TRENDS IN REMOVAL

MARK A. TICER
4144 N. Central Expwy.
Suite 1255
Dallas, Texas 75204

State Bar of Texas
9th ANNUAL
ADVANCED INSURANCE LAW COURSE
April 12-13, 2012
Dallas

CHAPTER 16

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TRENDS IN REMOVAL

INTRODUCTION

Taxes and death are two certainties of life. Add a third – removal of a case against insurer, especially where true diversity exists. But even naming an insurance agent, adjuster, or other nondiverse Defendant may not preclude removal.

What does one do to preclude removal or alternatively satisfy removal even when a nondiverse Defendant is named in a lawsuit? Is the mere inclusion of a nondiverse Defendant enough to defeat removal? Once the time for removal for the first served Defendant passes, are the rest of the Defendants prevented from removing? Can the Plaintiff name a nondiverse Defendant in a lawsuit and later nonsuit its claim against the nondiverse Defendant after one year removal deadline thereby precluding removal?

These issues will addressed in this paper. Also included will be a discussion of the new amendments to the removal statutes.

IMPROPER NOT FRAUDULENT JOINDER

A. Nothing New

It has become commonplace for a Plaintiff to include an insurance agent, insurance adjuster, and/or other insurance related persons or entities in a lawsuit against an insurer to keep from being removed to federal court. The legal response to this strategy is for the insurer to assert such joinder is done solely to defeat diversity and the grounds alleged against the nondiverse Defendant either are without legal basis or utterly meritless. The case is then removed.

B. Improper Joinder is the Preferred Term

The Fifth Circuit has adopted the term "improper joinder" as being more consistent with the statutory language than the term "fraudulent joinder" which has been used extensively in the past. *Smallwood v. Illinois Cent. R. R. Co.*, 385 F.3d 568, 572 (5th Cir. 2004) (en banc), *cert. denied*, 544 U.S. 992 (2005). While improper joinder is the term of choice in the Fifth Circuit, there is no substantive difference between fraudulent joinder versus improper joinder.

C. Standard for Evaluating Removal

Removal jurisdiction in insurance related cases most frequently involves diversity. Diversity exists only if each Plaintiff has a different citizenship from each Defendant. *Getty Oil Corp. v. Ins. Co. of N. Am.*, 841 F.2d 1254, 1258 (5th Cir. 1988). 28 U.S.C. § 1332 demands complete diversity of citizenship, meaning that a district court is precluded from exercising jurisdiction if any Plaintiff shares the same citizenship as any Defendant. *Corfield v. Dallas Glenn Hills, L.P.*, 355 F.3d 853, 857 (5th Cir. 2003). Importantly, "[t]he basis on which jurisdiction depends must be alleged affirmatively and distinctly and cannot be established argumentatively or by mere inference." *Getty*, 841 F.2d at 1259 citing *Illinois Cent. Gulf R.R. Co. v. Pargas, Inc.*, 706 F.2d 633, 636 n.2 (5th Cir. 1983). When there is a failure to allege adequately the basis of diversity, remand or dismissal is a mandated. *Stafford v. Mobil Oil Corp.*, 945 F.2d 803, 805 (5th Cir. 1991). A district court in evaluating citizenship, is to consider only the citizenship of real and substantial parties in the litigation; nominal or formal parties that have no real stake in the litigation are ignored for removal jurisdictional purposes. *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 460-61, 100 S. Ct. 1779, 1781-82 (1980).

The removing party bears the burden of establishing federal jurisdiction, *Allen v. R&H Oil & Gas Co.*, 63 F.3d 1326, 1335 (5th Cir. 1995); *Laughlin v. Prudential Ins. Co.*, 882 F.2d 187, 190 (5th Cir. 1989); and *B. Inc. v. Miller Brewing Co.*, 663 F.2d 545 (5th Cir. 1981). The burden placed upon those that allege improper joinder is a heavy one. *Smallwood*, 385 F.3d at 572. Federal policy and precedent favor remand of state court actions. *Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691, 699, 123 S.Ct. 1882, 1887, 155 L.Ed 2d 923 (2003); *Manguno v. Prudential Prop. & Cas. Ins. Co.*, 276 F.3d 720, 723 (5th Cir. 2002). To prove improper joinder, the removing party must demonstrate: 1) actual fraud in the pleading of jurisdictional facts; or 2) there is absolutely no possibility that the Plaintiff will be able to establish a cause of action against the instate Defendants. *Travis v. Irby*, 326 F.3d 644, 647 (5th Cir. 2003); *Smallwood*, 385 F.3d at 573.

In determining whether remand is appropriate, a district court must evaluate all the factual allegations in the light most favorable to the Plaintiff. *Nelson v. St. Paul Fire & Marine Ins. Co.*, 897 F. Supp. 328, 330-331 (S.D. Tex. 1995). All contested issues of fact must also be resolved in the Plaintiff's favor. *Id.* Finally, any uncertainties in the controlling substantive law must be resolved in favor the Plaintiff. *B. Inc.*, 663 F.2d at 549; *Nelson*, 897 F. Supp. at 330-31.

"Since the purpose of the improper joinder inquiry is to determine whether or not the instate Defendant was properly joined, the focus of the inquiry must be on the joinder, *not the merits of the Plaintiff's case*." *Smallwood*, 385 F.3d at 573. Emphasis added. Based on the facts alleged against the non-diverse Defendant, the Court must examine whether the possibility of recovery is so hypothetical, speculative or implausible as to amount to no possibility at all. *Smallwood*, 385 F.3d at 573.

In arguing the inability to establish a cause of action against the non-diverse Defendant, the Court may conduct a Rule 12(b)(6) type analysis. *Smallwood*, 385 F.3d at 573; *West End Square, Ltd. v. Great Am. Ins. Co.*, 2007 WL 804714 *2 (N.D. Tex. 2007). In doing so, the Court looks to the allegations against the instate Defendant. *Id.* A merits inquiry is to be avoided. *Smallwood*, 385 F.3d at 573. The exception will be where the Plaintiff has omitted or misstated facts that would determine the proprietary of joinder. *Smallwood*, 385 F.3d at 573; *West End Square*, 2007 WL 8047R4*2. The types of cases which require summary inquiry will be few in number. *Smallwood*, 385 F.3d at 573. However, the Court should still avoid a merits determination in evaluating joinder and at most make a summary inquiry. *Id* at 573-574.

D. Which Pleading Standard Applies

One frequent argument made by the removing party is that a Plaintiff's pleadings are insufficient to establish a viable cause of action against the nondiverse Defendant. And if the pleadings are insufficient, according to a removing Defendant, the joinder is purportedly improper. However, if state pleading requirements are applied, the allegations might be sufficient to satisfy a cause of action under state pleading rules but not under federal pleading requirements. Thus, an issue arises as to which pleading rules control when evaluating removal.

A recent decision from the Supreme Court of the United States has caused some confusion on whether the Plaintiff must satisfy the federal pleading standards to defeat removal for improper joinder. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 577, 127 S. Ct. 1955, 167 L.Ed 2d 929 (2007). More specifically, when applying *Fed. R. Civ. P.* 12(b)(6) standards and assessing improper joinder, a Plaintiff is obliged to provide the grounds of his entitlement to relief which requires "more than labels and conclusions, and a formuliac recitation of the elements of a cause of action will not do". *Twombly* 550 U.S. at 555; 127 S. Ct. at 1965.

Some courts have held *Twombly* pleading rules control in removal cases while other have held it is state court procedure that must be consulted. Compare *First Baptist Church v. GuideOne Mut. Ins. Co.*, 2008 WL 4533729 *4 (E.D. Tex. 2008); *Broadway v. Brewer*, 2009 WL 1445449 *2-3 (E.D. Tex. 2009); *King v. Provident Life & Acc. Ins. Co.*, 2010 WL 2730890 (E.D. Tex 2010) (all holding that at least implicitly federal pleading rules apply to removed cases) versus *Durable Specialties, Inc. v. Liberty Ins. Corp.*, 2011 WL 6937377 *4-6 (N.D. Tex. 2011); *Warren v. State Farm Auto. Ins. Co.*, 2008 WL 413377 * 4-5 (N.D. Tex. 2008) and *Edwea, Inc. v. Allstate Ins. Co.*, 2010 WL 5099607 * 2-6 (S. D. Tex. 2010). (all holding state (Texas) court pleadings rules apply).

In simple terms, the removing party under *Twombly* alleges the Plaintiff must satisfy the heightened pleading requirements for federal pleadings and anticipate removal. The opposing view is that the Plaintiff need only meet the fair notice pleading requirements, as it relates to Texas lawsuits.

Allegedly, no published case has specifically provided an answer to the question regarding removal and Texas pleading requirements. On the one hand, at least one case suggests that *Smallwood* and *Griggs v. State Farm Lloyds*, 181 F.3 694, 699 (5th Cir. 1999) (factual fit test) create an "uneasy tension between Texas more liberal pleading rules and federal pleading requirements; litigants must conform to federal pleading requirements to avoid removal". *First Baptist v. GuideOne Mutual Ins. Co.*, 2008 WL 4533729 * 4; *see also Doucet v. State Farm Fire & Cas. Co.*, 2009 WL 3157478 *5-6 (E.D. Tex. 2009).

In contrast, there is authority that Texas pleading rules control for purposes of evaluating removal. *De La Hoya v. Coldwell Banker Mexico, Inc.*, 125 F. App'x. 533, 537-38 (5th Cir. 2005); *Edwea*, 2010 WL 5099607 * 5; and *Warren*, 2008 WL 413377*4. Logically, it would make little sense to impose the federal pleading standard for a case removed from state court. *Durable Specialties*, 2011 WL 6937377 * 5.

Texas uses the fair notice pleading standard. *Penley v. Westbrook*, 146 S.W.3d 220, 232 (Tex. App. – Forth Worth 2004, *rev'd on other grounds*, 231 SW3d 389 (Tex. 2007)). The test for sufficiency under the fair notice standard is whether an opposing attorney of reasonable competence could ascertain from the pleadings the nature and basic issues of the controversy and the probable relevant evidence. *De Le Hoya*, 125 F. App'x. at 537-38. *Argonaut Ins. Co. v. Great Am. Ins. Co.*, 869 S.W.2d 537, 542-43 (Tex. App. – Corpus Christi 1993, writ denied). Fair notice is satisfied for improper joinder purposes when the Court can determine that the opposing party can ascertain from the pleading the nature and basic issues of the controversy and what testimony will be relevant at trial. *Archer v. Allstate Ins. Co.*, 2005 WL 1155059 *2 (S.D. Tex. 2005).

While some courts continue to impose the *Twombly* pleading requirements and rely on *Griggs* to assess improper joinder, one federal court has persuasively set out reasoning that joinder must be judged by state pleading standards citing a number of cases out of other Circuits:

> The district court cases using a *Twombly/Iqbal* standard in a motion to

remand based on a state court pleading's asserted insufficiency in alleging a claim against an in-state Defendant cited the *Griggs* language on the "factual fit between the Plaintiffs' allegations and the pleaded theory of recovery." But the statement was not made in the context of Rule 12(b)(6) – like procedure for analyzing an improper joinder argument. Instead, the language was in the context of a summary judgment – like procedure. In *Griggs*, the Plaintiffs had filed an affidavit that added the factual allegations to be considered beyond those in the petition. The issue was whether the combination of the state-law theories pleaded in the amended petition and the facts alleged in the affidavit could provide a reasonable basis for predicting that the Plaintiffs would be able to establish the in-state Defendant's liability. 181 F.3d at 700. The statement about "factual fit" was made in the specific context of disagreeing with the Plaintiffs' argument that he only had to show a "mere hypothetical possibility that [a valid claim] could exist." *Id.* at 701. *Griggs*, which, like *Smallwood*, was decided pre-*Twombly* and pre-*Iqbal*, does not provide guidance on whether the federal pleading standard applies to a motion to remand based on improper joinder when that motion is analyzed based solely on the state-court petition.

The majority of courts have held that a federal court should not look to the federal standard for pleading sufficiently under Rule 8 and 12 (b)(6) to determine whether the state-court petition provides a reasonable basis for predicting that the Plaintiff could recover against the in-state Defendant at least when, as here, the state pleading standard is more lenient. See, e.g., *Henderson v. Washington Nat'l Ins. Co.*, 454 F.3d 1278, 1284 (11th Cir. 2006) ("[T]he decision as to the sufficiency of the pleadings is for the state courts, and for a federal court to interpose its judgment would fall short of the scrupulous respect for the institutional equilibrium between the federal and state judiciaries that our federal system demands."); *DNJ Logistic Grp., Inc. v. DHL Express (USA), Inc.*, Civ. A. No. 08-CV-2789, 2010 WL 2976493, at *4 (E.D.N.Y. July 23, 2010) ("[C]ourts in this Circuit have referenced both state and federal pleading standards when testing the sufficiency of a Plaintiff's pleading' in the fraudulent joinder context. The more logical choice, though, is to apply state pleading standards, because 'the purpose of a fraudulent joinder analysis is to determine whether a state court might permit a Plaintiff to proceed with his claims ...' "(quoting *Kuperstein v. Hoffman-Loroche, Inc.*, 457 F. Supp. 2d 467, 471-72 (S.D.N.Y. 2006) (internal citations omitted)); *MBIA Ins. Corp. v. Royal Bank of Canada*, 706 F. Supp.2d 380, 394 (S.D.N.Y. 2009) ("[C]ourts apply the state pleading rules relevant to the particular pleading at issue in deciding whether a Plaintiff could have asserted a viable claim in state court based on that pleading."); *Pinnacle Choice, Inc. v. Silverstein*, Civ. A. No. 07-5857, 2008 WL 2003759, at *7 (D.N.J. May 6, 2008) ("While these claims may not be pleaded with specificity sufficient to withstand a motion to dismiss, that is not the standard applied here."); *Ruiz v. Forest City Enterprises, Inc.* No. 09 CV 4699, 2010 WL 3322505, at *3 (E.D.N.J. Aug. 20, 2010) ("[C]ourts apply the state pleading rules relevant to the particular pleading at issue in deciding whether a Plaintiff could have asserted a viable claim in state court based on that pleading."); *Shue v. High Pressure Transps., LLC*, No. 10-CV0559, 2010 WL 4824560, at *7 n. 2 (N.D. Okla. Nov. 22, 2010) ("The Court agrees with the other courts that have considered this issue and finds that *Twombly's* plausibility standard is inconsistent with the rules governing fraudulent joinder."); *Tofighbakhsh v. Wells Fargo & Co.*, No. 10-830, 2010 WL 2486412, at *3 (N.D. Cal. June 16, 2010) ("[T]he Court finds that Defendants have failed to show fraudulent joinder of Wells Fargo and Company, because they have failed to provide clear and convincing evidence proving that the causes of action against Wells Fargo and Company must obviously fail according to California law."); *Warren v. State Farm Mut. Auto. Ins. Co.*, Civ. A. No. 3:08-CV-0768-D, 2008 WL 4133377 at *4 (N.D. Tex. Aug. 29, 2008) ("Because state court Plaintiffs should not be required to anticipate removal to federal court, the court assesses the sufficiency of the factual allegations of the [the Plaintiff's] complaint under Texas' notice-pleading standard."); *In re Yasmin and Yaz (Drospirenone) Mktg, Sales practices, and Prods. Liab.*, Nos. 3:09-md-

> 02100, 3:10-cv-20095, 2010 WL 2402926, at *2 (S. D. Ill. June 15, 2010) ("Upon further consideration, the Court concludes that it was error to apply federal notice pleading standards in its fraudulent joinder analysis."); *In re Zicam Cold Remedy Mktg., Sales Practices, Prods. Liab. Litig.*, No. 09-md-2096, 2010 WL 3516755, at *2 (D. Ariz. Sept. 1, 2010) ("We conclude that although plaintiff has not stated a claim against HEB in accordance with federal pleading standards his failure is not 'obvious according to the settled rules of the state,' and thus, the joinder of defendant HEB is not fraudulent."). Such a result is also applied to fraud causes of action, which in federal court are subject to the particularity requirement of Rule 9(b). See, e.g., *Candy v. 474 Club LLC.*, No. CV-06-400, 2007 WL 1381806, at *3 (D. Idaho Jan. 31, 2007) (nothing that for remand purposes, "[t[he Court could ... agree that many of the claims fail to fully and completely articulate all the particulars of a given cause of action. [But][t]he Court cannot agree that there is no possibility the [p]laintiff can set forth a viable claim against [d]efendant ..."); *Waterloo Coal Co., Inv. v. Komastsu Mining Sys., Inc.*, No. C2-560, 2003 WL 124137, *4 (S.D. Ohio 2003) ("Although *Fed. R. Civ. P.* 9(b) requires that fraud be pleaded with particularity, Waterloo's failure to do so does not lead this Court to conclude that Waterloo may not have a colorable claim under state law for fraudulent inducement.").

Edwea, 2010 WL 5099607 *4-5.

From a review of these various authorities, the safe rule to follow is know what district you are in to determine what pleading rules apply and your probability of success to sustain or defeat removal. Additionally, sufficiency and detail will certainly be persuasive elements to prevent removal. What works in the Eastern District of Texas may be the opposite of what persuades in the Southern District of Texas.

REMOVABILITY UNDER CAFA

A. Introduction

In 2005, Congress passed the Class Action Fairness Act ("CAFA") expanding federal jurisdiction over class action lawsuits and giving Defendants another avenue for removal. CAFA grants federal court jurisdiction over class actions involving at least 100 class members, with minimal or incomplete diversity of citizenship between the parties with an amount in controversy exceeding $5 million dollars. However, it is the amount in controversy which has caused much confusion in the various circuits when determining removability.

B. Different Circuits and Different Tests

The standards that have been articulated by the various Circuits to assess the amount in controversy include reasonable probability, preponderance of the evidence, legal impossibility, and legal certainty. Each test varies from leniency to stringent.

1. Reasonable Probability and Preponderance of the Evidence

Two Circuits – the First and Second – require removing Defendants to show that a reasonable probability exists that more than $5 million is in controversy where no specific amount is pled. The First Circuit uses this same test if less than $5 million is claimed. The First Circuit used the reasonable probability standard in *Amoche v. Guarantee Trust Life Ins. Co.*, 556 F.3d 41 (1st Cir. 2009) and held that this standard should apply regardless of the amount alleged. In *Blockbuster Ins. v. Galeno*, 472 F.3d 53 (2d. Cir. 2006), the Second Circuit applied the reasonable probability test where no amount was alleged. The Second Circuit remanded *Galeno* to the district court to determine the amount of damages although the court was silent on whether this test would apply if less than $5 million was pled.

The Sixth and Eighth Circuits use the preponderance standard no matter what damages are alleged. *See Bell v. Hershey Co.*, 557 F.3d 953, 959 (8th Cir. 2009) (rejecting the legal certainty test and holding preponderance test applies regardless of the amounts alleged) and *Smith v. Nationwide Prop. & Cas. Ins. Co.*, 505 F.3d 401 (6th Cir. 2007).

The Ninth and Eleventh Circuits apply the preponderance of the evidence test where the complaint does not allege an amount in controversy. *Lewis v. Verizon Commc'ns, Inc.* 627 F.3d 395 (9th Cir. 2010); *Pretka v. Kolter City Plaza II*, 608 F.3d 744 (11th Cir. 2010). *But see Lowdermilk v. U.S. Bank Nat'l Ass'n*, 479 F.3d 994 (9th Cir. 2007) (employing legal certainty test where amount of damages alleged was less than $5 million).

2. Legal Certainty Standard

In the Third Circuit, when a party specifically alleges less than $5 million in damages, the removing Defendants must demonstrate to a legal certainty that the amount in controversy exceeds $5 million. However, where a genuine controversy exists over the amount at issue then the preponderance of evidence standard is used. *But see Frederico v. Home Depot*,

507 F.3d 188, 197 (3rd Cir. 2007) (applying legal certainty test where amount of damages alleged was unspecified).

3. Legally Impossible Standard

What would appear to a reversal on the burden to sustain removal, the Seventh Circuit has held it is up to the Plaintiff to show that it would be legally impossible for the amount in controversy to exceed $5 million where no amount was pled. *Back Doctors Ltd. v. Metro. Prop. & Cas. Ins. Co.*, 637 F.3d 827, 829 (7th Cir. 2011). This decision, far and away, is the most removal friendly in any Circuit.

4. Conclusion

When dealing with CAFA, most Circuits have at least one and perhaps two standards, depending on the facts. Some Circuits appear to have no tests. The rule is here tread carefully when dealing with CAFA. The question in a class action case is not whether you will get removed but whether the removal is sustained.

ERISA AND REMOVAL

A. Background

The acronym "ERISA" equates to many practitioners to mean automatic federal jurisdiction. Despite this predominate belief and perhaps bias, the legal reality is it just ain't so. A little research and specific pleading can make all the difference. The mere involvement of ERISA alone does not make a case removable, although many removing Defendants want you to believe that is true.

B. ERISA and Removability

"[t]he burden of establishing federal jurisdiction is on the party seeking removal." *Miller v. Diamond Shamrock Co.*, 275 F.3d 414, 417 (5th Cir. 2001)); *Carpenter v. Wichita Falls Indep. Sch. Dist.*, 44 F.3d 362, 365 (5th Cir. 1995). Where the removing party is relying on ERISA preemption, the removing party *must show* the presence of a substantial federal claim – one *completely preempted* by ERISA in order to satisfy removal jurisdiction. *Giles v. NYLCARE Health Plans, Inc.*, 172 F.3d 332, 337 (5th Cir. 1999)(Emphasis added). Significantly, "any doubts concerning removal must be resolved against removal and in favor of remanding the case back to state court." *Cross v. Bankers Multiple Line Ins. Co.*, 810 F. Supp. 748, 750 (N.D. Tex. 1992); *see also Healy v. Ratta*, 292 U.S. 263, 54 S.Ct. 700, 78 L.Ed. 1248 (1934).

There are two types of preemption: complete and partial. *Arana v. Ocsher Health Plan*, 338 F.3d 433, 439 (5th Cir. 2003). Complete preemption confers federal jurisdiction while conflicts preemptions does not. *Id.* For purposes of removal, complete preemption is required. *Id.* at 440.

Complete preemption involves a state law civil complaint that seeks relief under ERISA's provisions making it a federal claim. *Aetna Health, Inc. v. Davila*, 542 U.S. 200, 209, 124 S. Ct. 2488, 2496, 159 L. Ed.2d 312 (2004). If the complaint implicates ERISA's civil enforcement scheme then the claim is federal. *Giles*, 172 F. 3d at 336-37. ERISA enforcement provisions deal with: 1. recovery of benefits under the terms of the welfare benefit plan; 2. enforcement of a participant's ERISA rights under the plan; and/or 3. clarification of future rights to future benefits under the terms of a plan. *Arana*, 338 F.3d at 340; 29 U.S.C. § 1132 (a)(1)(B). If a party's state law claims fall under § 1132 (a)(1)(B), they are preempted by ERISA.

The test to establish complete ERISA preemption is whether the individual at some point in time could have brought his claim under the ERISA enforcement scheme, (§ 1132 (a)(1)(B)), and *there is no other independent legal duty* that is implicated by a Defendant's conduct; if the answer to this two part test is in the affirmative, then the individual's cause of action is completely preempted by ERISA. *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 66, 107 S. Ct. 1542, 1547, 95 L.Ed. 2d 55(1987); *Davila*, 542 U.S. at 210, 124 S.Ct. at 2496. *Mere consultation or reference to an ERISA plan is not enough to make the claims preempted under* § 1132 (a)(1)(B). *Lone Star Ob/Gyn Assoc. v. Aetna Health Ins.*, 579 F.3d 525, 530 (5th Cir. 2009).

The Fifth Circuit Court of Appeals opinion in *Memorial Hospital System v. Northbrook Life Ins. Co.*, 904 F.2d 236, 245 (5th Cir.1990), outlines the two common characteristics of cases in order to find ERISA preemption of a plaintiff's state law causes of action: (1) the state law claim addresses areas of exclusive federal concern, and (2) the claim directly affects the relationship among traditional ERISA entities—the employer, the plan and its fiduciaries, and the participants and beneficiaries. *See also Hollis v. Provident Life & Acc. Ins. Co.*, 259 F.3d 410, 414 (5th Cir. 2001); *Baylor Univ. Med. Ctr v. Arkansas Blue Cross Blue Shield*, 331 F. Supp. 2d 502, 507 (N.D. Tex. 2004).

In contrast, a second area of ERISA preemption is referred to as "conflicts preemption". *Baylor Univ. Med. Ctr*, 331 F. Supp. 2d at 506; *Erlandson v. Liberty Life Assurance Co.*, 320 F. Supp.2d 501, 506 (N.D. Tex. 2004). This type of preemption arises "when a federal law conflicts with state law" which provides a federal defense to a state law claim. *Baylor Univ. Med. Ctr*, 331 F. Supp. 2d at 506. Conflict preemption *does not confer federal jurisdiction* and consequently removal jurisdiction. *Id.* (*citing*

McClelland v. Gronwaldt, 155 F.3d 507, 516-19 (5th Cir. 1998), *rev'd other grounds*).

"Thus, lawsuits against ERISA plans for common place, run-of-the mill state-law claims – although obviously affecting and involving ERISA plans – are not preempted by ERISA". *Baylor Univ. Med. Ctr*, 331 F. Supp. 2d at 507; *Erlandson*, 320 F. Supp. 2d at 507. This includes state law torts such as intentional infliction of emotional distress, invasion of privacy, assault, etc. *Erlandson*, 320 F. Supp. 2d at 508. "[S]ignificantly for this case, even if the court were to find that Quintana's state law causes of action against the defendants relate to an ERISA plan within the meaning of § 514(a), conflict preemption is insufficient to create federal jurisdiction." *Quintana v. Lightner*, 2011 WL 976773 * 2 (N.D. Tex. 2011).

Also critical to complete ERISA preemption is "whether the claims directly affect the relationship among traditional ERISA entities – the employer, the plan, and its fiduciaries, and the participants and beneficiaries." *Mem'l Hosp.*, 904 F.2d at 425; *Hollis*, 259 F.3d at 414; *Baylor*, 331 F. Supp. at 508; and *Quintana*, 2011 WL976773 at 6. Persons who carry out perfunctory or ministerial duties are not fiduciaries unless the persons are given *discretionary authority and control* that amounts to actual decision making power. *Quintana*, 2011 WL 976773 at 6 *citing Reich*, 55 F.3d at 1049 (Emphasis added). The person cannot be a fiduciary if the plan documents grant the sponsor the ultimate right to review and modify benefit determinations made by the purported person/administrator. *Quintana*, 2011 WL976773 at 6. "A plan administrator who merely performs claims processing, investigatory, and record keeping duties is not a fiduciary." *Baker v. Big Star Division of the Grand Union Co.*, 893 F.2d 288, 290 (11th Cir. 1989). Additionally, being a fiduciary for one purpose does not make the administrator a fiduciary for all purposes. *Kerns v. Benefit Trust Life Ins. Co.*, 992 F.2d 214, 217 (8th Cir. 1993), *cert. denied*, 115 S.Ct. 1964 (1995); *Coleman v. Nationwide Life Ins. Co.*, 969 F.2d 54, 61 (4th Cir. 1992), *cert. denied*, 506 U.S. 1081, 113 S.Ct. 1051, 122 L.Ed. 2d 359 (1993).

C. Why Not ERISA

To illustrate the point that the mere reference or involvement of ERISA does not dictate removability, is helpful to discuss several cases which substantiate this point. While these cases discussed are out of either the Fifth Circuit and federal district courts in Texas, this point can be made in other Circuits as well.

In *Baylor University Medical Center v. Arkansas Blue Cross Blue Shield*, Baylor filed suit against Arkansas Blue Cross Blue Shield ("BCBS") for breach of contract and late payment of claims under the Texas Insurance Code. 331 F. Supp. 2d at 504. Baylor's suit sought to recover medical expenses rendered to Bobby Wall, an Arkansas BCBS insured. *Id.* Baylor had previously entered into a contract to provide medical services at a discount to BCBS of Texas insureds, as well as any out of state BCBS participant. *Id.* at 506. Baylor alleged only a portion of the charges had been paid. *Id.* Arkansas BCBS removed the suit to the Northern District of Texas. *Id.* at 505. Baylor moved to remand. *Id.* at 504.

In remanding the case, Judge Fish noted that health care providers are not traditional ERISA entities, unless they are assignees from a plan participant seeking to obtain benefits. *Id.* at 509. Additionally, "Enforcing a contract to provide medical services in exchange for payment for those services is hardly an exclusive area of federal concern." *Id.* This is part of the *Memorial Hospital* test. 964 F.2d at 246. Because the contract was between Baylor and BCBS and was not seeking benefits under a Plan, there was no complete preemption, thereby precluding Arkansas BCBS to removal. *Id.*

Furthermore, the delay damages sought under the Texas Insurance Code were also not completely preempted by ERISA. *Id.* at 511. This statute, given the contractual relationship between Baylor and BCBS, did not "impact ERISA plans only tenuously, remotely, or peripherally". *Id.* Baylor's statutory claims against Arkansas BCBS do not implicate ERISA's civil enforcement provisions. *Id.* Therefore, removal was improper.

Erlandson v. Liberty Life Assurance Co., also from Judge Fish's court, resulted in remand from a removal based on ERISA. 320 F. Supp. 2d at 504. Liberty Life Assurance Company ("Liberty") was in charge of administering Erlandson's claim for disability benefits. *Id.* Liberty hired MJM Investigation ("MJM") and Richard B. Cowan ("Cowan") to conduct surveillance of Erlandson for her claim. *Id.* According to Erlandson, Cowan and MJM began in an "aggressive and threatening manner" to follow Erlandson which cause Erlandson much despair in believing she was a target of violent crime. *Id.* at 504-05. Erlandson sued Liberty, Cowan, and MJM for assault, invasion of privacy, and intentional infliction of emotional distress. *Id.* at 505. Liberty removed and Erlandson filed a motion for remand. *Id.*

Judge Fish, likewise, remanded this cause finding that Erlandson's lawsuit did implicate ERISA's civil enforcement provisions. *Id.* at 506. Torts lawsuits are not typically an area of federal concern. *Id.* at 507. "Thus, lawsuits against ERISA plans for common place, run-of-the mill state-law claims – although obviously affecting and involving ERISA plans – are not preempted by ERISA". *Id.* at 507. "Instead, she

is suing Liberty as a victim of its allegedly tortuous conduct that was completely unauthorized by the Plan – i.e. conduct that was not undertaken in the course of carrying our responsibilities under the Plan". *Id.* at 508. Permitting such conduct to be classified as protected under ERISA would immunize tortuous conduct because it was ERISA. *Id.* at 508.

Another reason that Erlandson's claim not being preempted is that Liberty was not a plan fiduciary but merely a "claims administrator". *Id.* at 509-10. This distinction is significant as a plan fiduciary must have the ultimate authority "to receive and modify benefit determinations . . .". *Id.* at 509. If there is no plan fiduciary sued then the typical ERISA entities requirement under the *Memorial Hospital* test fails. *Id.* at 507.

Again, suing a party with some connection to ERISA is not enough.

In 2009, the Fifth Circuit decided *Lone Star OB/GYN Associates v. Aetna Health Inc.*, finding the removed suit based on ERISA preemption should be remanded to state court. 579 F.3d at 527. Lone Star sued Aetna in Texas State court under the Texas Prompt Pay Act for not paying claims timely. *Id.* at 528. Lone Star entered into a participating provider agreement with Aetna who administered several health insurance plans. *Id.* Aetna removed Lone Star's suit, asserting ERISA preemption. *Id.*

The Fifth Circuit noted the *Davila* test for complete preemption: that the individual could have brought his claim under ERISA and no other independent legal duty is implicated by a Defendant's actions. *Id.* at 529-30. In this cause, the Provider Agreement at issue and the Plan cross referenced each other. *Id.* at 530. However, the determination of the rate Aetna owed Lone Star was in the Provider Agreement and required no benefit determination under the controlling Plan. The Plan only needed to be consulted to determine the applicable deductible or copayment. *Id.*

The mere consultation of an ERISA plan is insufficient to bring a claim within the scope of ERISA's civil enforcement provisions. *Id.* The issue in *Lone Star* was the rate of payment, *not right of payment*. *Id.* at 532. Remand was therefore dictated in *Lone Star*.

A more recent case on this issue but also involving a plan beneficiary like *Erlandson* is *Quintana v. Lightner*, 2011 WL 976773 * 2, (as a matter of disclosure, *Quintana* is the writer's case). *Quintana* takes *Erlandson* one step farther, as the issue presented in *Quintana* was whether a lawsuit against an ERISA third party vendor for violating a plan participant's right to privacy when pursuing the Plan's subrogation rights was completely preempted by ERISA. Judge Fish (yes again) held such suit was not completely preempted by ERISA and remanded Quintana's suit back to state court.

The facts in *Quintana* are straightforward. Quintana was involved in a automobile accident resulting in serious injuries and substantial medical bills. *Id.* * 1. At the time of the accident, Quintana was a participant in the Choice EPO Plan for Employees of Tent Healthcare Corporation ("the Plan") pursuant to ERISA. *Id.* The Plan paid certain medical expenses on Quintana's behalf. *Id.* Quintana filed suit in state court against the person who he alleged caused his injuries. *Id.*

State Farm Mutual Automobile Insurance Company ("State Farm"), the liability insurer for the party Quintana sued, contacted the Plan's subrogation vendor, Ingenix, Inc. ("Ingenix") regarding the Plan's right to subrogation. *Id.* Ingenix provided State Farm medical bills and amounts paid. *Id.* (State Farm and Ingenix also had several communications about Quintana's medical). Ingenix then agreed to settle the Plan's subrogation interest with State Farm for about one-third of Quintana's medical expenses and agreed to provide an assignment of those claims to State Farm's insured in the liability suit. *Id.*

When Quintana's counsel learned of this agreement, suit was filed in state court seeking injunctive relief from the Defendants, State Farm, Ingenix and its adjuster Kem Lightener, seeking to prevent any communications about Quintana's medical information as none possessed any medical authorization; Quintana also sought damages for violation of Quintana's right to privacy, conspiracy to invade Quintana's right to privacy, and intentional infliction of emotional distress. *Id.*

Ingenix removed the suit to federal court asserting complete ERISA preemption because the Summary Plan Description ("SPD") controlled Ingenix's authority and the SPD was essential to the resolution of the case. *Id.* Ingenix also claimed that Quintana's causes of action dealt with claims for benefits under the Plan thereby impacting ERISA's civil enforcement scheme. *Id.* * 4.

Judge Fish, just as in *Erlandson*, found that the common law torts alleged by Quintana were hardly a matter of federal concern. *Id.* The Court noted that the Plan did not include a waiver under HIPPA in pursuance of its subrogation rights and the Plan was silent on privacy. Therefore, Quintana's claims did not arise under the Plan. *Id.* The Court also noted Quintana was not disputing the amount of benefits or the Plan's right to subrogation. *Id.* * 5.

The Court characterized Quintana's lawsuit as conduct arising outside the Plan. *Id.* Moreover, the Court ruled that Quintana's claims might have some connection to the Plan and the Plan might need to be

consulted or read but Quintana's tort claims existed "independently" of the Plan. *Id.*

The Court also discussed whether Ingenix was a traditional entity under ERISA falling under the *Memorial Hospital* test (part 2). *Id.* * 6. Curiously, the Court believed that Ingenix was a traditional entity at it related "urgent care claims", eligibility, and the amount thereof. *Id.* Nevertheless, even if Ingenix was a fiduciary, it made no difference, as Quintana's lawsuit fell outside the civil enforcement scheme of section 502. *Id.*

The Court therefore remanded this cause to state court, where as a postscript, it was later removed again with no determination yet on the propriety of the second removal.

D. Conclusion

Sustaining removal based on ERISA is hardly a sure thing. While the word "ERISA" seems to strike fear in the minds of some lawyers, there is no reason to accept ERISA removal. A few basic rules govern ERISA removal and knowing those will often dictate the outcome.

CHANGES IN REMOVAL

A. Background

With little fanfare and apparently without notice under the radar, Congress passed and President Obama signed the Federal Courts Jurisdiction and Venue Clarification Act ("The Act") in 2011. The changes in the Act for removal jurisdiction are notable and significant. Removal has become easier, mostly for the benefit of insurers and those that frequently pursue removal.

B. Removal Procedures and Changes

The Act provides a number of favorable changes when removing. The Act now allows each defendant thirty (30) days after service to remove in multiple defendant cases. 28 U.S.C. § 1446(b)(2)(A). In other words, if earlier served defendants elected not to remove and the thirty (30) days for removal had passed, a subsequently served Defendant has thirty (30) to remove with the consent of all Defendants including the earlier served Defendants who elected not to remove. See 28 U.S.C. § 1446(b)(2)(C). This change clarifies different interpretations in various circuits – some which have used the Act's codified procedures and other circuits which held the actions and timing of service to the first served Defendants dictated removal for other Defendants, even if the Defendants were later served and did not have an opportunity to remove.

Additionally, a removing Defendant will be permitted to assert an amount in controversy in the removal notice where a Defendant seeks nonmonetary relief or money judgment where state court procedure does not allow a Plaintiff to demand a sum certain (Texas) or permits a Plaintiff to recover damages in excess of the amount sought. 28 U.S.C. § 1446(a)(2). For example, a Defendant may use discovery from the state court lawsuit for removal. Information in the state court record that demonstrates an amount in controversy to support removal is now deemed "other paper" under 28 U.S.C. § 1446(b)(3).

Lastly, the amount in controversy is now to be determined by a preponderance of the evidence standard as opposed to clear and convincing evidence.

Section 1446(c)(3) codifies recent authority that permits tolling on the one year limitation on removal in diversity actions if a Plaintiff has acted in bad faith. A federal district now has the discretion to sustain removal where bad faith is demonstrated. This provision will likely lead to significant litigation given the abuse of discretion standard and what can happen if a summary judgment is granted disposing of the nondiverse Defendant after remand. House Report 112-10 provides that if a Plaintiff purposely fails to disclose the amount in controversy to preclude removal, same would be bad faith.

Lastly, the Act sparses out removal for civil cases from criminal proceedings, the former remaining section 1446 and the latter now in Section 1454.

C. Severance and Remand Now Mandated

28 U.S.C. § 1441(c) now clarifies lawsuits that involve federal law claims that are joined with unrelated state law claims. Removal was permitted where a separate and independent federal question was joined with one or more claims over which a federal district court did not have original jurisdiction. Previously, a federal district court could keep the entire case or remand all parts in which state law controlled. Some courts viewed this removal as unconstitutional because Section 1446(c) purported to allow a federal court to decide state law claims where a federal court has no original jurisdiction. H.P. Rep. No. 112-10 at 12 (2011).

The Act sets out a severance and remand directive. Now, a Defendant may remove the entire case but the federal court may resolve only the federal claims, and *must remand* unrelated state law claims. *Id.* Unfortunately, the Act does not provide guidance what is meant by a unrelated state law matter.

D. Citizenship for Insurance Companies and Corporations

The Act has expanded the citizenship of corporations including insurance companies in direct actions. Some commentators have suggested this will limit the frequency of these entities in federal court.

Section 102 of the Act which will amend 28 U.S.C. § 1332(c)(1) changes the way a district court will treat corporations and insurance companies in direct actions. Previously, a corporation in a civil action was viewed as citizen of any state where it was incorporated and where it had its principal place of business. Problems arose in interpreting this version when U.S. corporations with foreign contacts or foreign corporations operating in the U.S. were involved: did the term "state" in Section 1332(c)(1) mean only a state within the U.S. or was a "foreign" state also included.

Now section 1332(c)(1) has been amended from "any State" to "every state". The effect of this change means that all domestic and foreign corporations will be citizens of *both* their places of incorporation and their principal places of business. For example, there will no diversity when a citizen of a foreign county sues a U.S. corporation with its principal place of business abroad or a foreign corporation with its principal place of business in a state is sued or sues a citizen in that same state. H.R. Rep. No. 112-10 at 9 (2011).

This new definition also changes the application for insurance companies and direct actions. Direct actions are those lawsuits where the insurer is sued directly by the Plaintiff, rather than the tortfeasor such as in Louisiana. Old section 1332(c)(1) made the insurer a citizen of both its state of incorporation and where it has its principal place of business (just like corporations). Under the Act, the definition is expanded to make the insurer a citizen of every State and foreign state of which the insured is a citizen; every state and foreign state by which the insurer has been incorporated; and the state or foreign state where the insurer has its principal place of business.

With a number of insurance companies operating overseas, this amendment will cause some decrease in removals by insurers.

CONCLUSION

Removal continues to be fluid both in its application and with new amendments to the removal statutes, certainty of change will result. Considerations of whether state pleading rules apply in evaluating improper joinder have caused inconsistency. Whether CAFA jurisdictional amounts can be wired around to prevent or discourage removal depends largely on the Circuit.

ERISA does not equate to automatic federal jurisdiction and consequently removal. Rather, careful attention to pleading and legal research will dictate the propriety of removal.

New changes in removal statutes will in some instances expand removal, while in other cases restrict it. When considering removal be aware of not only the Circuit that you are in but the District as well; read the removal statutes carefully to protect your removal or learn how to successfully attack it. Regardless, a little luck is always welcomed and helpful.