

**ENTERED**

May 04, 2016

David J. Bradley, Clerk

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
LAREDO DIVISION

MARIA RUDOLPH,

Plaintiff

VS.

NATIONWIDE GENERAL  
INSURANCE COMPANY, *et al.*,

Defendants.

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CIVIL ACTION NO. 5:15-CV-312

**MEMORANDUM AND ORDER**

Pending before the Court is Plaintiff's Motion to Remand (Dkt. No. 6). For the reasons that follow, Plaintiff's Motion (Dkt. No. 6) is **DENIED**.

**I. BACKGROUND**

This is an insurance coverage dispute arising from storm damage to Plaintiff's property. Plaintiff, a Texas citizen, is the insured. Defendant Nationwide General Insurance Company (Nationwide) is the insurer and a foreign citizen. Defendant Catherine Brown (Brown) is an insurance adjuster and also a Texas citizen.

Plaintiff filed an Original Petition in the 341st Judicial District Court, Webb County, Texas, on September 22, 2015, against Nationwide and Brown. (Dkt. No. 1-1). The Original Petition alleges that Nationwide wrongfully undervalued Plaintiff's claim for repairs to Plaintiff's property. (*Id.*) Plaintiff brings claims

against both Nationwide and Brown for violations of Texas Insurance Code, Chapter 541, relating to unfair settlement practices. (*Id.* at 12–15, 16–17). Plaintiff brings claims against Nationwide only for breach of contract, violations of Chapter 542 of the Texas Insurance Code, and breach of the common law duty of good faith and fair dealing. (*Id.* at 15–20).

Nationwide was served on December 1, 2015. (*Id.* at 2). On December 31, 2015, Nationwide filed a Notice of Removal, on the basis of diversity jurisdiction. (Dkt. No. 1). In the Notice of Removal, Nationwide urges this Court to disregard Brown’s citizenship. In particular, Nationwide argues that Brown is improperly joined in this lawsuit because she was not involved in the evaluation of Plaintiff’s claim and there is no cause of action against her. The Parties do not dispute that the jurisdictional amount in controversy is met.

In response to Nationwide’s Notice of Removal, Plaintiff filed the instant Motion to Remand, arguing that Brown was actively involved in adjusting Plaintiff’s claim and that Nationwide has failed to prove that Brown was improperly joined. (Dkt. No. 6). Nationwide filed a response in opposition. First, Nationwide contends there is actual fraud in the pleading of jurisdictional facts because Brown had only limited involvement in processing Plaintiff’s insurance claims. (Dkt. No. 8 at 4–5). In the alternative, Nationwide argues that Plaintiff cannot establish a cause of action against Brown under any theory of Texas law. (*Id.* at 6). Plaintiff filed a reply, reiterating the sufficiency of the allegations against Brown. (Dkt. No. 10).

## II. LEGAL STANDARD FOR REMOVAL

Under 28 U.S.C. § 1441, an action filed in state court may be removed to federal court when (1) subject matter jurisdiction exists and (2) the removal procedure is properly followed. Motions to remand to state court are governed by 28 U.S.C. § 1447(c), which provides that “[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.” The removing party bears the burden of establishing that federal jurisdiction exists over the controversy. *Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387, 397 (5th Cir. 1998). This burden requires all contested factual issues and any uncertainties under controlling state law to be resolved in favor of remand. *Guillory v. PPG Indus., Inc.*, 434 F.3d 303, 308 (5th Cir. 2005).

With limited exceptions, “[a] federal district court has removal jurisdiction over an action if the district court could have exercised original jurisdiction over it.” *Elam v. Kansas City S. Ry Co.*, 635 F.3d 796, 803 (5th Cir. 2011) (citing 28 U.S.C. § 1441(a)). Federal courts have original jurisdiction in cases where the amount in controversy exceeds \$75,000 and which are between, *inter alia*, “citizens of different States.” 28 U.S.C. § 1332(a)(1). The doctrine of improper joinder, however, “constitutes a narrow exception to the rule of complete diversity.” *McDonal v. Abbott Laboratories*, 408 F.3d 177, 183 (5th Cir. 2005). When a “plaintiff improperly joins a non-diverse defendant, then the court may disregard the citizenship of that defendant, dismiss the non-diverse defendant from the case, and exercise subject matter jurisdiction over the remaining diverse defendant.” *Flagg v.*

*Stryker Corp.*, No. 14-31169, 2016 WL 1169067, at \*2 (5th Cir. Mar. 24, 2016) (en banc).

Improper joinder can be established two ways: “(1) actual fraud in the pleading of jurisdictional facts, or (2) the inability of the plaintiff to establish a cause of action against the non-diverse party in state court.” *Smallwood v. Ill. Cent. R.R. Co.*, 385 F.3d 568, 573 (5th Cir. 2004) (en banc). To make the second showing, a defendant must demonstrate that there is no possibility that the plaintiff will recover against the non-diverse defendant under the relevant law. *Id.*

Under this analysis, there are two ways to determine whether the plaintiff could possibly recover against the non-diverse defendant: (1) conduct a “Rule 12(b)(6)-type analysis,” looking to the face of the complaint to assess whether it states a claim against the non-diverse defendant; or (2) to “pierce the pleadings” and conduct a summary judgment-type analysis to identify discrete facts that would preclude recovery against the non-diverse defendant. *Id.* at 573–744. The latter method is applicable only if the plaintiff has stated a claim against the non-diverse defendant, but summary judgment evidence reveals facts withheld by the plaintiff relevant to the propriety of joinder. *Id.*

### III. ANALYSIS

Plaintiff’s arguments against diversity jurisdiction hinge on the status of Defendant Brown. Nationwide alleges Brown is improperly joined on two grounds: actual fraud in the pleading of jurisdictional facts and the inability of Plaintiff to recover against Brown under Chapter 541 of the Texas Insurance Code.

### **A. Actual Fraud in the Pleading of Jurisdictional Facts**

Actual fraud in the pleading of jurisdictional facts occurs when a plaintiff has stated a claim against a diverse defendant that the plaintiff fraudulently alleges is non-diverse. *Int'l Energy Ventures Mgmt., L.L.C. v. United Energy Grp., Ltd.*, No. 14-20552, 2016 WL 1274030, at \*3 (5th Cir. Mar. 31, 2016). Here, Plaintiff alleged, and Nationwide admits (Dkt. No. 1 at 2), that Brown is a citizen of Texas. Accordingly, the Court concludes that Plaintiff has not fraudulently alleged that Brown is non-diverse.

### **B. Sufficiency of Plaintiff's Pleading**

Turning to the second grounds for improper joinder, the Parties dispute whether there is any possibility that Plaintiff might recover against Brown on claims under Chapter 541 of the Insurance Code. Section 541.060 of the Texas Insurance Code provides that “[i]t is an unfair method of competition or an unfair or deceptive act or practice in the business of insurance to engage in” certain enumerated “settlement practices with respect to a claim by an insured,” including:

(1) misrepresenting to a claimant a material fact or policy provision relating to coverage at issue;

(2) failing to attempt in good faith to effectuate a prompt, fair, and equitable settlement of: (A) a claim with respect to which the insurer's liability has become reasonably clear; . . .

(3) failing to promptly provide to a policyholder a reasonable explanation of the basis in the policy, in relation to the facts or applicable law, for the insurer's denial of a claim or offer of a compromise settlement of a claim;

(4) failing within a reasonable time to: (A) affirm or deny coverage of a claim to a policyholder; or (B) submit a reservation of rights to a policyholder; . . .

(7) refusing to pay a claim without conducting a reasonable investigation with respect to the claim; . . .

TEX. INS. CODE § 541.060. Claims under this statute can be brought against insurers and against insurance adjusters in their individual capacities. *Gasch v. Hartford Acc. & Indem. Co.*, 491 F.3d 278, 282 (5th Cir. 2007).

Plaintiff's Original Petition directs numerous allegations against Brown. These allegations focus on Brown's substandard inspection, inadequate settlement offer, inequitable investigation, and underpayment and mishandling of claims. (Dkt. No. 1-1 at 8–15). Even assuming that these allegations sufficiently state a cause of action against Brown, the undisputed discrete fact that Brown was never personally involved in evaluation of Plaintiff's claim shows there is no possibility of recovery against Brown. As the Fifth Circuit has explained, "there is no reasonable possibility that Texas would allow recovery . . . against an insurance company employee . . . in the absence of evidence sufficient to sustain a finding that the employee *himself* committed a violation." *Hornbuckle v. State Farm Lloyds*, 385 F.3d 538, 545 (5th Cir. 2004)

Here, it is uncontroverted that Brown was not the adjuster that investigated and denied Brown's claim,<sup>1</sup> and that Brown's only involvement was limited to forwarding records to Plaintiff's counsel. In the Notice of Removal, Nationwide submitted an affidavit regarding her involvement in Plaintiff's claim. In the affidavit, Brown explains that she was not assigned to the claim until July 27, 2015, when Nationwide was contacted by Plaintiff's counsel. (Dkt. No. 1-3). After this

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<sup>1</sup> The denial of payment on Plaintiff's homeowner's claim from November 2014 is signed by claims associate Michael Schwanz. (Dkt. No. 6-1 at 1).

date, Brown states her only involvement was limited to forwarding the requested file information to Plaintiff's counsel. (*Id.*). Additionally, Brown avers that she did not inspect Plaintiff's property, adjust the claim, complete any reports on inspection or estimates of Plaintiff's claim, apply Plaintiff's deductible, or deny payment of Plaintiff's claim. (*Id.*). In reply, Plaintiff argues that a document from July 27, 2015 (or later), listing Brown as "Estimator" effectively challenges Brown's declarations. (Dkt. No. 6-1 at 3). Instead of negating Brown's declarations, however, this document merely supports that Brown had some limited involvement with Plaintiff's claim in July 2015 (or later), consistent with Brown's declaration.

Because it is uncontroverted that Brown herself was not involved in any substantive way with Plaintiff's claim, the Court concludes Nationwide has met its burden of demonstrating there is no reasonable basis for recovery against Brown. Accordingly, the Court finds that the joinder of Brown was improper.

#### IV. CONCLUSION

For the reasons explained above, the Court concludes that Brown was improperly joined and that this Court has diversity jurisdiction. Accordingly, Plaintiff's Motion to Remand (Dkt. No. 6) is hereby **DENIED** and Catherine Brown is **DISMISSED** without prejudice.

It is so **ORDERED**.

**SIGNED** this 4th day of May, 2016.



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Marina Garcia Marmolejo  
United States District Judge