

INTERESTING DECISIONS ON IMPROPER JOINDER OF AN ADJUSTER: SIMILAR FACTS, SAME DISTRICT AND DIVISION, BUT DIFFERENT RESULTS

DAVIS V. TRAVELERS LLOYDS OF TEXAS INS. Co., 2009 WL 3255093 (S.D. TEX. SEPTEMBER 29, 2009); AND *LAKEWOOD CHIROPRACTIC CLINIC V. TRAVELERS LLOYDS INSURANCE COMPANY*; AND *SONJA R. VICTOR*, 2009 WL 3602043 (S.D. TEX. OCTOBER 27, 2009)

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Many counsel prosecuting insurance bad faith cases fear the prospect of litigating in federal court. Indeed, some bad faith plaintiffs go to great lengths to avoid federal court. For example, with regard to garden variety bad faith cases, bad faith plaintiffs may specifically allege an amount in controversy to be less than the \$75,000 jurisdiction minimum required by 28 USC 1332(a) to avoid removal of their cases to federal court.

Another common technique is for a plaintiff to join a non-diverse insurance adjuster and allege that the adjuster is personally liable for the plaintiff's damages suffered as a result of the defendant's bad faith claims handling. While many judges (as well as the general public) find the tactic of suing a person who can ill afford to pay a judgment in excess of \$75,000 offensive, especially when an insurance company exists to pay any such judgment, that does not stop plaintiffs counsel from employing that strategy. This recurring issue is the focus of two recent Memorandum Orders by different Houston Federal Judges in *Davis v. Travelers Lloyds of Texas Ins. Co.*, 2009 WL 3255093 (S.D. Tex. Sept. 29, 2009) and *Lakewood Chiropractic Clinic v. Travelers Lloyds Ins. Co. and Sonja R. Victor*, 2009 WL 3602043 (S.D. Tex. Oct. 27, 2009).

Both *Davis* and *Lakewood Chiropractic* involve Hurricane Ike coverage/bad faith claims against Travelers companies. In both *Davis* and *Lakewood Chiropractic*, the bad faith plaintiffs joined non-diverse Travelers adjusters alleging fraud and breaches of the Texas Insurance Code. Both Houston Federal Judge Kenneth Hoyt in *Davis* and Judge Ewing Werlein in *Lakewood Chiropractic* recognized the same standard of review for analyzing improper joinder claims; however, Judge Hoyt remanded *Davis* back to state court, while Judge Werlein denied the Motion for Remand and kept *Lakewood Chiropractic* in federal court.

I. STANDARD FOR DETERMINING IMPROPER JOINDER

To begin with, the particular jurisdiction must recognize the possibility of a private cause of action against an employee of an insurance company. Here, Texas law recognizes suits against insurance adjusters in their individual capacities under the Insurance Code, the DTPA and for common law fraud. Accordingly for suits against adjusters under these theories, remand of a removed suit against a non-diverse adjuster will be required, unless it is found that the non-diverse adjuster defendant was improperly joined to destroy diversity jurisdiction.

Judge Hoyt in *Davis* articulated the analysis as “whether the defendant has demonstrated that there is no possibility of recovery by the plaintiff against an in-state defendant, which stated differently means there is no reasonable basis for the district court to predict that the plaintiff might be able to recover against an in-state defendant.” 2009 WL 3255093 at *3. In *Lakewood Chiropractic*, Judge Werlein recited the standard as “whether there is arguably a reasonable basis for predicting that state law might impose liability on the non-diverse defendant,” requiring “a reasonable possibility of recovery, not merely a *theoretical* one.” 2009 WL 3602043 at *1. As explained by the Fifth Circuit:

[T]he standard for evaluating a claim of improper joinder is similar to that used in evaluating a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). The scope of the inquiry for improper joinder, however, is broader than that for Rule 12(b)(6) because the court may “pierce the pleadings” and consider summary judgment-type evidence to determine whether the plaintiff has a basis in fact for the claim.

Id. at *2, “*Campbell v. Stone Ins., Inc.*, 509 F.3d 665, 669 (5th Cir. 2007). It should also be noted that defendants seeking removal due to improper joinder bear “a ‘heavy’ burden of persuasion” and that any contested issue of fact or ambiguity in state law inures in “favor of remand.” *Id.*

II. *Davis v. Travelers Lloyds*

In her pleadings, Plaintiff Davis made simple perfunctory and conclusory allegations against a non-diverse adjuster, Eduardo Cespedes. Typical of such allegations was that Cespedes failed “to attempt in good faith to effectuate a prompt, fair and equitable settlement of the claim even though liability under the policy was reasonably clear.” The defendants removed the case to Houston federal court because Davis “failed to allege actionable facts sufficient to support a valid cause of action against Cespedes under the Texas Insurance Code.”

In the Motion for Remand and Response, the parties presented summary judgment type evidence demonstrating that Cespedes had some involvement in the handling of Davis’ claim; although perhaps merely administrative. For example, Cespedes testified in his affidavit that he was assigned to handle Davis’ claim; however, he did not actually adjust Davis’ claim. Judge Hoyt acknowledged that:

while the facts presented do not irrefutably establish that Texas law will impose liability on Cespedes, at this point, the plaintiff is not required to make such a showing. It is the defendant’s duty to show with certainty that the plaintiff has no possibility of recovery against Cespedes in light of the facts presented and the inference that this Court is required to deduce from such facts.

2009 WL 3255093 at *5. Judge Hoyt applied this law to the summary judgment type of proof presented and ruled that:

[w]hen resolving all factual disputes and ambiguities in the plaintiff’s favor, as this Court is required to do, the Court determines that the evidence presented tends to show that Cespedes, while acting as a “person” engaged in the business

of insurance, *may* have contributed in some way to the investigation and/or decision relative to the plaintiff's claim

Id. Although Judge Hoyt remanded the case back to state court, he refused to award costs to the plaintiff pursuant to 28 USC 1447(c). In this regard, Judge Hoyt noted that "the defendants have undoubtedly presented some compelling evidence tending to establish Cespedes' limited role with respect to the plaintiff's claim." *Id.* at *7.

III. *Lakewood Chiropractic v. Travelers*

Lakewood Chiropractic involved a pre-suit claim denial to which Lakewood Chiropractic's counsel replied in correspondence that "adjusters employed by [Travelers] appear to have violated the Texas Insurance Code." In response, Travelers through a new adjuster, the non-diverse Sonja Victor, requested permission for a third-party inspection. There was another exchange of correspondence; however, Lakewood Chiropractic refused the third-party inspection. Ultimately, Lakewood Chiropractic sued both the diverse Travelers and the non-diverse adjuster, Sonja Victor, for coverage and bad faith in Texas state court and the defendants collectively removed the case to Houston Federal Court on the basis that "Victor was joined improperly to destroy [federal court] jurisdiction."

Under this scenario, Judge Werlein considered Lakewood Chiropractic's Motion to Remand. Since Travelers and Victor were not contending that Lakewood Chiropractic was committing "actual fraud in the pleading of jurisdictional facts," the procedural analysis was limited to whether Lakewood Chiropractic was able "to establish a cause of action against [Victor]." Here, Judge Werlein found that Lakewood Chiropractic failed to state such a claim. In so doing, Judge Werlein characterized Lakewood Chiropractic's allegations against adjuster Victor as "near verbatim recitation[s] of portions of Chapters 541 and 542 of the Texas Insurance Code," which failed "to allege facts illustrating what actions are attributable to Victor individually." 2009 WL 3602043 at *3.

The court next examined Lakewood Chiropractic's argument that adjuster "Victor's handling of the claim provides *much of the basis* for Lakewood's causes of action against both Defendants." Judge Werlein, then turned that phrase "much of the basis" against Lakewood Chiropractic by noting its vagueness and ruling that Lakewood Chiropractic "must put defendants on fair notice of the allegations against them; not require defendants to 'glean' the factual basis of such allegations from a list of ambiguous legal conclusions." *Id.*

The next step was for Judge Werlein to analyze the proof offered by Lakewood Chiropractic, consisting of an affidavit by its office manager and three letters authored by adjuster Victor. The office manager affidavit was rejected as "merely reiterat[ing] the legal conclusions asserted in the state court petition." The letters did not support a claim against Victor because they only established "that Victor had *some* involvement in a further investigation of plaintiff's claim, however, they did not show "a *reasonable possibility* of recovering on any claim against Victor." *Id.* at *4.

Interestingly, Lakewood Chiropractic also tried seeking remand by making the alternative argument that since its claim against adjuster Victor lacked a reasonable possibility of

recovering, then so does its claims against Travelers. Under the rule of *Smallwood v. Illinois Central Railroad Co.*, 385 F.3d 568 (5th Cir 2004); if the reason why a plaintiff cannot recover against a non-diverse defendant would equally dispose of plaintiff's potential recovery against the diverse defendant, then "there is no improper joinder; there is only a lawsuit lacking merit" and accordingly, the federal court should remand the case back to state court. Judge Werlein rejected this argument because Lakewood Chiropractic pled breach of contract and common law bad faith claims against Travelers that do not apply against Victor and survive the dismissal of the claims against Victor. Accordingly, Judge Werlein dismissed the claims against Victor and denied the Motion to Remand.

IV. PRACTICAL APPLICATION

The diametrically opposite results in *Davis v. Travelers Lloyds* and *Lakewood Chiropractic v. Travelers Lloyds* can be rationalized on the basis that while the allegations in the pleadings against the non-diverse defendants were inadequate to plead a case against the non-diverse adjuster and did not require a remand in either case, Davis' proof was more compelling than the proof offered by Lakewood Chiropractic in support of their remand motions. In this regard, the proof offered by Davis adequately rebutted, at least to Judge Hoyt's satisfaction, defendants showing that Davis could not recover against Cespedes, whereas the proof offered by Lakewood Chiropractic did not adequately rebut defendant's evidence and argument with regard to Lakewood Chiropractic's inability to recover against Victor, who only worked on the claim post-denial.

Regardless of whether the plaintiff's case against a non-diverse adjuster is removable on the pleadings, the plaintiff may still be able to obtain remand by offering summary judgment type proof in connection with its Motion for Remand. Such proof could allow the Court to "pierce the pleadings . . . to determine whether the plaintiff has a basis in fact for its claims against the non-diverse insurance adjuster." This proof could consist of affidavit testimony and relevant documents; however, some situations might warrant deposition testimony as well.

Naturally, the particular judge making the call will be a factor, as witnessed by the similar cases of *Davis* and *Lakewood Chiropractic*. Judge Hoyt strictly held Travelers to its burden of showing with certainty that Davis had no possibility of recovering against Cespedes. Applying the same standard, however, Judge Werlein rejected Lakewood Chiropractic's proof in support of its Motion for Remand as vague and he seemingly placed the burden on the plaintiff to demonstrate a reasonable possibility of recovering on a claim against the adjuster.

At the end of the day, the practice of joining non-diverse insurance adjusters in bad faith litigation is not likely to stop, so long as, if successful, it allows the case to be litigated in state court. What remains to be seen is how a particular judge will apply the standard on improper joinder in determining whether to remand a case against a non-diverse adjuster back to state court.