasonable diligence, should have discovered that the unfair method of competition or unfair or deceptive act or practice occurred."

Courts have generally determined that joinder is improper where the applicable statute of limitations would bar claims against in-state defendants. *Houle*, No. 13-CV-01689-B, Doc. 28, at 6 (citing *Boone v. Citigroup, Inc.*, 416 F.3d 388 (5th Cir. 2005)). However, some key rulings and exceptions rendered in the insurance area to date make this fairly basic assertion less straight forward than it might appear at first glance.

The Fifth Circuit held in *Smallwood* that "where a common defense of the statute of limitations would dispose equally of both non-diverse and diverse defendants, there is no improper joinder and the case, although 'lacking in merit,' should be remanded to state court." *Smallwood,* 385 F.3d at 574-75. Another panel of the Fifth Circuit subsequently clarified the exception established in *Smallwood* by explaining that it applies "[i]f, but only if, the showing which forecloses [the] claims against the non-diverse defendants necessarily and equally compels foreclosure of all their claims against all the diverse defendants." *Boone*, 416 F.3d at 391. In any event, insurers will do well to thoroughly understand the nuances concerning applicable statutes of limitations in Texas and any implications bearing on their position in the dispute.

V. CONCLUSION

In insurance based lawsuits, some ongoing trends are discernibly taking shape. On the one hand, policyholders' methods for keeping disputes at the local state court level continue to develop and are gaining traction. The growth and complexity of the insurance industry itself facilitates this to a degree, by requiring more and more varieties of personnel, including agents, brokers and adjusters, to conduct insurance business at the local level. Increased demand for such personnel, perhaps unavoidably, exposes insurance providers to a greater likelihood of facing suit in state court insofar as it expands the pool of candidates for joinder.

Insurers, for their part, retain more or less the traditional, though tried and true, options for seizing the counter-offensive. From the insurers' standpoint, attorneys must remain as attuned and meticulous as ever in observing the statutory restrictions, time requirements and even common law doctrines governing removal. And, as always, counsel for insurers will take heed to recognize procedural and evidentiary defects in the pleadings submitted, so as to consolidate their territorial gains when removal is initially granted.