

and Witt were served with La Quinta's petition on March 23, 2020, and March 24, 2020, respectively. La Quinta failed to provide Ohio Casualty or Witt with pre-suit notification 61 days prior to filing as required by the Texas Insurance Code (the "Code"). *See* Tex. Ins. Code Ann. §§ 541.154 & 542A.003 (Supp.). Service of the petition was the first notification Ohio Casualty or Witt received of the suit and they filed pleas in abatement on April 10, 2020. The same day, Ohio Casualty elected to accept Witt's liability related to the claim. The Code allows an insurer to assume legal responsibility for the acts and omissions of an agent. *See id.* § 542A.006(c). On April 22, 2020, Ohio Casualty removed the action to this court claiming complete diversity. La Quinta moves the court to remand the action based on a lack of complete diversity because a claim against the nondiverse party, Witt, existed when the state-court petition was served. Ohio Casualty responds that the court should disregard Witt's Texas citizenship because he was an improperly joined party, and there was complete diversity at the time of removal.

II. Removal Law

The removing party "bear[s] the burden of establishing jurisdiction." *Boone v. Citigroup, Inc.*, 416 F.3d 382, 388 (5th Cir. 2005). "Any ambiguities are construed against removal because the removal statute should be strictly construed in favor of remand." *Manguno v. Prudential Prop. & Cas. Ins. Co.*, 276 F.3d 720, 723 (5th Cir. 2002). A defendant may remove any civil action from state court to a district court of the United States that has original jurisdiction. 28 U.S.C. § 1441(a). District courts have diversity jurisdiction over all civil actions that are between citizens of different states and involve an amount in controversy in excess of \$75,000. *Id.* § 1332(a). Defendants have 30 days after receiving the petition in state court to file notice of removal. *See id.* § 1446(b)(2)(B). Diversity jurisdiction "requires complete diversity—if any plaintiff is a citizen of the same State

as any defendant, then diversity jurisdiction does not exist.” *Flagg v. Stryker Corp.*, 819 F.3d 132, 136 (5th Cir. 2016).

Jurisdictional facts are determined at the time of removal. *Id.* at 137. To determine whether the parties are diverse at time of removal, the court applies the voluntary-involuntary rule: “an action nonremovable when commenced may become removable thereafter only by the voluntary act of the plaintiff.” *Crockett v. R.J. Reynolds Tobacco Co.*, 436 F.3d 529, 532 (5th Cir. 2006). However, courts recognize an exception to the voluntary-involuntary rule where a claim against a nondiverse defendant is dismissed on account of improper joinder. *Id.* The improper-joinder exception to the voluntary-involuntary rule is designed to prevent plaintiffs from blocking removal by joining nondiverse defendants who should not be parties. *Id.* at 533.

Improper joinder “constitutes a narrow exception to the rule of complete diversity.” *McDonal v. Abbott Labs.*, 408 F.3d 177, 183 (5th Cir. 2005). If a court finds that a nondiverse defendant has been improperly joined, then the court may disregard the citizenship of that defendant, dismiss the nondiverse defendant from the case, and exercise jurisdiction over the remaining diverse defendant. *Flagg*, 819 F.3d at 136. Improper joinder may be established in two ways: (1) actual fraud in the pleading of jurisdictional facts; or (2) inability of the plaintiff to establish a cause of action against the nondiverse party in state court. *Travis v. Irby*, 326 F.3d 644, 646–47 (5th Cir. 2003). If there is no allegation of fraud in the pleadings, a court proceeds under the second prong of the test to assess whether the plaintiff has a “reasonable basis of recovery under state law” against the nondiverse defendant. *Smallwood v. Ill. Cent. R. Co.*, 385 F.3d 568, 573 (5th Cir. 2004). Courts in the Fifth Circuit apply a “12(b)(6)-type analysis” to determine whether a plaintiff has a reasonable basis of recovery. *Id.* If a plaintiff has not stated a claim for

relief against a nondiverse defendant, then that defendant was improperly joined, and the court may disregard the nondiverse defendant's citizenship. *Allen v. Walmart Stores, LLC*, 907 F.3d 170, 183 (5th Cir. 2018).

Federal courts apply the federal pleading standard in the 12(b)(6)-type analysis of improper joinder. *International Energy Ventures Mgmt., L.L.C. v. United Energy Grp., Ltd.*, 818 F.3d 193, 208 (5th Cir. 2016). The party requesting dismissal of an improperly joined party must demonstrate "that there is no reasonable basis for the district court to predict that the plaintiff might be able to recover against [a nondiverse] defendant." *Id.* at 199–200. "[T]he existence of even a single valid cause of action against in-state defendants (despite the pleading of several unavailing claims) requires remand of the entire case to state court." *Gray ex rel. Rudd v. Beverly Enterprises-Miss., Inc.*, 390 F.3d 400, 412 (5th Cir. 2004). When considering whether a plaintiff has established a cause of action against the nondiverse party, and the state court has yet to rule on the merits of the plaintiff's claim, "the federal court must ask whether there [is] any reasonable possibility that a state court would rule against the non-diverse defendant." *Hoyt v. Lane Constr. Corp.*, 927 F.3d 287, 296 (5th Cir. 2019) (quotations omitted). If a state court has come to a judgment on the merits, "the federal court must ask whether there [is] any reasonable possibility that the judgment will be reversed on appeal." *Id.* (quotations omitted).

III. Applicable Texas Law

In Texas, an insurer has the option to assume legal responsibility for the acts and omissions of an agent. The Code provides:

- (a) [A]n insurer that is a party to the action may elect to accept whatever liability an agent might have to the claimant for the agent's

acts or omissions related to the claim by providing written notice to the claimant.

(b) If an insurer makes an election . . . before a claimant files an action . . . no cause of action exists against the agent related to the claimant's claim, and, if the claimant files an action against the agent, the court shall dismiss that action with prejudice.

(c) If a claimant files an action . . . against an agent and the insurer thereafter makes an election . . . the court shall dismiss the action against the agent with prejudice.

Tex. Ins. Code Ann. § 542A.006(a)-(c) (Supp.).² The result, dismissal with prejudice of the claims against the agent, is the same for suits brought before and after the insurer's election. *Compare id.* § 542A.006(b) *with id.* § 542A.006(c). An insurer "may not revoke, and a court may not nullify, an insurer's election." *Id.* § 542A.006(f). There is no requirement that the insurer's written notice of the election be made in any particular form, nor is there a requirement that the insurer take any steps other than the election in order to dismiss claims alleged against the agent. *See generally, id.* § 542A.006.

If an insurer makes an election pre-suit, no cause of action exists against the agent and the agent's inclusion in the suit must be ignored when determining the jurisdictional facts as they pertain to removal for diversity. However, federal district courts disagree as to Section 542A.006's effect on removability as applied to an insurer's post-suit election to assume its nondiverse agent's liability. *See Bexar Diversified MF-I, LLC v. Gen. Star Indem. Co.*, No. SA-19-CV-00773-XR, 2019 WL 6131455, at *3 (W.D. Tex. Nov. 18, 2019) (collecting cases).

² "Agent" is defined as "an employee, agent, representative, or adjuster who performs any act on behalf of an insurer." Tex. Ins. Code Ann. § 542A.001 (Supp.). Witt is an agent.

La Quinta contends that even though there is no possibility a plaintiff will recover against the nondiverse defendant in state court following an insurer's post-suit election, the existence of a claim against the nondiverse party at the time the state-court petition was served means the joinder was proper. See *River of Life Assembly of God v. Church Mut. Ins. Co.*, No. 1:19-CV-49-RP, 2019 WL 1468933, at *3 (W.D. Tex. Apr. 22, 2019); *Robbins Place W. Campus, LLC v. Mid-Century Ins. Co.*, No. A-18-CV-875-LY, 2019 WL 2183792 (W.D. Tex. May 21, 2019), *report and recommendation adopted*, 2019 WL 3818039 (W.D. Tex. June 7, 2019). Ohio Casualty responds that even when a plaintiff asserts a viable claim against an agent in a state-court petition, an election of liability by the insurer for the agent's acts or omissions is sufficient to show improper joinder because there is no reasonable basis to predict that the plaintiff might be able to recover against the agent. See *Bexar Diversified*, 2019 WL 6131455, at *3; *Flores v. Allstate Vehicle & Prop. Ins. Co. Co.*, No. SA-18-CV-742-XR, 2018 WL 5695553, at *5 (W.D. Tex. Oct. 31, 2018).

The court finds Ohio Casualty's argument persuasive. Much of the ambiguity in district-court decisions related to the effect on removability of post-suit elections of liability by insurers involve a misapplication of the narrow holding in *Smallwood*. The oft-repeated statement that "the focus of the inquiry must be on the joinder, not the merits of the plaintiff's case" in *Smallwood* is only applicable to the "limited range of cases where the allegation of improper joinder rests on a showing that there is no reasonable basis for predicting that state law would allow recovery against the in-state defendant and that showing is equally dispositive of all defendants." *Smallwood*, 385 F.3d at 573, 576 (known as the common-defense rule). Otherwise, the court looks at the jurisdictional facts at the time of removal to determine if complete diversity is present. *Flagg*, 819 F.3d at 137. "If there is no reasonable basis of recovery, then the court can conclude that the

plaintiff's decision to join the in-state defendant was indeed improper, unless that showing compels the dismissal of *all* defendants." *Cuevas v. BAC Home Loans Servicing, LP*, 648 F.3d 242, 249 (5th Cir. 2011) (emphasis in original).

Application of the Federal Rules of Civil Procedure along with long-standing rubrics that apply to removal such as the voluntary-involuntary rule, improper-joinder exception, no-reasonable-basis-of-recovery test, and common-defense rule make a contrived assessment of insurer pre- or post-suit election unnecessary. The defendant insurer has 30 days after receipt of the petition to file the notice of removal. *See* 28 U.S.C. § 1446(b)(2)(B). In cases involving a diverse defendant insurer and a nondiverse defendant agent with claims implicating the appropriate sections of the Code, it is a function of Texas substantive law that the defendant insurer has the right to fully elect liability for the agent, render the agent improperly joined, and remove to federal court within the timeline set by Section 1446.³ Beyond the 30-day removal deadline, the voluntary-involuntary rule applies. *See id.* § 1446(b)(3).

IV. Analysis

Because a showing of improper joinder as to Witt does not compel the dismissal of all defendants in this case, the court looks at the jurisdictional facts that existed at time of removal. *See Cuevas*, 648 F.3d at 249. Though Ohio Casualty's election to assume Witt's liability was not a voluntary act by the plaintiffs, improper joinder is an exception to the voluntary-involuntary rule,

³ Abatement in state court due to a claimant's failure to comply with the pre-suit notification requirements of the Texas Insurance Code extends the clock under Title 28 United States Code Section 1446(b)(3) in favor of the insurer because the statute explicitly states that pre-suit notification is a prerequisite to filing the claim. *See* Tex. Ins. Code Ann. § 542A.003(a) (Supp.). This court concludes that any other reading of the notice requirement would cloud the Texas Legislature's definitive statutory language. *Contra Yarco Trading Co., Inc. v. United Fire & Cas. Co.*, 397 F. Supp. 3d 939, 951 (S.D. Tex. 2019).

so the court must inquire if Witt's citizenship should be disregarded. *See Crockett*, 436 F.3d at 532. Because there is no claim of fraud in the pleading of jurisdictional facts, the court conducts a Rule 12(b)(6)-type analysis to determine if La Quinta has stated a claim with a possibility of recovery against Witt. *See Hoyt*, 927 F.3d at 296.

Under the Code an insurer may "elect to accept whatever liability an agent might have to the claimant for the agent's acts or omissions related to the claim." Tex. Ins. Code Ann. § 542A.006(a) (Supp.). This election is final, unappealable, and not subject to nullification by a court. *Id.* § 542A.006(f). Ohio Casualty's letter to La Quinta states: "Pursuant to Section 542A.006 of the Texas Insurance Code, this letter serves as Ohio Casualty's election in writing to accept whatever liability Witt might have to your client for any acts or omissions related to the referenced insurance claim." Though there is the possibility that an insurer might elect to assume only some liability of its agent, that is not the case here. *See Project Vida v. Philadelphia Indem. Ins. Co.*, No. EP-20-CV-00082-DCG, 2020 WL 2220193 (W.D. Tex. May 7, 2020). Ohio Casualty's election accepts all of Witt's liability relating to the claim, not just liability under the Code.

Ohio Casualty's election renders Witt improperly joined. The court disregards Witt's citizenship for the purposes of diversity jurisdiction. Because the remaining parties' citizenship was diverse at the time of removal and the amount in controversy exceeds \$75,000, the court exercises jurisdiction over this case. Accordingly,

IT IS ORDERED that La Quinta's motion to remand filed May 5, 2020 (Doc. #6) is **DENIED**.

IT IS FURTHER ORDERED that La Quinta's claims alleged against Witt are **DISMISSED WITHOUT PREJUDICE**.⁴

IT IS FURTHER ORDERED that the parties consult the website for the United States District Court for the Western District of Texas (www.txwd.uscourts.gov), the "Forms" tab, "Austin Division," and submit a joint proposed scheduling order utilizing this court's form **on or before Friday, July 10, 2020**. See Loc. R. W.D. Tex. CV-16(c).

SIGNED this 12th day of June, 2020.



LEE YEAKEL
UNITED STATES DISTRICT JUDGE

⁴ Though the court applies Texas substantive law, which would require dismissal of the claims alleged against Witt with prejudice, the only ground for dismissing an improperly joined, nondiverse party is lack of subject matter jurisdiction. Compare Tex. Ins. Code Ann. § 542A.006(b)-(c) (Supp.) with *International Energy*, 818 F.3d at 210. "The dismissal of a nondiverse party over whom the court does not have jurisdiction must be a dismissal *without prejudice* in every instance." *International Energy*, 818 F.3d at 210 (emphasis in original).