IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

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| ASHLEE GREEN, | § | |
| | § | |
| Plaintiff, | § | |
| | § | |
| v. | § | 2:21-CV-120-Z |
| | § | |
| ALLSTATE VEHICLE AND PROPERTY INSURANCE CO., | § | |
| | § | |
| Defendant. | § | |

**ORDER**

Before the Court is Plaintiff's Motion for Remand (ECF No. 9). For the reasons below, the Court **GRANTS** Plaintiff's Motion. The Court hereby **ORDERS** that this case be **REMANDED** to 47th Judicial District Court of Randall County, Texas.

**BACKGROUND**

This case involves a simple state-law insurance dispute but implicates thorny legal questions that have plagued the federal district courts in Texas. Here, Plaintiff had an insurance policy issued by Defendant that covered her residential property. Plaintiff alleges that the property suffered serious damage caused by a severe storm. Plaintiff made a claim to recover the damages.

Defendant Allstate assigned Steven Buchert as adjuster for the claim. Buchert found $4,005.17 in covered damages but concluded most of the damages were excluded from the policy. Plaintiff alleges that a third-party inspected reviewed the damages and found covered damage to the property in the amount of $46,472.15. Resultingly, Plaintiff brought suit in Texas state court against *both* Allstate and Steven Buchert under various theories: breach of contract, non-compliance with Chapters 541 and 542 of the Texas Insurance Code, breach of the duty of good faith, violations of the Deceptive Trade Practices Act, and fraud.

Allstate was served on May 18, 2021 and filed its Answer in state court on June 1, 2021. Important to this motion, Allstate also filed its Written Notice of Election of Legal Responsibility for Agent pursuant to Texas Insurance Code Section 542A.006. Under this section, a court "shall dismiss the action against the agent with prejudice" if the insurer makes an election to accept all liability for its "agent's act or omissions." *Id.* 542A.006(a), (c). In other words, Allstate accepted all liability for Steven Buchert's actions or omissions related to this case. Resulting, the state court dismissed Buchert from the case with prejudice as required by Texas law.

On June 17, Allstate filed its Notice of Removal. Within the Notice, Allstate asserted that this Court has diversity jurisdiction as the amount in controversy exceeds $75,000 and the *remaining* parties are completely diverse. Plaintiff is a citizen of Texas and Defendant Allstate is an Illinois corporation, and its principal place of business is also located in Illinois. Steven Buchert is citizen of Texas. So there is no dispute that Allstate could *not* have removed the this case before Bucher was dismissed as there was no complete diversity.

Plaintiff filed a Motion to Remand. Plaintiff's argument is simple. Normally, a case that was initially non-removable may only become removable by a *voluntary* act of the plaintiff. *See, e.g.*, *Stephens v. Safeco Ins. Co. of Indiana*, No. 4:18-CV-00595, 2019 WL 109395, at *4 (E.D. Tex. Jan. 4, 2019). Plaintiff argues this judicially created "voluntary-involuntary rule" is applicable here. Defendant counters that an exception to the voluntary-involuntary rule arises when a defendant is improperly joined. Distilled, the legal question is whether a dismissal of a non-diverse defendant by the post-filing operation of Section 542A can convert an undisputedly properly joined defendant at the time of filing into an improperly joined defendant for the purposes of removal and diversity jurisdiction. This question has left the federal district courts in Texas deeply divided. The Fifth Circuit should resolve this question. *But see* 28 U.S.C. § 1447(d).

**LEGAL STANDARDS**

When considering a motion to remand, "[t]he removing party bears the burden of showing that federal jurisdiction exists and that removal was proper." *Manguno v. Prudential Prop. & Cas. Ins. Co.*, 276 F.3d 720, 723 (5th Cir. 2002). When the party relies on improper joinder, the burden of persuasion is a "heavy one." *Kling Realty Co., Inc. v. Chevron USA, Inc.*, 575 F.3d 510, 514 (5th Cir. 2009).

**ANALYSIS**

Much ink has been spilled among the various district courts on this subject and this Court does not have much to add to the debate. Judge Pulliam fairly summed up the opposing lines of cases in a recent decision:

> One line of cases has taken the view that an insurer's post-suit election to accept liability "does not by itself establish improper joinder to defeat remand." These courts conduct the familiar "Rule 12(b)(6)-type analysis" articulated in *Smallwood* and, where the plaintiff has plausibly alleged a claim against the non-diverse defendant, decline to find improper joinder and grant remand. The other line of cases has adopted the conclusion that where an insurer's election "establishes the impossibility of recovery against the non-diverse defendant in state court at the time of removal, the non-diverse defendant is improperly joined and its citizenship may be disregarded for diversity jurisdiction purposes."
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> *Koenig v. Unitrin Safeguard Ins. Co.*, No. SA-20-CV-00887-JKP-HJB, 2021 WL 51762 at *3 (W.D. Tex. Jan. 6, 2021) (quoting *Bexar Diversified MF-1, LLC v. Gen. Star Indem. Co.*, No. SA-19-CV-0773-XR, 2019 WL 6131455, at *11 (W.D. Tex. Nov. 18, 2019)).

Two recent opinions have exhaustively covered the grounds on these topics. Judge Pittman recently found that Defendants had *not* established the improper joinder of a non-diverse adjuster, while Judge Alvarez found the exact opposite. *Compare Kessler v. Allstate Fire and Cas. Ins. Co.*, 2021 WL 2102067 (N.D. Tex. May 25, 2021), *with Ramirez v. Allstate Vehicle and Prop. and Ins. Co.*, 2020 WL 5806436 at *5 (S.D. Tex. Sept. 29, 2020).

Rather than regurgitate the extensive legal analysis provided by these jurists, the Court will simply adopt and incorporate Judge Pittman's analysis in *Kessler*. The Court finds the *Kessler* opinion well-reasoned, thoughtful, and more persuasive overall than *Ramirez*. *Kessler*, 2021 WL 2102067, at *10 ("[N]o Fifth Circuit case holds that the improper-joinder rule requires courts to pretend that a defendant that was initially join[ed] properly became improperly join[ed] later.").

The Court will limit itself to two additional observations in support of the *Kessler* line of cases. First, the Court avers that the *Ramirez* line of cases may be unintentionally collapsing the question of joinder with the resolution of the merits. *Smallwood v. Illinois Cen. R. Co.*, 385 F.3d 568, 573 ("[T]he focus of the inquiry must be on the joinder, not the merits of the plaintiff's case."). By focusing on the state court's dismissal of the non-diverse defendant, *Ramirez* courts are focusing on the plaintiff's failure on the merits and not whether plaintiff had established a *cause of action* in state court, which is the proper inquiry for improper joinder. This is akin to concluding improperly that a failure on the merits of a cause of action deprives a court of its jurisdiction. *See Steel Co. v. Citizens for a Better Envt.*, 523 U.S. 83, 89 (1998) ("Jurisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover.") (quoting *Bell v. Hood*, 327 U.S. 678, 682 (1946); *Bell*, 327 U.S. at 682 ("[I]t is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction.").[1]

Second, the Court finds that *Ramirez* courts' reliance on the recent Fifth Circuit decision in *Hoyt* is misplaced. *Hoyt v. Lane Constr. Co.*, 927 F.3d 287 (5th Cir. 2019). In *Hoyt*, the Fifth Circuit stated "[w]hen a state court order creates diversity jurisdiction and that order cannot be

[1] By way of another analogy, *Ramirez* courts are making the same type of mistakes some courts made in the *Erie* context prior to *Hanna v. Plumer*, 380 U.S. 460 (1965). They are looking at the *actual* outcome in state court to determine if a defendant was improperly joined. Instead, courts should look *ex ante* about whether a cause of action existed, and not whether it failed by the operation of Section 542A.

reversed on appeal, our precedent treats the voluntary-involuntary rule as inapplicable." *Id.* at 297. District courts have treated that statement to mean that *any* state order that is unappealable and that creates diversity jurisdiction displaces the voluntary-involuntary rule. But *Hoyt* need not stand for that sweeping of a proposition.

In support of its statement, the Fifth Circuit cited *Crockett v. R.J. Reynolds Tobacco Co.*, 436 F.3d 529 (5th Cir. 2006). In turn, *Crockett* stated that "removal on the basis of an unappealed severance, by a state court, of claims against *improperly joined* defendants is not subject to the voluntary-involuntary rule." *Id.* at 553 (emphasis added). So *Crockett* stands for the proposition that if the state court finds improper joinder or makes a finding "tantamount to a finding of improper joinder," then the voluntary-involuntary rule is not applicable in the removal context. *Id.*

A proper reading of *Hoyt* and *Crockett* leads then to the conclusion: when a state order creates diversity jurisdiction — *by making a finding of improper joinder (or tantamount to improper joinder)* — and that order cannot be reversed on appeal, precedent treats the voluntary-involuntary rule as inapplicable.

The situation in *Hoyt* itself fits with this reading of *Crockett*. In *Hoyt*, the federal district court found that the state court decision was "tantamount to a determination that [the non-diverse defendant] had been improperly joined." ECF No. 35 at 5, *Hoyt*, No. 4:17-CV-780-A (N.D. Tex. Dec. 4, 2017); *see also Hoyt*, 927 F.3d at 297 n. 4. Accordingly, *Hoyt* stands for the proposition that if a state court finds improper joinder than the voluntary-involuntary rule is inapplicable upon removal. It does not stand for the proposition than *any* state court ruling that dismisses a non-diverse defendant and is unappealable renders the voluntary-involuntary rule inapplicable.

And here, the state court decision did *not* make a finding "tantamount to a finding of improper joinder." Instead, the state court merely dismissed the non-diverse defendant because of

the operation of Section 542A. Restated, the state court did not dismiss the non-diverse defendant because he was improperly joined, but instead dismissed the defendant because of the election of liability by Allstate. This must be so because it is *impossible* to conclude that Plaintiff improperly joined the non-diverse defendant at or before the time of election. [2]

**CONCLUSION**

Accordingly, the Court finds that Steven Buchert was not improperly joined and that the voluntary-involuntary rule *does* apply. This case is not removable. Plaintiff's Motion to Remand is **GRANTED.** The Court hereby **ORDERS** that this case be **REMANDED** to 47th Judicial District Court of Randall County, Texas.

**SO ORDERED.**

August 26, 2021.

MATTHEW J. KACSMARYK
UNITED STATES DISTRICT JUDGE

[2] The Fifth Court in *Hoyt* also concluded that the non-diverse defendant was improperly joined because the state court's dismissal at summary judgment was unchallengeable on appeal. *Hoyt,* 927 F.3d at 297. The plaintiffs in *Hoyt* did not challenge this conclusion in their briefs and therefore *waived* the issue and so it is not binding. In any case, the Fifth Circuit quoted an out-of-circuit case for the proposition that "'[i]f a state court has come to judgment,' the federal court must ask whether 'there [is] any reasonable possibility that the judgment will be reversed on appeal.'" *Id.* at 296 (quoting *Poulus v. Naas Foods, Inc.*, 959 F.3d 69, 73 (7th Cir. 1992)). But *Poulos* is more complicated than that.

In *Poulus*, the state district court granted summary judgment for a non-diverse defendant and dismissed it from the case just like in *Hoyt*. *Id.* at 70. But in concluding that the non-diverse defendant was improperly joined, the Seventh Circuit did not merely rely on the grant of summary judgment to determine that the defendant was improperly joined. Rather, the Seventh Circuit (and the district court) reviewed the *complaint* to see if set forth a viable cause of action. *Id.* at 74 ("Based on the allegation in his *complaint*, Poulos had no chance of recovering damages.") (emphasis added).

This follows from *Poulos*'s premise that to establish improper joinder "the defendant must show that, after resolving all issues of fact *and law* in favor of the plaintiff, the plaintiff cannot establish a cause of action against the in-state defendant." *Id.* at 73 (emphasis in original). The Seventh Circuit specifically noted that "[i]f a state trial court dismisses a defendant (or grants summary judgment, as did the Wisconsin court in the case before us), it does not resolve issues *of law* in either party's favor. Thus, a federal court considering fraudulent joinder in a case where the state court has come to judgment *is not bound* by the state court's decision. If federal courts were bound in such situations, fraudulent joinder would *swallow up* the voluntary/involuntary rule." *Id.* n. 4 (emphasis added); *Kessler*, 2021 WL 2102067, at 10 ("But as articulated in *Ramirez*, the improper-joinder test eviscerates the voluntary-involuntary rule."). *See also Whitcomb v. Smithson*, 175 U.S. 635, 638 (1900) ("The right to remove was not contingent on the aspect the case may have assumed on the facts developed on the merits of the issues tried.").