Should I Stay or Should I Go?

Recent Developments and Special Situations Impacting Removal in Insurance Cases

By Stephen P. Pate and Karl A. Schulz

This article will focus on recent developments in law governing removals as well as removals that involve special situations.

Discussion of removal is one of the most important early strategy questions in insurance litigation. 28 U.S.C. §1446(b)(1) provides:

> The notice of removal of a civil action or proceeding shall be filed within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which the proceeding is based, or within 30 days after the service of the summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

Removal in insurance cases is typically going to be based on diversity jurisdiction and a careful evaluation will have to be made of whether diversity exists. This article will focus on recent developments in law governing removals as well as removals that involve special situations, such as the London market, limited liability companies, and improperly joined defendants. This article will also examine a unique procedure under Texas law to defeat improper joinder of adjusters.

Is Federal Court Really Better?

It's often assumed that the decision to remove should be automatic. Not so. Attorneys may wish to consider the following factors:

i. Who are the federal judges to whom the case will be removed?
ii. What is the federal judge's level of expertise regarding insurance? What is the state court judge's level of expertise regarding insurance by comparison?
iii. Are the federal judges hostile towards insurance cases?
iv. What is the federal judge's track record with regard to finding improper joinder of adjusters, since this is a typical issue upon removal?
v. Do you really have diversity? Do you have a forum defendant problem, is any defendant a citizen of the state in which the case was filed?
vi. If you are uncertain regarding whether diversity is complete, what is the federal judge's track record regarding allowing jurisdictional discovery?
vii. Would you be removing a case into an MDL, such as the Hurricane Laura and Hurricane Delta fast track protocol in the Western District of Louisiana? Would you be okay with the required procedures and one of the court-required neutrals?
viii. What are the differences, if any, between state jury pools and federal jury pools in your jurisdiction?
ix. Are you okay with what are likely to be stricter and more onerous disclosure and docket control deadlines, which can escalate costs early in litigation?
x. Are you considering an offer of judgment? Do the differences between the state and federal offer of judgment rules make a difference? In Texas, Texas Rule of Civil Procedure 167 is probably

Stephen P. Pate of Cozen O'Connor focuses his litigation practice on property insurance matters, Directors and Officers insurance matters, business interruption issues, CGL insurance matters, builders risk matters, commercial general liability insurance disputes, fraud, and various other extracontractual litigation matters. Over a 30-year career in coverage work, he has tried more than 45 first-party extracontractual cases to verdict. **Karl A. Schulz** of Cozen O'Connor is an experienced litigator who serves clients in the insurance industry. In particular, Karl has experience in first-party property claims and is widely published on the subject. Karl is a member of the State Bar of Texas Insurance Law Section.

not as strong or favorable to defendants as Federal Rule of Civil Procedure 68(d).

xi. Federal courts limit the availability of interlocutory appeals as compared to state courts.

Improper Joinder of Adjusters and Other Professionals

Policyholder plaintiffs often join local adjusters to destroy diversity and keep matters in state court, which is perceived to be more pro-plaintiff than federal court. *See SYP-Empire LC v. Travelers Cas. Ins. Co. of Am.*, 2015 U.S. Dist. LEXIS 61789, *3 (N.D. Tex. 2015) ("The joinder of a local claims adjuster in a state court action against a non-citizen insurance company in an attempt to avoid federal court jurisdiction apparently has become a popular tactic."). This practice is called "improper joinder" or "fraudulent joinder."

Adjusters are usually considered the agent of the insurer. An important threshold is whether a state's unfair claims practices statute even allows adjusters to be sued. Courts will also analyze whether the adjuster acted in the course and scope of his or her employment.

Texas, for example, recently enacted Section 542A of the Texas Insurance Code to address rampant improper joinder of adjusters. As discussed below, under the new law, an insurer can accept liability for the alleged wrongdoing of the adjuster, removing him or her from the diversity analysis, and enabling removal based on diversity. Texas' approach has no apparent analog around the country.

Policyholder attorneys have also tried suing engineers and insurance agents to destroy diversity. This creates threshold problems for claimants, since many states have onerous and strict pre-suit notice requirements to protect professionals. Unless the pre-suit notice requirements are properly completed, such as a certificate of merit for a claim against an engineer, the professionals are improperly joined. Also, courts have held that engineers are not "engaged in the business of insurance" such that they would be subject to the applicable unfair claim practices statute. *See, e.g., Michels v. Safeco Ins. Co.*, 544 Fed. Appx. 535, 540 (5th Cir. 2013) ("Although adjusters can be liable under Texas law, Texas courts have held that engineers who investigate and consult with insurance companies in the adjustment of a claim are not 'persons' engaged in the business of insurance. An independent engineering firm hired by an insurer to investigate a claim is not 'engaged in the business of insurance' under the Insurance Code.").

Removals Involving Special Situations

The London Market

What is Lloyd's of London? The Fifth Circuit Court of Appeals provided a useful discussion in *Corfield v. Dallas Glen Hills, LP*, 355 F.3d 853, 857 (5th Cir. 2003):

a. Lloyds of London is not an insurance company but rather a self-regulating entity which operates and controls an insurance market.

b. The members or investors who collectively make up Lloyd's are called "Names" and they are the individuals and corporations who finance the

insurance market and ultimately insure risks.

c. In order to increase the efficiency of underwriting risks, a group of Names will, for a given operating year, form a "Syndicate" which will in turn subscribe to policies on behalf of all Names in the Syndicate. A typical Lloyd's policy has multiple Syndicates which collectively are responsible for 100 percent of the coverage provided by a policy.

d. In practice, since many Names through their respective Syndicates are liable on a Lloyd's policy, the active underwriter from *one* of the underwriting Syndicates is designated as the representative of *all* the Names on the policy. This single underwriter, called the "lead" underwriter on the policy, is usually the only Name disclosed on the policy with all other Names remaining anonymous. The lead underwriter is typically the first to subscribe to the policy and typically assumes the greatest amount of risk.

e. A claimant can sue a Name individually, but if the claimant does not sue a Name, those Names on the Policy who are not parties to the case and are not before the court are relevant to determining whether the parties are completely diverse.

So how does one determine diversity in a London case? *Corfield* has already given us a preview: Look at the Names who are parties and determine if they are diverse. The court in *Green Coast Enters., LLC v. Certain Underwriters at Lloyd's*, 2022 U.S. Dist. LEXIS 109199, *6 (E.D. La. June 21, 2022) explained:

> Thus, a policyholder insures at Lloyd's but not *with* Lloyd's. Overall, "while an insured receives a Lloyd's 'policy' of insurance, what he has in fact received are numerous contractual commitments from each Name which has agreed to subscribe to the risk." With respect to the requirement of complete diversity for subject matter jurisdiction based on diversity, "[t]he majority of courts that have addressed this issue have found that each Name must be diverse.

A good example of how complicated this analysis can be is found in *Dailey v. Certain Underwriters at Lloyds London*, 2022 U.S. Dist. LEXIS 127522, *11 (S.D. Tex. July 19, 2022). The court recited the case's typical fact pattern:

> Policyholders bringing first-party insurance claims on Lloyd's of London policies, who often do not have the "highly confidential" information regarding the identities of most of the underwriting Names, typically list as the defendant "Certain Underwriters at Lloyd's, London Subscribing to" the number of the policy at issue. Suing "Certain Underwriters at Lloyd's, London Subscribing to" the number of the policy at issue is considered "synonymous with suing every Name subscribing to the policy since the Names are the underwriters[,]" which allows the policyholder to get all of the underwriters with potential liability on his or her policy into court without knowing all of their identities. That is what plaintiff did here.

The Court allowed limited discovery related to the identities of the Names that subscribed to plaintiff's policy. We will discuss this procedure more later. The resultant evidentiary record showed that the claimant's policy was underwritten by Lloyd's Syndicate 1206. Lloyd's Syndicate 1206's underwriting business was being fully reinsured to close by Lloyd's Syndicate 2008. Lloyd's Syndicate 2008's sole Name was SGL, which was a subsidiary of Enstar Group. SGL was domiciled in the United Kingdom, and Enstar Group is domiciled in Bermuda. Plaintiff was a citizen of Texas. Accordingly, the Court decided that the action was between a citizen of a state and citizens of foreign countries, and plaintiff did not share citizenship with any defendant.

Significantly, the $75,000.00 amount in controversy requirement applies to each Name. *Team One v. Certain Underwriters,* 281 Fed. App'x 323, 323 (5th Cir. 2008). A claimant cannot aggregate claims against individual names to satisfy the jurisdictional amount. *Rips, LLC v. Underwriters at Lloyd's London*, 2015 U.S. Dist. LEXIS 66594, *6 (E.D. La. 2015). The Eleventh Circuit Court of Appeals expressly follows the Fifth Circuit Court of Appeals in these matters. *See Underwriters at Lloyd's v. Osting-Schwinn*, 613 F.3d 1079, 1089 (11th Cir. 2010); *Certain Underwriters at Lloyd's v. Zoller Eng'g*, 2021 U.S. Dist. LEXIS 6418, *3 (M.D. Fla. 2021). Courts answering to the Third Circuit Court of Appeals also rely on the analysis by the Fifth Circuit Court of Appeals but have also elaborated with their own analysis. *See Atlantic Casualty Company v. Federal Insurance Company,* 2010 U.S. Dist. LEXIS 129058, *2 (D. N.J. 2010).

What do you do when you're not certain about a limited liability company's citizenship? One option is to ask the court to conduct limited discovery.

Limited Liability Companies

"Like limited partnerships and other unincorporated associations or entities, the citizenship of an LLC is determined by the citizenship of all of its members." *Guijarro v. Enterprise Holdings,* 39 F.4th 309, 314 (5th Cir. 2022). Where do you get information about citizenship of members? Many states, but not all, have an online search engine that requires signing up for an account and creating a password, but the system is easy to navigate, and you can print records that you can attach to removal pleadings.

The Ninth Circuit Court of Appeals observed that limited liability companies have characteristics of both partnerships and corporations but ultimately decided that a limited liability company is a citizen of every state where its members are citizens. *Johnson v. Columbia Props. Anchorage*, 437 F.3d 894, 899 (9th Cir. 2006). The Eleventh Circuit Court of Appeals made the same observation and holding in *Rolling Greens MHP, LLP v.*

Comcast SCH Holdings, LLC, 374 F.3d 1020, 1021 (11th Cir. 2004).

What do you do when you're not certain about a limited liability company's citizenship? One option is to ask the court to conduct limited discovery. In *Dougherty Funding, LLC v. Gateway Ethanol, LLC,* 2008 U.S. Dist. LEXIS 44749 (D. Kan. 2008), the motion for limited jurisdictional discovery emphasized the very limited nature of the discovery sought. The movant's briefing and the court's opinion demonstrate that it is best to specify how many interrogatories you are going to ask and what you are going to ask. The movant also emphasized good cause for quickly resolving the jurisdictional dispute and the lack of prejudice to the plaintiff. The plaintiff did not respond to the motion, which helped make the movant's lack of prejudice argument.

Some courts are hostile to limited jurisdictional discovery, though, even when it seems like there is good cause. *See NL Industries v. OneBeacon Ins. Co.*, 435 F. Supp. 2d 558, 566 (N.D. Tex. 2006) (stating that the removing party should anticipate a motion to remand, and should be prepared to show that the parties are completely diverse without the need for jurisdictional discovery; "Jurisdictional discovery places an undue and unnecessary burden on the parties when the proponent of such discovery only supports the request by conjecture, speculation, or suggestion."); *MCP Trucking, LLC v. Speedy Heavy Hauling, Inc.*, 2014 WL 5002116, *6 (D. Col. Oct. 6, 2014) (denying jurisdictional recovery and remanding action to state court even as it was acknowledged that further discovery in that forum could demonstrate that diversity exists, leading to a subsequent removal).

Inactive and Dissolved Entities

The Fifth Circuit Court of Appeals has held that inactive corporations remain citizens of the state of their incorporation. *Williams v. Homeland Ins. Co.*, 657 F.3d 287, 291 (5th Cir. 2011). The interesting pre-*Williams* case of *Ewert v. Poly Implant Protheses*, 2008 U.S. Dist. LEXIS 87047 (S.D. Tex. 2008) undertook an entirely different analysis but arrived at the same result:

> The capacity of P.I.P./USA to be sued is determined by the law of the state where it is incorporated--Florida. FED. R. CIV. P. 17(b)(2); *see also Texas Clinical Labs, Inc. v. Leavitt*, 535 F.3d 397, 402 (5th Cir. 2008). Under Florida law, "[a] dissolved corporation continues its corporate existence," FLA. STAT. ANN. § 607.1405(1) (West 1993), and its dissolution does not "[p]revent commencement of a proceeding by or against the corporation in its corporate name." FLA. STAT. ANN. § 607.1405(2)(3); *see also DeLeo v. Swirsky*, No. 00 CC 6917, 2001 U.S. Dist. LEXIS 8465, 2001 WL 687458, at *9 (N.D. Ill. June 19, 2001) (applying Florida law). Therefore, contrary to Plaintiffs' allegations, P.I.P./USA still exists for the purposes of litigation and it remains a citizen of Florida. *See Harris v. Black Clawson Co.,* 961 F.2d 547, 550 (5th Cir. 1992) (stating that an inactive or dissolved corporation is a citizen of the state of its incorporation).

The Fifth Circuit did not cite *Ewert* in *Williams*, nor has *Ewert's* analysis been criticized by other courts.

No rule has been announced by the Ninth Circuit Court of Appeals that we could locate. At least one lower court has followed the so-called "functional approach." *Ibrahim v. FiatChrysler*, 2020 U.S. Dist. LEXIS 244167, *6 (C.D. Cal. 2020) ("When a *substantial period of time has lapsed* since a corporation was active, its citizenship reverts to include only its state of incorporation." Three years is a substantial period of time for this test.). In the Second Circuit Court of Appeals, the citizenship of a corporation that has ceased business activity is determined by examining its state of incorporation and last place of transacted business. *Wm. Passalacqua Builders, Inc. v. Resnick Developers., Inc.*, 933 F.2d 131, 141 (2nd Cir. 1991). The Third Circuit Court of Appeals, on the other hand, has determined that an inactive corporation has no principal place of business. Accordingly, it has held that an inactive corporation was only a citizen of the state of its incorporation. *Midlantic Nat'l Bank v. Hansen*, 48 F.3d 693, 698 (3rd Cir. 1995).

Stipulations as to Amount in Controversy

Some policyholder attorneys try to defeat removal by stipulating that the claimant does not seek and will not accept relief in excess of $74,999.99. These stipulations sometimes come in the form of an affidavit from the attorney or claimant or are sometimes simply contained in the pleading that initiates the litigation.

Policyholder attorneys have been sharpening their game to make the stipulations more and more effective as courts analyze the stipulations. Stipulations should be scrutinized to see if in fact the amount in controversy remains below $75,000.00. *Abascal v. United Prop. & Cas. Ins. Co.*, 2019 U.S. Dist. LEXIS 119653, *4 (S.D. Tex. 2019) (read the whole petition; trebling under consumer protection statute may raise the amount in controversy over $75,000); *Varela v. Wal-Mart Stores East, Inc.*, 86 F. Supp.2d 1109, 1110 (D. N.M. 2000) (defendant trying to use plaintiff's refusal to stipulate against her; unsuccessful because court found plaintiff is the master of her lawsuit and court will not draw negative inferences from a refusal to stipulate to a cap on damages).

Texas Insurance Code Section 542A

In *Advanced Indicator & Manufacturing v. Acadia Insurance Company*, 50 F.4th 469 (5th Cir. 2022), the Fifth Circuit Court of Appeals resolved a thorny split in Texas federal district courts regarding Texas Insurance Code Section 542A by returning to a bedrock principle governing removal. Now, as long as the insurer has elected to accept the adjuster's liability any time before removal – even after suit is filed – there is no possibility of recovery against the adjuster and removal will be proper.

The Texas Legislature enacted Texas Insurance Code Section 542A to combat abuses and gamesmanship by policyholder attorneys arising out of weather claims. HB 1774, House Research Organization (May 4, 2017); *Gateway Plaza Condo v. Travelers Indem. Co.*, 2019 U.S. Dist. LEXIS 211244, *6 (N.D. Tex. 2019) (strictly applying Section 542A's pre-suit notice requirements and

expressing concern about the involvement of public adjusters in plaintiff's claim).

The statute includes a number of provisions to accomplish this public policy goal, including additional information required in a pre-suit notice letter and a statutory right for the insurer to conduct a re-inspection. Tex. Ins. Code §542A.003; Tex. Ins. Code §542A.004. Another provision enables insurers to elect to accept legal responsibility for the acts and omissions of "agents," such as adjusters. Tex. Ins. Code §542A.006. Such an election precludes any cause of action against the adjuster, removing him or her from the diversity analysis. *Id*.

Even after the enactment of Section 542A, policyholder attorneys tried to skirt the statute by arguing that the timing of an election mattered to its effectiveness, and many cases were remanded on the basis that a post-suit election was ineffective. *See, e.g., Collier v. Metro. Lloyds Ins. Co.,* 2022 U.S. Dist. LEXIS 52434, *8 (E.D. Tex. Mar. 11, 2022). Other courts, though, held that "both pre-suit and post-suit elections of acceptance of liability are sufficient to establish improper joinder." *See, e.g., Southbound, Inc. v. Firemen's Ins. Co. of Washington, D.C.,* 2021 U.S. Dist. LEXIS 45424, *6 (W.D. Tex. 2021) adopted by 2022 U.S. Dist. LEXIS 52292.

Advanced Indicator arose out of a Hurricane Harvey claim. The insured (a Texas resident) sued its insurer and its adjuster (also a Texas resident) for breach of contract, bad faith, and violations of the Texas Insurance Code. The insurer elected to accept the adjuster's liability under Section 542A.006 and, after accepting liability in writing, removed the case the next day. The adjuster subsequently moved to dismiss the claims against him, arguing that the insured could no longer state a claim against him. The insured filed a motion to remand. The district court denied the remand and ordered that the adjuster was "struck as improvidently joined." The district court subsequently granted the insurer's motion for summary judgment based on the insured's failure to segregate its damages under the doctrine of concurrent causation.

On appeal, the insured argued that the removal violated the voluntary-involuntary rules, which states that a case is only removable by a voluntary act of plaintiff. The insured also argued that the adjuster was properly joined because the insurer elected to accept his liability only after the suit was filed.

The Fifth Circuit opined:

> [The insured] argues that removal of this case based on [the insurer's] post-suit, pre-removal §542A.006 election violates the voluntary-involuntary rule. This judicially created rule dictates that "an action nonremovable when commenced may become removable thereafter only by the voluntary act of the plaintiff." [The insured] contends that because the §542A.006 election was an action of a *defendant*, rather than the plaintiff, it cannot make the case removable. This question has deeply divided district courts. Some courts have held that the voluntary-involuntary rule bars removal when an insurer makes a §542A.006 election after the filing of suit. Others have held that the voluntary-involuntary rule is inapplicable if the agent is improperly joined at the time of removal.
>
> Today we adopt the latter approach, which is a natural extension of our precedent. Indeed, "courts have long recognized an exception to the voluntary-involuntary rule where a claim against a nondiverse or in-state defendant is dismissed on account of fraudulent joinder." Moreover, our en banc court stressed that "to determine whether a plaintiff has improperly joined a non-diverse defendant, the district court must examine the plaintiff's possibility of recovery against that defendant *at the time of removal*." In this case, [the nondiverse adjuster] was improperly joined after [the insurer's] election because §542A.006's mandate that an agent be dismissed with prejudice dictates that [the insured] had no possibility of recovery against him. Taking our holdings in *Crockett* and *Flagg* together, the answer to this case becomes clear: because [the nondiverse adjuster] was improperly joined at the time of removal, [the insurer's] removal was proper.

Id. at 475. Internal citations omitted; emphasis in original.

The Fifth Circuit added that *Hoyt v. Lane Construction Corp.*, 927 F.3d 287 (5th Cir. 2019) confirms its decision. The Fifth Circuit reasoned that improper joinder is an exception to the voluntary-involuntary rule and opined: "If the court court's post-filing, pre-removal ruling dismissing an in-state defendant [by summary judgment as in *Hoyt*] can make a case removable, so too can a §542A.006 election, which eviscerates any claim against an agent."

The Fifth Circuit also disposed of another similar argument by the insured. Texas Insurance Code Sections 542A.006(b) and 542A.006(c) contain slightly different wording regarding dismissal of actions against adjusters. Some insureds have been able to evade removal based on the wording. In any event, both parts of the statute require dismissal of the adjuster. The Fifth Circuit held that the differences between the statutory provisions are not material, so long as the insurer elects to accept liability for the adjuster before removal.

Advanced Indicator will likely touch many pending motions to remand for weather-related claims. Going forward, insurers will have up to the thirty-day post service removal deadline to evaluate potential adjuster liability, and how to address it, prior to deciding whether to remove a Texas state-filed suit to federal court.

Rule of Unanimity

28 U.S.C. §1446(b)(2)(A) provides that, "[w]hen a civil action is removed solely under section 1441(a), all defendants who have been properly joined and served must join in or consent to the removal of the action." Generally speaking, the removing defendants bear the burden of establishing compliance with the rule of unanimity, either by showing all properly joined and served defendants' consent to removal or by establishing that a named defendant's consent to removal is not required.

In the Fifth Circuit, *Breitling v. LNV Corp.*, 86 F. Supp.3d 564, 570 (N.D. Tex. 2014) and *Bohannon v. W. Indep. Sch. Dist.*,

2021 U.S. Dist. LEXIS 147363, *12 n. 1 (W.D. Tex. 2021) adopted by 2021 U.S. Dist. LEXIS 145400 (W.D. Tex. 2021) discuss application of the Rule of Unanimity and an important exception to the Rule of Unanimity that is not limited to insurance defendants. If a defendant is not properly joined and served, that defendant's consent to removal is not required. Other exceptions to the Rule of Unanimity include nominal parties and unnecessary parties. *See id.* The Ninth Circuit Court of Appeals follows the same Rule of Unanimity. *Vasquez v. N. County Transit Dist.,* 292 F.3d 1049, 1060 (9th Cir. 2002).

The case of *Cachet Residential Builders, Inc. v. Gemini Ins. Co.*, 547 F. Supp. 2d 1028, 1029 (D. Ariz. 2007) provides an interesting example of the application of the Rule of Unanimity within the context of an Arizona statute governing service of process. The plaintiff sent the summons and complaint to the defendant via FedEx rather than by U.S. postal mail as required by the statute. The Court deemed that the defendant may have had notice, but not service required by the statute, and the Rule of Unanimity did not apply. Thus, the exception to the Rule of Unanimity is available not just when the plaintiff wholly fails to join and serve the defendant at all, but when the plaintiff fails to properly join and serve the defendant under applicable law.

The Rule of Unanimity and exceptions thereto are widely analyzed and accepted around the country. *See, e.g., Sherman v. A.J. Pegno Constr. Corp.*, 528 F. Supp. 2d 320, 330 (S.D.N.Y. 2007) ("There are exceptions to this rule for defendants who have not been served, unknown defendants, and fraudulently joined defendants."); *Environmental, Inc. v. Hess Oil Co., Inc.*, 718 F.Supp.2d 719, 722 (N.D. W. Va. 2010) (nominal party need not join in removal and such a party's presence in the lawsuit will have no bearing on the court's diversity jurisdiction).

Reviewability of Remand

Generally, remand is not reviewable on appeal. 28 U.S.C. 1447(d); *Gonzalez-Garcia v. Williamson Dickie Mfg. Co.*, 99 F.3d 490, 491 (1st Cir. 1996) (where the district court order of remand rests on lack of subject matter jurisdiction, that order is not reviewable by appeal or mandamus, even if erroneous). There are appeals of remands allowed in federal question cases, as required by statute, but those situations almost never apply in insurance disputes.

Conclusion

Removal can be a potent defensive tool for insurers. Texas has expanded the availability of removal in insurance cases. It will be interesting to see if other states follow suit. In addition, the other special situations discussed in this article are likely to continue to generate litigation as policyholder attorneys adjust their tactics. Courts and legislatures may intervene if, as in Texas, it is perceived that policyholder tactics are getting out of hand.