VENUE, JURISDICTION AND REMOVAL IN TEXAS

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I. TEXAS VENUES

Texas has 254 counties spanning across 267,339 square miles. The King Ranch in South Texas is larger than the state of Rhode Island. In fact, Forty-one counties in Texas are each larger than the state of Rhode Island. DFW airport is larger than the island of Manhattan. El Paso, Texas is closer to Los Angeles on the Pacific Coast than it is to Port Arthur on Gulf Coast of Texas. Port Arthur, on the other hand, is closer to Jacksonville, Florida on the Atlantic Coast than it is to El Paso. In all, Texas makes up 7.4% of the United States' total size. Texas has an impressive economy with export shipments in 2006 totaling $150.9 billion, the largest among the 50 states. In addition, Texas is one of the most diverse states in the country. In 2006, 50.2% of Texans were women, 48.3% were anglo, 11.9 % of Texans were African American and 35.7% were Hispanic/Latino.

When considering the size, diversity, economy, and complexity of the state of Texas, the practical rules of jurisdiction, venue, and removal of a lawsuit many times will have equal consideration to parties as the actual merits of the case. This paper discusses the practical considerations in determining venue and the ability to remove a case in Texas Courts.

II. CHOICES

A. Jurisdiction

It is important to apply the appropriate jurisdiction in considering the potential coverage afforded by an insurance policy. Choice of jurisdiction problems arise in the context of liability policies because the insurer, insured, and tort plaintiff might all be from different states, and the incident might have occurred in another. Correct resolution of any choice of jurisdiction issue is particularly important with respect to the duty to defend, as Texas follows a fairly strict complaint allegation rule and many other states do not.

In Texas, all choice of jurisdictional issues, except those involving contracts with a valid jurisdictional clause, are resolved in favor of the law of the state with the most significant relationship to the particular substantive issue. *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 421 (Tex. 1984).

An analysis of jurisdictional law must start with Article 21.42 of the Texas Insurance Code, which provides a provision that states:

> Any contract of insurance payable to any citizen or inhabitant of this State by any insurance company or corporation doing business within this State shall be held to be a contract made and entered into under and by virtue of the laws of this State relating to insurance, and governed thereby ....

Although the statute appears to be clear and unambiguous, the courts have not necessarily always applied it as such. For comparison of different applications of the statute, *see W.R. Grace & Co. v. Continental Casualty Co.*, 896 F.2d 865, 883 (5th Cir. 1990). *See also, Hull & Co. v. Chandler*, 889 S.W.2d 513 (Tex.App. -- Houston [14th Dist.] 1994, writ denied). Two of the more recent decisions to address choice of jurisdictional questions are *St. Paul Mercury Insurance Company v. Lexington Insurance Company*, 78 F.3d 202 (5th Cir.1996) and *Snydergeneral Corporation v. Great American Insurance Company*, 928 F.Supp. 674 (N.D.Tex. 1996). In *St. Paul*, the tort plaintiff suffered an injury while working in Louisiana. As a result of his injuries, the tort plaintiff brought suit against a Louisiana corporation, which was a wholly-owned subsidiary of a Texas corporation. Three of the four policies of insurance in dispute were issued and delivered to the Texas corporation in Texas. In determining which jurisdiction had the most significant contracts, the Fifth Circuit concluded that, although Louisiana had the most significant contract with respect to the underlying litigation, Texas had the most significant contracts with respect to the insurance dispute and therefore Texas law should apply.

In *Snydergeneral*, the insured was a Delaware corporation, with its principal place of business in Texas. One of the policies in question was negotiated and delivered in the State of Texas which provided coverage for operations in California. A second policy of insurance was issued to its subsidiary which was incorporated and based in Minnesota and the policy was delivered in Minnesota. With respect to the first policy, the district court concluded that Article 21.42 of the Texas Insurance Code applied and therefore the policy had to be governed by Texas law. The court noted that the insured had its principal place of business in Texas, the insurance company was doing business in Texas, and the policy was issued and delivered in Texas. On the other hand, the court concluded that Minnesota law applied to the other policy. The court noted that the policy was negotiated and purchased in Minnesota and the insured was a Minnesota corporation.

B. Construction

Insurance policies are contracts, and as such, are governed by the rules of construction applicable to contracts in general. *State Farm Life Ins. Co. v. Beaston*, 907 S.W.2d 430 (Tex.1995); *Forbau v. Aetna Life Ins. Co.*, 876 S.W.2d 132 (Tex. 1994). When the terms used in an insurance policy are

unambiguous, they are to be given their plain, ordinary, and generally accepted meaning, unless the instrument itself shows the terms have been used in a technical or different sense. *Security Mut. Casualty Co. v. Johnson*, 584 S.W.2d 703 (Tex. 1979).

The determination of whether the terms in an insurance policy are ambiguous is a question of law for the court to decide. *Grain Dealers Mut. Ins. Co. v. McKee*, 943 S.W.2d 455 (Tex. 1997); *Yancey v. Floyd West & Co.*, 755 S.W.2d 914 (Tex. App.--Fort Worth 1988, writ denied). However, the courts are not permitted to create ambiguity where none exists. Where the terms of the policy are unambiguous, a court cannot vary those terms and must enforce the contract as written. *Royal Indem. Co. v. Marshall*, 388 S.W.2d 176 (Tex. 1965).

In order to find an insurance policy ambiguous, the court must determine that there are two or more reasonable interpretations of the policy. An insurer may not escape liability merely because its interpretation of the policy is more likely a reflection of the true intent of the parties than the interpretation urged by the insured. The only requirement is that the insured's interpretation not be unreasonable. *Continental Casualty Co. v. Warren*, 254 S.W.2d 762, 763 (Tex. 1953). Where the dispute involves exceptions or limitations on the insurer's liability, the most restrictive construction must be applied.

It is important to note that the special rules favoring the insured are only applicable where there is an ambiguity in the policy. If the terms in questions are susceptible of only one reasonable construction, then the court cannot apply any rules of construction. *National Union Fire Ins. Co. of Pittsburgh, PA v. CBI. Indus., Inc.*, 907 S.W.2d 517, 520 (Tex. 1995); *Puckett v. U.S. Fire Ins. Co.*, 678 S.W.2d 936, 938 (Tex. 1984).

III. JURISDICTION

A. Federal Court

1. *Federal Jurisdiction Question* 28 U.S.C. § 1331

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

2. *Diversity of Citizenship* 28 U.S.C. § 1332

a. The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—

(1) citizens of different States;
(2) citizens of a State and citizens or subjects of a foreign state;
(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
(4) a foreign state, defined in section 1603(a)of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, sections 1335 and 1441, state that an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

b. Except when express provision … is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

c. For the purposes of this section and section 1441 of this title—

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business; and
(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

d. **The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.**

3. Precedent

Schiavo ex rel. Schindler v. Schiavo.

Jurisdiction can become a fertile ground for litigation and in recent years, such cases have made headlines across the country. In March 2005, the case of whether to remove the breathing tube of Terri Schiavo prompted appeals in the Florida Court of

Appeals[1], the Federal 11th Circuit Court of Appeals[2], certiorari to the U.S. Supreme Court, and finally action by the U.S. Congress to enact Public Law 109-3. According to this law, the U. S. District Court for the Middle District of Florida was granted jurisdiction to hear a suit regarding the alleged violations of rights held by Terri Schiavo under the Constitution and laws of the United States.

This law was unique in recent history because as the Court of Appeals noted, the Act eliminated constitutional and procedural barriers to the federal jurisdiction that would otherwise have kept the dispute out of federal court. Among those barriers was; (1) exhaustion of remedies; (2) standard of review; (3) the *Rooker-Feldman* doctrine; and (4) abstention. The immediate question was whether or not to grant a temporary restraining order to prohibit the removal of Ms. Schiavo's breathing tube.

Traditional rules governing appellate review of restraining orders provide that generally, a lower court's grant or denial of such relief is NOT appealable. Judge Whittemore, of the Middle District of Florida, had ruled that the plaintiffs could not show a substantial likelihood of success on the merits of their claims regarding Terri Schiavo's federally-protected civil rights not to have her life support removed over her husband's wishes, and so the plaintiffs were not entitled to the relief they sought. Both the state and federal courts ruled that the Schindlers had shown that irreparable injury would be suffered if the relief was not granted, that the threatened injury would outweigh any harm to Michael Schiavo, and that entry of injunctive relief was in the public interest.[3]

When the straightforward appellate relief was denied, the Schindlers invoked virtually every possible and tenuous theory of jurisdiction to obtain a stay, injunction or temporary relief under federal practice. However, despite their creativity, their lawyers were unsuccessful. Ultimately the U.S. Supreme Court denied certiorari without opinion and Terri Schiavo died shortly after the denial of rehearing *en banc*. The core issues were:

(1) whether or not the courts' power to say what the law is may be limited to certain subjects; or

(2) whether or not the court's power carries with it the equivalent of a "necessary and proper" clause such as the one contained in Article 1, Section 8 of the U.S. Constitution.

Both are open questions.

***Lincoln Property Co. v. Roche* – Measuring the Extent of Diversity Jurisdiction**

The Roches leased an apartment in Virginia which somehow developed toxic mold. They moved out to allow remediation, but left behind their personal belongings. Lincoln managed the property and the belongings were in their care. When the Roches returned their personal property was either lost or stolen. The Roches filed two lawsuits in Virginia state court naming Lincoln (property manager – a Texas corporation), INVESCO (property developer), and the State of Wisconsin Investment Board (property owner). Defendants timely removed the case to federal court. The parties moved for summary judgment and the court granted defendant's motion. Plaintiffs moved to remand to state court before the judgment was final, alleging a lack of diversity as to Lincoln, because Lincoln was a partnership with a Virginia partner, thus destroying complete diversity. The District court denied the remand.

The case was appealed to the fourth circuit that reversed and directed the district court to remand to state court. The issue was that an entity not named in the original suit (the Virginia partner of Lincoln) could be deemed a real party in interest whose presence would then destroy diversity. The Supreme Court granted certiorari because of the conflict among the circuit courts.

The plaintiffs are the makers of their complaint and under the "well pleaded complaint" rule, they are in sole control of the allegations and over which parties are sued. The defendant has no obligation to name any affiliated subsidiaries or related entities that might be involved and whose joinder would operate to destroy diversity of citizenship.

***Wachovia Bank, N.A. v. Schmidt* – Diversity and National Banks**

Schmidt and other plaintiffs sued Wachovia in South Carolina state court for alleged fraudulent inducement into an illegal tax shelter. Wachovia is a national banking association with it principal place of business in North Carolina. Wachovia filed its own action in South Carolina federal district court to compel arbitration, alleging jurisdiction based on diversity. Wachovia's petition was denied and Wachovia appealed.

The fourth circuit court found that diversity did not exist.

***Exxon Mobil Corp. v. Allapattah Services, Inc.* – Supplemental Jurisdiction**

Approximately 10,000 Exxon dealers alleged Exxon had systematically overcharged them for fuel. Some, but not all, of the class members satisfied the minimum jurisdictional amount. The jury returned a unanimous verdict for the class. Exxon appealed on

[1] *Schiavo ex rel. Schindler v. Schiavo,* 403 F.3d 1289 (11th Cir. 2005), *rehearing en banc denied,* 404 F.3d 1270 (2005) (Birch, J., concurring specially).

[2] *Schiavo ex rel. Schindler v. Schiavo,* 404 F.3d 1270, 1273 (11th Cir. 2005).

[3] *Schiavo ex rel. Schindler v. Schiavo,* 424 F.3d 1223, 1225 (11th Cir., 2005).

the question of whether all of the class members should have been included, since they did not all have a minimum claim of $75,000. The eleventh circuit decided the district court had properly exercised supplemental jurisdiction.

The rule is, so long as at least one named plaintiff in an action satisfies the amount-in-controversy requirement, 28 U.S.C. Section 1367 will authorize supplemental jurisdiction over the claims of the other plaintiffs in the same action, even if those claims are for less than those contained in 28 U.S.C. § 1332.

Section 1367. Supplemental Jurisdiction

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—

(1) the claim raises a novel or complex issue of State law;
(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction;
(3) the district court has dismissed all claims over which it has original jurisdiction; or
(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

***Luv N' Care, Ltd. V. Insta-Mix, Inc.* – Personal Jurisdiction**

Luv N'Care is an international corporation based in Monroe, Louisiana. Insta-Mix is a small Colorado company with a patented plastic bottle designed with a freezable core. The lid to the bottle resembled a lid to a Luv N'Care bottle lid. Insta-Mix sold 3,696 bottles through Wal-Mart in Louisiana. Luv N'Care sued Insta-Mix for copyright infringement, trademark dilution and unfair competition under the Lanham Act of intellectual property rights. Insta-Mix asserted lack of personal jurisdiction.

Personal jurisdiction can be established over an out-of-state defendant by means of:

1. continuous and systematic business general contacts with the forum state; and
2. specific conduct tied to the jurisdiction or the state.

The court in Insta-Mix reasoned that "where a defendant knowingly benefits from the availability of a particular state's market for its products, it is only fitting that the defendant be amendable to suit in that state." *Luv N' Care, Ltd. V. Insta-Mix, Inc.*, 438 F.3d 465, 469 (5th Cir. 2006).

B. State Court

The Texas rules do not require a party to allege the court has jurisdiction like the federal rules. Rather, the plaintiff must plead sufficient facts to affirmatively demonstrate the trial court has jurisdiction. *TDCJ v. Miller*, 51 S.W.3d 583, 587 (Tex. 2001). The requirements for a court to be able to render a binding judgment can be formulated as follows:

1. court must have jurisdiction over the parties or property – a resident of Texas or have property within Texas, or does business in Texas;
2. jurisdiction of the subject matter of the suit – amount in controversy for common law claims, and statutory claims, e.g. eminent domain, eviction, FELA, Jones Act;
3. jurisdiction to enter the particular judgment; and
4. capacity to act as a court.

***State Bar v. Gomez*, 891 S.W.2d 243, 245 (Tex. 1994) – Amount in Controversy ("AIC")**

The Texas court system is made up of district courts, county courts, justices of the peace, probate courts, and various other courts established by legislative enactment (e.g. tax court, municipal traffic court, constitutional county court, juvenile court, etc.). Each type of court has jurisdiction over specific types of cases and amounts in controversy. All courts can render a judgment for damages, but not all courts can render a judgment for injunctive relief.

The amount in controversy is calculated by examining the plaintiff's good-faith pleadings – *Peek v. Equipment Serv. Co.*, 779 S.W.2d 802, 804 (Tex.

1989). When a pleading asserts multiple claims against a single defendant, jurisdiction is determined by adding the various amounts claimed together, i.e. aggregating the claims. *Texas City Tire Shop v. Alexander,* 333 S.W.2d 690, 693 (Tex.App.—Houston [1st Dist.] 1960, no writ). If alternative theories are pled, then jurisdiction is determined according to the theory that would yield the highest award. *Lucey v. Southeast Tex. Emerg. Physicians Assocs.,* 802 S.W.2d 300, 302 (Tex.App.—El Paso 1990, writ denied).

Where multiple plaintiffs assert claims against a single defendant, those claims are aggregated to calculate the amount in controversy. Gov't Code § 24.009. This means if 1,000 plaintiffs assert damages of $100 against a single credit card company, their amount in controversy would be $1,000,000.

Where multiple plaintiffs assert separate, independent, and distinct claims against multiple defendants, the AIC is calculated by looking at each claim separately, with no aggregation. Thus, one plaintiff suing 10 credit card companies for $100 dollars each would have only $100 in controversy and would need to file suit in justice court or small claims court.

Other factors –

1. Counter-claims are judged on their own merit and cannot be for an amount above the court's maximum jurisdiction. *See Kitchen Designs v. Wood*, 584 S.W.2d 305, 307 (Tex.App.—Texarkana 1979, writ ref'd n.r.e.). If the counter-claim is above the jurisdictional limits, then the court should dismiss the counter-claim on the other party's motion. Counter-claims of multiple defendants are not aggregated. *Smith v. Clary Corp.*, 917 S.W.2d 796, 798 (Tex. 1996), see Gov't Code § 24.009.
2. A court cannot assert jurisdiction over a claim that is above its maximum jurisdictional limits. *Hawkins v. Anderson,* 672 S.W.2d 293, 296 (Tex. App.—Dallas 1984, no writ).

Amending to exceed jurisdictional limits –

1. As a general rule, once jurisdiction is properly established, no later fact or event can defeat the court's continuing jurisdiction. *Continental Coffee Prods. Co. v. Cazarez*, 927 S.W.2d 444, 449 (Tex. 1996).
2. If an amendment adds a claim for damages that existed at the time the suit was filed but was not included in the original petition, and if the additional claim is outside the court's jurisdiction, the additional claim should be dismissed on a plea to the jurisdiction. *Hawkins v. Anderson,* 672 S.W.2d 293, 296 (Tex.App.—Dallas 1984, no writ).

Amending to correct amount in controversy –

1. If a pleading makes a claim for non-severable liquidated damages that are outside the trial court's jurisdiction, then the party cannot amend its damage claim to state an amount that is within the court's jurisdiction. *Smith Detective Agcy. v. Stanley Smith Sec.*, 938 S.W.2d 743, 747 (Tex.App.—Dallas 1996, writ denied).
2. However, if the claim is for un-liquidated damages, a party may amend its claim for damages to an amount within the court's jurisdiction if the pleading is done in good faith. *Id.*

Interest –

1. Interest (*eo nomine – "interest as interests"*) is excluded from calculation of the amount in controversy. Interest *eo nomine* is provided for by agreement (i.e. contract, purchase order, etc.) or by statute. It is part of the debt.
2. Interest as damages is included in the amount in controversy calculation. *Weidner v. Sanchez,* 14 S.W.3d 353, 360-61 (Tex.App.—Houston [14th Dist.] 2000, no pet.). Interest as damages is interest added to the debt for not paying a sum by a certain time when it is due. This includes equitable prejudgment interest.

Attorneys Fees –

1. Attorney's fees are generally included in the amount in controversy. *Johnson v. Universal Life & Acc. Ins. Co.*, 94 S.W.2d 1145, 1146 (Tex. 1936).
2. However, Gov't Code § 25.0003(c)(1) specifically excludes attorney's fees, penalties and statutory or punitive damages from the amount in controversy for suits filed in county courts at law. *Smith v. Clary Corp.*, 917 S.W.2d 796, 798 (Tex. 1996).

Costs –

1. Costs of court are not included in the amount in controversy.

C. Amount in Controversy for Each Court Level

Texas courts have overlapping jurisdiction as follows:

1. Justice Court & Small Claims Courts - $.01 to $10,000 [Gov't Code § 27.031(a)(1)]
2. County Courts at Law - $200.01 to $100,000 [Gov't Code § 25.0003(c)(1)]

3. Constitutional County Courts - $200.01 to $10,000 [Gov't Code § 26.042(a)]
4. District Courts - $200.01 with no limit [Gov't Code § 24.007]

D. Other Jurisdictional Issues

1. The Texas Supreme Court is the final statewide appellate jurisdiction in civil cases and juvenile cases.
2. There are 14 courts of appeals whose jurisdiction is based on geographical region. These courts are the intermediate level between the trial courts in their regions and the State Supreme Court. Houston has two such courts, the 1st District and the 14th District.
3. There are 432 state district courts. They have jurisdiction over matters of divorce, title to land, contested elections, and juvenile matters.
4. There are 216 county courts at law from 84 counties. They can handle virtually all civil litigation up to $100,000.
5. There are 17 probate courts in 10 counties—other counties will use county courts at law for probate matters. The 17 probate courts have jurisdiction limited to probate matters.
6. There are 254 constitutional county courts—mainly in smaller counties that handle all civil matters between $200.01 and $10,000, probate, and appeals from justice of the peace courts or municipal courts.

IV. VENUE

Venue is a county in Texas where the case should be filed. It is where all or a substantial part of the acts or omissions occurred. TEX. CIV. PRAC. & REM. CODE § 15.002(a)(1). Venue is determined by the facts as they existed at the time the cause of action accrued. TEX. CIV. PRAC. & REM. CODE § 15.006. Accrual occurs when the wrongful act causes legal injury, even if the injury is not discovered until some time later and all resulting damages have not yet occurred.

A. Definitions

1. A company's principal office means a Texas office where the decision-makers for the organization within Texas conduct daily affairs of the organization. TEX. CIV. PRAC. & REM. CODE § 15.001(a). Mere presence of an agent or representative in a county does not establish a principal office in that county.
2. A person can have more than one residence for purposes of venue, but the venue is fixed to where the person resided at the time the cause of action accrued. TEX. CIV. PRAC. & REM. CODE § 15.002(a)(2).
3. Residence is established by possessing a fixed place of abode and occupying or intending to occupy a place over a substantial period of time in a permanent, rather than a temporary manner. *Snyder v. Pitts*, 241 S.W.2d 136, 140 (Tex. 1951).

B. Venue Provisions

Mandatory – a suit must be filed in a county of mandatory venue. *See generally*, TEX. CIV. PRAC. & REM. CODE § 15.011-15.020. The mandatory rules are given below:

1. Suit affecting Title to Land – in the county where all or a substantial part of the land is located.
2. Landlord-Tenant suits – in the county where all or part of the real property is located.
3. Mandamus against the State – if against a head of a department of the State of Texas, it must be filed in Travis County (Austin, Texas).
4. Defamation or invasion of privacy – (1) in the county where the plaintiff resided at the time the cause of action accrued, or (2) where the defendant resided when the suit was filed, (3) county where all defendants reside, or (4) domicile of any corporate defendant.
5. FELA & Jones Act
   - In the county where all or a substantial part of the events or omissions occurred,
   - Where the defendant's principal office in Texas is located,
   - Where the plaintiff resided at the time the cause of action accrued.
6. Contractual Agreement on venue – in a transaction involving at least $1 million, the parties to a contract can agree to a venue in a certain county. TEX. CIV. PRAC. & REM. CODE § 15.020(a)-(c).
   - Except in major transactions, parties cannot contractually agree before suit to a venue contrary to a mandatory venue provision or a specific venue statute. *See e.g. Leonard v. Paxson*, 654 S.W.2d 440, 441-42 (Tex. 1983).
7. Texas Tort Claims Act
   - The TTCA provides the suit "shall" be brought in the county where the cause of action or a part of the cause of action arises. Tex. Civ. Prac. & Rem. Code § 101.102(a).
8. Probate
   - Venue largely depends on where the applicant resides, where the decedent was domiciled, or where the majority of the estate is located.

- Venue for guardianship of a minor depends on where the parents reside. Tex. Prob. Code § 610.

9. Trust
   - In the county where the trustee resided or where the trust was administered
   - An action against a corporate trustee may be brought in the county of the trustee's principal office.
10. Insurance Contract
    - Mandatory venue provisions are given in the Insurance Code.
      1. In a suit for coverage, the county where the policyholder or beneficiary resided at the time of the accident
      2. In the county where the accident involving the uninsured motorist occurred
    - Permissive venue provisions are given in the Texas Civil Practice & Remedies Code.
      1. In a suit against a fire, marine, or inland insurance company, it is permissive to file in the county where the insured property is located, or
      2. In a suit against a life, accident, or health insurance company, in the county where the loss occurred, or where the policyholder resided at the time the cause of action accrued. TEX. CIV. PRAC. & REM. CODE § 15.032.
11. General Venue Rule is used when there is no mandatory rule.
    - Where all or a substantial part of the events occurred. TEX. CIV. PRAC. & REM. CODE § 15.002(a)(1).
    - Defendant's residence at the time the cause of action accrued, if the defendant is a natural person. TEX. CIV. PRAC. & REM. CODE § 15.002(a)(2).
    - Defendant's principal office if the defendant is a corporation. TEX. CIV. PRAC. & REM. CODE § 15.002(a)(3).
    - Plaintiff's residence at the time the cause of action accrued, if no other provision applies. TEX. CIV. PRAC. & REM. CODE § 15.002(a)(4) – usually comes into play against a non-resident defendant and where the cause of action accrues outside of Texas.

C. Multiple Parties & Claims

1. Multiple plaintiffs – each plaintiff or intervener must establish their own venue facts independent of the others. TEX. CIV. PRAC. & REM. CODE § 15.003(a), *Surgitek v. Abel*, 997 S.W.2d 598, 602 (Tex. 1999).
2. Multiple claims – if a plaintiff joins two or more claims from the same transaction or occurrence, if one of the claims is governed by a mandatory venue rule, then that rule will control for the entire suit. TEX. CIV. PRAC. & REM. CODE § 15.004.

V. REMOVAL

Section 1441. Actions Removable Generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

A. Purpose and Grounds for Removal

Purpose – removal provides a means for a case to get into federal court from a state court. Generally federal court is thought to be a better place for defendants than in a state court.

Grounds – the grounds may be removed when the case involves a federal question or when the parties have complete diversity of citizenship.

Other grounds for removal are:

1. removing a case can avoid the threat of local prejudice to a non-resident defendant;
2. in federal question cases a federal judge will be more familiar with federal law;
3. removal will serve to delay a trial because federal courts move slower than state courts hoping to encourage settlement;
4. federal rules of procedure are thought to be more advantageous to defendants than corresponding state rules;
5. federal jury pools are drawn from a larger geographic region, thus jurors are less likely to be familiar with the plaintiff's attorney; and

6. defense attorneys believe federal courts award smaller verdicts than state juries and federal judges are more willing to cut back large verdicts.

B. Checklist for Removal

1. The suit can be removed based on the following:
   - Applicable federal jurisdiction question ;
   - Complete diversity of citizenship between plaintiffs and defendants;
   - A statute authorize removal;
   - Suit involves a foreign country or citizen of a foreign country;
   - Notice of removal must be filed within 30 days of receipt of notice of suit;
   - All defendants must agree to the removal, with the exception of nominal defendants
2. Fraudulent joinder – a plaintiff may join a defendant against whom he will not recover in an effort to defeat diversity. Federal courts have developed the "fraudulent joinder" and "improper joinder" concepts to deal with these problems.
   - Notice from defendant can assert fraudulent joinder due to fraud in jurisdictional facts;
   - Assert plaintiff has no possibility of establishing a cause of action against a non-diverse defendant in state court;
   - Claim against the non-diverse defendant has no real connection to the claim.

C. Notice of Removal

Defendant must file a notice of removal with the federal district court stating the short and plain basis for removal. 28 U.S.C. § 1446(a).

1. If federal question, state specific statute or federal law;
2. If diversity, state basis for diversity, i.e. citizenship at the time the suit was filed and the amount in controversy exceeding $75,000 with supporting facts;
3. Assert fraudulent joinder;
4. Once a notice of removal if filed, it confers jurisdiction on the federal court;
5. Improper removal will result in a summary remand and costs assessed against the removing defendant.

D. Consent to Removal

1. The removing defendant must secure written consent from the other served defendants.
2. The notice and attachments must be filed in the state and the federal court; notice is effective when it is filed.
3. A defendant may remove without the consent of defendants that have not been served.
4. Federal officers of any agency of the United States government have a statutory right to removal without the approval of other defendants.
5. A foreign state may remove without the consent of other defendants.

E. Prohibitions Against Removal

1. A state court action against a railroad under 45 U.S.C. §§ 51-60 cannot be removed.
2. A Federal Employer's Liability Act (FELA) case cannot be removed.
3. Lawsuits under state worker's compensation laws are not removable from the state whose WC laws are at issue. However, another state's WC laws being litigation is a second state are removable.
4. The Jones Act incorporates an anti-removal provisions from the FELA.

F. Cases

1. *Crockett v. R. J. Reynolds Tobacco Co.* – Voluntary - Involuntary
   - Under the voluntary-involuntary rule, if an action is non-removable when commenced may become removable thereafter only by voluntary act of the plaintiff. *Weems v. Louis Dreyfuss Corp.*, 380 F.2d 545, 547 (5th Cir. 1967).
   - The exception to this rule is when the plaintiff fraudulently joins defendants to defeat a defendant's legitimate effort to remove a case.
2. *Martin v. Franklin Capital Corp.* – Attorney's Fees under 28 U.S.C. § 1447(c)
   - A district court remanding a removed case may require the payment of "just costs and any actual expenses, including attorney's fees" by the removing party.
   - There is no presumption of an award of fees to a prevailing civil rights claimant. The District Court has discretion to award fees, but is not compelled to do so. *Martin v. Franklin Capital Corp.*, 393 F.3d 1143, 1146 (10th Cir. 2004).

VI. FRAUDULENT JOINDER

Except in certain circumstances, complete diversity of citizenship must exist between all plaintiffs and all defendants to create federal subject matter jurisdiction in a case governed by substantive state law. *First Baptist Church of Mauriceville, Texas vs. GuideOne Mut. Ins. Co.*, 2008 WL 4533729, at *2 (E.D. Tex. Sep. 29, 2008) (NO. 1:07-CV-988). However, citizenship of only properly joined parties is considered. *Id.* Citizenship of an improperly joined party is disregarded entirely when determining the court's subject matter jurisdiction. *Id.*

The term "improper joinder" evolves from and includes "fraudulent joinder," a doctrine originally developed by courts to remedy bad faith joinder of a non-diverse party to prevent removal of a case to federal court. *Id*. The party asserting federal jurisdiction has the burden of proving that jurisdiction exists. *Id* at *3. This burden of proof is a heavy one. *Blanchard v. State Farm Lloyds*, 206 F. Supp. 2d 840, 844 (S.D. Tex. 2001). To show improper joinder of a non-diverse defendant, the removing party must prove either: (1) actual fraud in the pleading of jurisdictional facts, or (2) plaintiffs inability to establish a cause of action against the non-diverse party in state court. *Smallwood v. Illinois Cen. R.R. Co*., 385 F.3d 568, 573 (5`h Cir. 2004).

In analyzing the second type of fraudulent joinder, the inquiry is not whether the plaintiff will probably prevail against the defendant in state court, but whether it has been shown that there is no reasonable possibility of recovery against the in-state defendant. *Id*. See also, *Blanchard*, 206 F. Supp. at 845.

The analysis used to determine whether a plaintiff has a reasonable basis for recovery against an alleged non-diverse defendant under state law involves certain discrete inquiries:

1. Does it appear the plaintiff intended to pursue a claim against the defendant;

2. Does state law recognize the cause of action against the defendant;

3. Does the state court petition allege sufficient facts against the defendant; See *First Baptist*, 2008 WL 4533729, at *3-*4; and,

4. When the state court petition fails to allege sufficient facts, is there "other evidence" in the record which clarifies the claim set forth in the petition? See *Griggs v. State Farm Lloyds*, 181 F.3d 694, 700 (5th Cir. 1999)

Upon completion of this analysis, if the court finds there is no reasonable possibility of recovery against the in-state defendant, the court may then make a fifth inquiry to determine whether remand would still be proper. See e.g., *Smallwood*, 385 F.3d at 574. That inquiry is whether the plaintiff's allegations against the remaining defendants are equally insufficient to state a claim. See *Id*.

A. Does It Appear Plaintiff Intended to Pursue a Claim against the Defendant?

First, the court determines whether the record supports any inference that the plaintiff intended to actively pursue a claim against the non-diverse defendant. See *First Baptist*, 2008 WL 4533729, at *3, and *Griggs*, 181 F.3d at 699.

i. Petition Usually Controls

The petition as filed in state court typically controls this inquiry. See *Griggs*, 181 F.3d at 699. See also, *First Baptist*, 2008 WL 4533729, at *3; *Cavallini v. State Farm. Mut. Auto. Ins. Co*., 44 F.3d 256, 264 (5th Cir.1995). The court utilizes a Federal Rule 12(b)(6)-motion-to¬dismiss analysis of the plaintiff's petition to determine "whether there is any reasonable basis for the court to predict that the plaintiff might be able to recover against an in-state defendant." *Smallwood*, 385 F.3d at 573. “To survive a Rule 12(b)(6) motion, the plaintiff must plead `enough facts to state a claim to relief that is plausible on its face.’” *In re Katrina Canal Breaches Litigation*, 495 F.3d 191, 205 (5th Cir. 2007) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)), cert. denied, 127 S.Ct. 1955, 170 L.Ed.2d 63 (2008). "While a complaint attacked by a Rule 12(b)(6) motion does not need detailed factual allegations, a plaintiff’s obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic*, 127 S.Ct. at 1964-65. Assuming all allegations in the complaint are true, factual allegations must be enough to raise a right to relief above the speculative level. *In re Katrina Canal*, 495 F.3d at 205. Accordingly, the court accepts all well-pleaded facts as true, viewing them in the light most favorable to plaintiff and resolving all disputed questions of fact in favor of the plaintiff. *Bell Atlantic*, 127 S.Ct. at 1965; *First Baptist*, 2008 WL 4533729, at *3. A "mere theoretical possibility of recovery under local law" will not preclude a finding of improper joinder. *Smallwood*, 385 F.3d at 573, note 9, citing *Badon v. RJR Nabisco, Inc.*, 236 F.3d 282, 286, n. 4 (5th Cir. 2000).

Utilizing the Rule 12(b)(6) analysis, the court must determine whether it appears from the live pleadings that the plaintiff ever intended to pursue the claim against the defendant. See *First Baptist*, 2008 WL 4533729, at *3. In this regard, some factors courts have considered include:

1. whether the defendant is only minimally mentioned;

2. whether any actionable facts or causes of action are specifically alleged against the defendant; and,

3. whether the defendant was ever served. *Id.*

ii. If Petition Fails to Allege Sufficient Facts, Court May Consider "Other Evidence" in the Record (Piercing the Pleadings)

As previously noted, the court first examines the plaintiff's petition for an inference that the plaintiff intended to actively pursue a claim against the in-state defendant. See *First Baptist*, 2008 WL 4533729, at *3. In certain instances where the plaintiff's petition fails to provide guidance, the court may in its discretion and under very limited circumstances consider "other evidence in the record," but only to the extent that the factual allegations contained in the other evidence clarify or amplify the claims actually alleged in the petition. See e.g., *Griggs*, 181 F.3d at 699 - 700. This method is known as "piercing the pleadings." *Id.* at 700. See e.g., *Smallwood*, 385 F.3d at 573; *Martin*, 2004 WL 2526425, at *3 (W.D. Tex. Oct 21, 2004) (NO. SA-04-CV-480); *Davis v. Travelers Lloyds Ins. Co*., 2009 WL 3255093 (S.D. Tex. Sep. 29, 2009); *Jones v. Ace Amer. Ins. Co*., 2006 WL 3826998, at *6 (E.D. Tex. Dec. 22, 2006) (NO. CIV. A. 106-CV-616); *Gasch v. Hartford Accident & Indem. Co*., 491 F.3d 278 (5th Cir. 2007).

B. Does State Law Recognize a Cause of Action against the Defendant?

Once the court determines that an inference exists to show the plaintiffs intent to pursue a claim against the defendant, the court must next decide whether state law recognizes any cause of action against the defendant. See *First Baptist*, 2008 WL 4533729, at *4. A litigant's petition may include a laundry list of claims against an in-state defendant. See e.g., *West End Square, Ltd. v. Great Amer. Ins. Co. of New York*, 2007 WL 804714, at *4 (N.D. Tex. Mar. 14, 2007) (NO. CIV. A. 3:06-CV-1871B) (insurance code and DTPA violations); *Weldon Contractor*, 2009 WL 1437837, at *1 (breach of contract); *Jones v. Ace Amer*., 2006 WL 3826998) (breach of duty of good faith and fair dealing) *Brooks v. Amer. Home Ins. Co*., 1997 WL 538727 (N.D. Tex. Aug. 20, 1997) (NO. CIV. A. 3:97-CV-0515-P) (negligence); *Leisure Life*, 2009 WL 3834407, at *2 (fraud); *McNeel v. Kemper Cas. Ins. Co*., 2004 WL 1635757 (N.D. Tex. July 21, 2004) (NO. CIV. A. 3:04-CV-0734) (other tortious conduct). However, if the court determines that a plaintiff cannot recover from the resident-defendant because the asserted claims are not valid under state law, the individual is not properly joined. See *First Baptist*, 2008 WL 4533729, at *4.

C. Does the State Court Petition Allege Sufficient Facts against the Defendant? (Factual Fit Analysis)

A plaintiff's complaint need allege only one valid state court action against the defendant. Once this requirement is met, the federal court will analyze whether the complaint asserts enough facts against the defendant to support that particular cause of action. See *First Baptist*, 2008 WL 4533729, at *4. A defendant may defeat remand by showing that the petition fails to allege "specific actionable conduct" sufficient to support the cause of action. *Id*. See also, *Griggs*, 181 F.3d at 699.

Ultimately, "whether the plaintiff has stated a valid state law cause of action depends upon and is tied to the factual fit between the plaintiffs' allegations and the pleaded theory of recovery." *Id.* at 701. Identifying only what law forms the basis of the complaint, without identifying how a defendant violated that law, proves only that there is a theoretical possibility that a cause of action could be stated against the defendant, not that the plaintiff did state a cause of action. See *First Baptist*, 2008 WL 4533729, at *4; *Travis v. Irby*, 326 F.3d 644, 648 (5th Cir. 2003); *Griggs*, 181 F.3d at 701. This is what is meant by the requirement that there be a "factual fit" between the pleaded cause of action and the plaintiff's petition. *First Baptist*, 2008 WL 4533729, at *4.

In determining whether there is a "factual fit" between the cause of action alleged against a defendant and the petition, the court begins with the same Rule 12(b)(6) standard previously described in this paper. See, e.g., *First Baptist*, 2008 WL 4533729, at *5. In this analysis, the petition as filed in state court controls the initial inquiry. Id. See, e.g., *Cavallini*, 44 F.3d at 264; *Griggs*, 181 F.3d at 699; *Smallwood*, 385 F.3d at 573. Under the Rule (I2)(b)(6) analysis, mere conclusory allegations contained in the petition are insufficient. *Martin*, 2004 WL 2526425, at *3; *Bailey*, 2001 WL 34106907, at *4; *First Baptist*, 2008 WL 4533729, at *4. For example, a verbatim recitation of portions of unfair settlement practices specified in the insurance code does not create a colorable claim against an adjuster-defendant unless coupled with facts indicating the adjuster's individual role in the alleged events. *Killion v. Allstate Texas Lloyds*, 2004 WL 612843, at *5 (S.D. Tex. Feb. 25, 2004) (NO. CA-C-03-442-H).

D. When State Court Petition Fails to Allege Sufficient Facts, Does "Other Evidence" Exist to Clarify the Claim? (Piercing the Pleadings again)

In limited situations where the petition does not allege sufficient facts under a Rule 12(b)(6) analysis, a federal court may in its discretion consider "other evidence in the record" to clarify the claims alleged in the petition. See e.g., *Griggs*, 181 F.3d at 700 (citing *Cavallini*, 44 F.3d at 263). Although, post-removal filings may not be considered when or to the extent they present new causes of action or theories, case law indicates that summary judgment-type evidence contained in the record may be considered to the extent that the factual allegations contained therein clarifies or amplifies the claims actually alleged in the petition. See e.g., *Griggs*, 181 F.3d at 700. Examples of such evidence include affidavits and deposition testimony. See *Id*. at 699 and 700.

This decision to "pierce the pleadings" is one of discretion by the court, with the favored approach being the Rule 12(b)(6)-type analysis. See *Martin*, 2004 WL 2526425, at *3. Under this "piercing" approach, the court may choose to conduct a limited, summary- judgment type inquiry, but only to identify the presence of discrete and undisputed facts which would clarify whether a plaintiff may have a right of recovery against the in-state defendant. See *Smallwood*, 385 F.3d at 573. As the court in *Smallwood* cautioned, "Attempting to proceed beyond this summary process carries a heavy risk of moving the court beyond jurisdiction and into a resolution of the merits, as distinguished from an analysis of the court's diversity jurisdiction by a simple and quick exposure of the chances of the claim against the in-state defendant alleged to be improperly joined." *Id*.

E. When Petition and Evidence in the Record Do not Support a Claim against the In-State Defendant, Are Plaintiff's Allegations against the Remaining Defendants Equally Insufficient to State a Claim? (Common Defense Rule)

"When, on a motion to remand, a showing that compels a holding that there is no reasonable basis for predicting that state law would allow the plaintiff to recover against the in-state defendant necessarily compels the same result for the nonresident defendant, there is no improper joinder." *Smallwood*, 385 F.3d at 574. Rather, in such a case, "there is only a lawsuit lacking merit." *Id* at 575. In that event, remand is proper. *Id*. at 574. "In other words, there is no improper joinder if a defense compels the same result for the resident and nonresident defendants because this would simply mean that `the plaintiff's case is ill founded as to all the defendants." *Gasch*, 491 F.3d at 284.

VII. CONCLUSION

Jurisdiction in Texas state court is determined by the type of case being filed and the dollar amount in controversy among the litigants. Jurisdiction in federal courts is determined by whether the case involves a federal question, the plaintiff and defendant are from different states, and the amount in controversy is greater than $75,000.

Venue is determined by where the acts or omissions occurred that gave rise to the suit. Some cases have a specific venue, because of the type of case or who is being sued, i.e. suits against state officials must be brought in Austin, Travis County, Texas.

Removal can be done only by a defendant and only if the case somehow qualifies for federal court jurisdiction. Exceptions include suits against federal officers or agencies and suits against foreign governments or citizens—those cases can always be removed.

Each of these matters can become complicated questions. Always confer with your legal counsel before making any important decisions regarding jurisdiction, venue or removal.