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Fifth Circuit Widens Availability of Federal Jurisdiction in Property Insurance Disputes

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Since the Texas Legislature promulgated Texas Insurance Code Chapter 542A in 2017, federal district courts in Texas have been deeply divided on what this means for removal jurisdiction in the state. The two competing views are best set forth by Judge Micaela Alvarez of the Southern District of Texas[1] and Judge Mark Pittman of the Northern District of Texas.[2] Because the district courts were so deeply divided, whether a case could be removed to federal court depended on which judge was assigned the case after the notice of removal was filed.[3]

As the district courts became even more divided and entrenched in their respective positions, the Fifth Circuit issued its opinion in *Advanced Indicator & Manufacturing, Inc. v. Acadia Insurance Company*, Cause No. 21-20092, __ F.4th __ (5th Cir. 2022). The authors of this article, who were the defense attorneys in this case, convinced the Fifth Circuit to accept the minority view that an insurance company may remove a case to federal court even if the insurance company's election of liability occurred after the suit was filed in state court. This decision presents a big win for defendants seeking a federal forum.

Chapter 542A and Removal Jurisdiction

Section 542A.006 of the Texas Insurance Code sets forth a framework by which an insurance company can elect to accept whatever liability its agent may have for the agent's acts or omissions related to the claim.[4] If the insurance company makes the election before the lawsuit is filed, "no cause of action exists against the agent."[5] If the insurance company makes its election after the lawsuit is filed, the court must dismiss the agent with prejudice.[6] All courts agreed that if the election were made prior to the suit being filed in state court, then the case would be removable to federal court. Where they disagreed, however, was what to do when the insurance company elected to accept the agent's liability after the suit was filed.

Because the agent was a proper party when the lawsuit was filed, some federal district courts held that the removal was barred by the voluntary-involuntary rule, which says that if a case is not initially removable to federal court then it only can become removable by the voluntary act of the plaintiff.[7] This became known as the majority view. In contrast, the district courts that adopted the

minority view held that because the election is irrevocable and there is no possibility that the plaintiff could recover against the agent, the improper-joinder rule applies and the case would be removable.[8]

An insurance company that was sued in Texas state court was then left in the uncomfortable position of having to remove the case to federal court and then learn whether they were able to do so, per 28 U.S.C. § 1447(d):

An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of this title shall be reviewable by appeal or otherwise.

Insurance coverage lawyers were forced to keep spreadsheets tracking each judge's opinions on the subject to advise – based on the *particular county* in which suit was filed – what were the odds of being remanded. Neither party had much certainty, nor did they have any way to challenge an erroneous remand.[9] As more and more judges picked a side, the two sides became more entrenched, and it became clear that there would be no consensus until the Fifth Circuit declared who was right.

Advanced Indicator

In *Advanced Indicator & Manufacturing, Inc. v. Acadia Insurance Company*, the Fifth Circuit resolved the split and adopted the minority view. Insurance companies can now reap the benefit intended by the Texas Legislature as the Fifth Circuit concluded that the timing of the election made no difference, so long as the removal to federal court occurred after the election was made.[10] Relying on its recent decision in *Hoyt v. Lane Constr. Corp.*,[11] the Fifth Circuit set forth the rule that the relevant inquiry is whether the plaintiff can recover against the agent at the time the notice of removal is filed.[12]

As the concurring opinion by Judge Engelhardt notes, this decision is not limited to Chapter 542A but broadly spells the end of the voluntary-involuntary rule in the Fifth Circuit.[13] Thus, defendants of all types may find themselves more able to access federal court on cases that previously seemed impossible.

Insurance companies can expect plaintiffs to seek new ways to prevent removal to federal court, but with the Fifth Circuit's opinion in *Advanced Indicator*, the doors to federal court are open a bit wider. Attorneys remain vigilant to these attempts to close off federal jurisdiction and are prepared to fight to keep federal court a viable option for anyone who has been sued.

[1] *Valverde v. Maxum Cas. Ins. Co.*, 558 F. Supp. 3d 385 (S.D. Tex. 2021).

[2] *Morgan v. Chubb Lloyds Ins. Co.*, 541 F. Supp. 754 (N.D. Tex. 2021).

[3] Compare *Chaudhary v. Chubb & Son, Inc.*, No. H-18-2179, 2021 U.S. Dist. LEXIS 33292 (S.D. Tex. Feb. 23, 2021) (Southern District of Texas, Houston Division denying motion to remand) with *Shenvari v. Allstate Vehicle & Prop. Ins. Co.*, (S.D. Tex. 2020) (Southern District of Texas, Houston Division granting motion to remand).

[4] Tex. Ins. Code § 542A.006(a).

[5] Tex. Ins. Code § 542A.006(b).

[6] Tex. Ins. Code § 542A.006(c).

[7] *See, e.g.*, *Morgan*, 541 F. Supp. 3d at 758-60.

[8] *See, e.g.*, *Valverde*, 558 F. Supp. 3d at 396-98.

[9] *See* 28 U.S.C. § 1447(d).

[10] Prior to this decision, some courts permitted the election to be made in the notice of removal. *See, e.g., Bexar Diversified MF-1, LLC v. General Star Indem. Co.*, No. SA-19-CV-00773-XR, 2019 U.S. Dist. LEXIS 200150 (W.D. Tex. Nov. 18, 2019). Based on the Fifth Circuit's dicta in *Advanced Indicator*, the safer path is to make the election in a separate letter prior to filing the notice of removal.

[11] 927 F.3d 287 (5th Cir. 2019).

[12] *Advanced Indicator*, __ F.4th __ at 8 (5th Cir. 2022) (slip op.).

[13] *Id*. at 14 (Engelhardt, J. concurring).

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