IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

YOLONDA CARNEY,	§	
	§	
Plaintiff,	§	
	§	
v.	§	**Civil Action No. 4:21-cv-0775-O**
	§	
ALSTATE VEHICLE AND PROPERTY INSURANCE COMPANY et al.,	§	
	§	
Defendants.	§	

ORDER

Before the Court are Plaintiff's Opposed Motion to Remand (ECF No. 5), filed July 23, 2021; Defendants' Response (ECF No. 9), filed August 13, 2021; and Plaintiff's Reply (ECF No. 11), filed August 27, 2021. Having considered these pleadings, the Court finds the matter must be **REMANDED** to the 48th District Court of Tarrant County, Texas.

I. BACKGROUND

The facts pertinent to this Motion are undisputed. This is an ordinary state law dispute over insurance coverage resulting from a hailstorm. Before filing this case in state district court, Plaintiff sent Defendant Allstate Vehicle and Property Insurance Company ("Allstate"), her insurer, and Defendant Bryan Obichukwu Aniekwena ("Aniekwena"), Allstate's adjuster, a demand letter explaining how Plaintiff believed they are liable for their actions concerning storm damage to her home. Defendants did not respond, nor did Allstate elect to assume the liability of Aniekwena in connection with Plaintiff's claims. Plaintiff filed suit against both of them. Defendants filed a Notice of Removal, and Allstate simultaneously elected to assume Aniekwena's liability in connection with Plaintiff's insurance code claims against him. *See* Notice of Removal 2, ECF No. 1. Because Allstate elected to assume Aniekwena's liability, it contends Aniekwena

was improperly joined and therefore his citizenship should be disregarded when determining whether diversity exists. *Id.*

II. LEGAL STANDARD

A. Removal Jurisdiction

Title 28 U.S.C. § 1441(a) permits the removal of "any civil action brought in a [s]tate court of which the district courts of the United States have original jurisdiction." 28 U.S.C. § 1441(a). The statute allows a defendant to "remove a state court action to federal court only if the action could have originally been filed in federal court." *Anderson v. Am. Airlines, Inc*., 2 F.3d 590, 593 (5th Cir. 1993). But courts must strictly construe the removal statute because "removal jurisdiction raises significant federalism concerns." *Willy v. Coastal Corp.*, 855 F.2d 1160, 1164 (5th Cir. 1988); *see also Gutierrez v. Flores*, 543 F.3d 248, 251 (5th Cir. 2008). Therefore, "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). The party seeking removal bears the burden of establishing federal jurisdiction. *Willy*, 855 F.2d at 1164.

There are two principal bases upon which a district court may exercise removal jurisdiction: the existence of a federal question and complete diversity of citizenship among the parties. *See* 28 U.S.C. §§ 1331, 1332. Here, Allstate, the removing defendant, asserted only diversity of citizenship as a basis for jurisdiction. *See* Notice of Removal 1, ECF No. 1. Courts can properly exercise jurisdiction on the basis of diversity of citizenship after removal only if: (1) the parties are of completely diverse citizenship; and (2) none of the properly joined defendants are a citizen of the state in which the case is brought.[1] *See* 28 U.S.C. § 1441(b). If a nondiverse party is

[1] The amount-in-controversy requirement of 28 U.S.C. § 1332(a) has not been disputed in this case.

present in the action, the court may nonetheless have jurisdiction if an in-state defendant has been improperly joined.

B. Improper Joinder

The doctrine of improper joinder is a narrow exception to the requirement of complete diversity and provides that a defendant may remove a case to a federal forum if the plaintiff improperly joined the sole in-state defendants. *See Smallwood v. Ill. Cent. R.R.*, 385 F.3d 568, 573 (5th Cir. 2004). "[A] nondiverse defendant has been improperly joined if the plaintiff has failed to state a claim against that defendant on which relief may be granted." *Int'l Energy Ventures Mgmt., LLC v. United Energy Grp. Ltd.*, 818 F.3d 193, 202 (5th Cir. 2016). However, "if the plaintiff has stated a claim against a nondiverse defendant on which relief *may* be granted, a federal court is without . . . *diversity* jurisdiction . . . over that claim and, by extension, over any claims." *Id.* To establish that a plaintiff has improperly joined a nondiverse defendant to defeat diversity jurisdiction, the removing party must show: "(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." *Id.* at 205.

There is no allegation of fraud in the pleading in this case, so the first ground is inapplicable. The second ground for improper joinder then requires a court to find "no reasonable basis . . . to predict that the plaintiff *might* be able to recover against an in-state defendant." *Smallwood*, 385 F.3d at 573 (emphasis added). To "predict[] whether a plaintiff has a reasonable basis of recovery under state law," a court may "conduct a Rule 12(b)(6)-type analysis" or "pierce the pleadings and conduct a summary inquiry." *Id.* When conducting a 12(b)(6)-type analysis, a federal court must apply the federal pleading standard. *Int'l Energy Ventures Mgmt., LLC*, 818 F.3d at 202 ("When determining the scope of its own jurisdiction, a federal court does so without

reference to state law, much less state law governing pleadings."). "Ordinarily, if a plaintiff can survive a Rule 12(b)(6) challenge, there is no improper joinder." *Smallwood*, 358 F.3d at 573. But "the decision regarding the procedure necessary in a given case must lie within the discretion of the trial court." *Id.* And "[t]he party seeking removal bears a heavy burden." *Id.* at 574.

III. ANALYSIS

Allstate makes no argument that Aniekwena was improperly joined at the litigation's inception. Instead, Allstate contends that once it elected to assume responsibility for Aniekwena's liability, his citizenship should be disregarded when considering whether diversity jurisdiction exists in this case. The primary question then "is whether an action non-removable when commenced due to the lack of complete diversity among the parties, becomes removable based *solely* on a diverse insurer's election to accept complete liability of a nondiverse adjuster." *Stephens v. Safeco Ins. Co. of Ind.*, No. 4:18-CV-00595, 2019 WL 109395 at *2 (E.D. Tex. Jan. 4, 2019). On this question, Plaintiff argues this case should be remanded because Allstate elected to accept liability for the nondiverse defendant, Aniekwena, *after* this litigation commenced and therefore the voluntary-involuntary rule provides his citizenship is to be considered for diversity purposes. Pl.'s Mot. Remand 3, ECF No. 5. Allstate responds that the timing of its election is not dispositive because certain cases indicate that removal is proper when an insurance company elects responsibility for its adjustor no matter when the election was made. Defs.' Resp. 2–3, ECF No. 9.[2]

A. Voluntary-Involuntary Rule

The voluntary-involuntary rule recognizes that "a case nonremovable on the initial pleadings [may] become removable only pursuant to a voluntary act of plaintiff." *Stephens*, 2019

[2] Allstate argues only that electing to assume liability for Aniekwena justifies disregarding his citizenship. It does not otherwise argue that any other reason exists to disregard it.

WL 109395, at *3 (alteration in original) (internal quotation marks omitted) (quoting *Weems v. Louis Dreyfus Corp.*, 380 F.2d 545, 547 (5th Cir. 1967)). In *Weems*, the Fifth Circuit adopted the voluntary-involuntary rule and held that "an action commenced in state court against a non-diverse defendant and a diverse defendant—nonremovable to federal court when commenced due to lack of diversity of citizenship—could not thereafter be removed when the non-diverse defendant was dismissed by means of a directed verdict." *Id.* (citing *Weems*, 380 F.2d at 548). In *Stephens*, the Eastern District of Texas adopted the voluntary-involuntary rule for removals like the one at issue in this case—where an insurer elects to accept an adjuster's liability pursuant to the Texas Insurance Code *after* being sued in state court. *See id.* at *3–*4. It found that an "[insurer]'s election and [adjuster]'s dismissal are undoubtedly involuntary acts of [Plaintiff]." *Id.* at *4.

In this case, Allstate elected to accept liability for—and presumably sought to unilaterally obtain a dismissal of—Aniekwena under Texas Insurance Code Section 542A.006 *after* Plaintiff filed suit. *See* Notice of Removal 3–4, ECF No. 1. Section 542A.006 provides Allstate "unabridged discretion in deciding whether to elect to accept legal liability . . . [for] its agent/adjuster." *Stephens*, 2019 WL 109395, at *4. Notably, Allstate's decision "is not contingent on and does not anticipate [Plaintiff's] assent." *Id.* Here, Allstate made no effort to accept liability before suit was filed, even though it had notice, deciding instead to wait. While its election means Plaintiff cannot recover from Aniekwena, it does not undermine the propriety of Aniekwena's initial joinder.

This unilateral action mirrors the involuntary action examined in *Stephens*. Accordingly, the Court finds that this case did not "become removable only pursuant to a voluntary act of plaintiff," and should be remanded to state court. *Id.* at *3. Indeed, as of the date of this order, Aniekwena has yet to be dismissed by any court.

Because Allstate argues the improper-joinder doctrine may overcome the voluntary-involuntary rule, the Court will determine if the improper-joinder doctrine applies to this case.

B. Improper Joinder

Allstate argues that its election requires the Court to disregard Aniekwena's citizenship because after the election Plaintiff has no reasonable basis for recovery against Aniekwena, meaning he was improperly joined. Defs.' Br. 2–3, ECF No. 9. Allstate's argument, however, "wholly disregards the joinder itself and, instead, proposes that the Court adopt a blanket 'no possibility of recovery' rule as dispositive to an improper joinder analy." *Stephens*, 2019 WL 109395, at *4. Its contention that Aniekwena *became* improperly joined when Allstate elected to accept his liability is incorrect. Only if Aniekwena was improperly joined *after* that election should his citizenship be disregarded. *See Lewis v. Safeco Ins. Co. of Ind.*, No. 4:21-CV-00149-P, 2021 WL 1250324, at *3 (N.D. Tex. Apr. 5, 2021) (Pittman, J.).

In the Fifth Circuit, "the focus of the inquiry must be on the joinder," not on subsequent events. *Smallwood*, 385 F.3d at 573. And, importantly, "a diverse defendant arguing improper joinder has the heavy burden of showing that, while a non-diverse defendant is facially a proper party to an action, the relevant laws and jurisdictional facts—whether known or unknown, but certainly existing, *at the time of the joinder*—establish that the non-diverse defendant is an improper party and should not have been joined to the suit." *Stephens*, 2019 WL 109395, at *5 (emphasis added). That is not the case here. Allstate's necessary-dismissal argument did not arise until it elected to accept Aniekwena's liability, which occurred *after* his initial joinder. And "[i]t does not follow that a non-diverse defendant that is *initially* properly joined may become *initially* improperly joined." *Id.* (emphasis added). Improper joinder is not retroactive at Defendants'

discretion.[3] Accordingly, the Court finds that Allstate's arguments fail to establish that Plaintiff had no possibility of recovery against Aniekwena when this suit was filed.

IV. CONCLUSION

Based on the foregoing and noting that "any doubts concerning removal must be resolved against removal and in favor of remanding the case back to state court," the Court finds that Plaintiff's Opposed Motion to Remand is **GRANTED** for lack of subject matter jurisdiction. This case is hereby **REMANDED** to the **48th District Court of Tarrant County, Texas**. The clerk shall mail a certified copy of this order to the district clerk of Tarrant County, Texas. 28 U.S.C. § 1447(c).

SO ORDERED on this **21st day** of **September, 2021**.

Reed O'Connor
UNITED STATES DISTRICT JUDGE

[3] The Honorable Mark T. Pittman has meticulously analyzed the historical background of, and interplay between, the voluntary-involuntary rule and the improper-joinder doctrine. *See Morgan v. Chubb Lloyds Ins. Co. of Tex.*, No. 4:21-CV-00100, 2021 WL 2102065 (N.D. Tex. May 25, 2021). The Court follows his view that the focus on an improper joinder claim is on the initial joinder. And if initial joinder is proper, the voluntary-involuntary doctrine does not otherwise alter it.