# RIPENESS AND JOINDER

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## A. RIPENESS

The doctrine of ripeness addresses whether a lawsuit may be brought. The court examines whether a case has been brought at a time when there is a clear and real dispute to be resolved between the parties; in other words, the court assesses whether there is a present need for it to act. If a case is not ripe, the court will not know if the facts have sufficiently developed and if the matter is sufficiently concrete for it to be able to render a decision that will resolve the dispute. *Abbott Labs. v. Gardner*, 387 U.S. 136, 148, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967) (ripeness prevents courts from entangling themselves in abstract disagreements). The principles applicable to whether a case is ripe are very similar under Texas law and federal law.

### 1. Analysis of Ripeness under Texas Law

In Texas, ripeness is a question that arises at the beginning of a case and implicates the court's subject matter jurisdiction. There must be a concrete injury involved in the case in order for a justiciable claim to be presented. With ripeness, the question that will be asked when the case is filed is "whether the facts have developed sufficiently so that an injury has occurred or is likely to occur, rather than being contingent or remote." *Patterson v. Planned Parenthood*, 971 S.W.2d 439,442 (Tex. 1998).

The goal of ripeness is to avoid premature adjudication. Texas courts "are not empowered to give advisory opinions," *id at 443* (citations omitted), which includes hearing or deciding cases that are not yet ripe. *See id.* "A case is not ripe when its resolution depends on contingent or hypothetical facts, or upon events that have not yet come to pass." *Id. citing Camerena v. Texas Employment Comm'n*, 754 S.W.2d 149, 151 (Tex. 1998) (holding trial court could not grant relief based on "a hypothetical situation which might or might not arise at a later date. "District Courts, under our Constitution, do not give advice or decide upon speculative, hypothetical or contingent situations."). Thus, ripeness involves a court examining not only whether it can act, i.e. it has jurisdiction, but also whether it should act. *Perry v. Del Rio*, 66 S.W.3d 239, 250 (Tex. 2001).

A case that is not ripe when filed may be dismissed. However, the court may decline to dismiss a case if the plaintiff can show that the case will soon become ripe. Lack of ripeness when a claim is filed will not be "a jurisdictional infirmity requiring dismissal if the case has matured. *Id.* ("The district court could properly have dismissed *Del Rio* for lack of ripeness while the Legislature was still considering redistricting during the regular session . . . . But just as a case may become moot after it is filed, it may also ripen. After the claims in *Del Rio* ripened, the district court was not required to dismiss the case simply because it was filed prematurely.")

To survive a challenge for ripeness, a case generally must not be reliant upon contingent or hypothetical facts or upon events that may occur in the future. *Patterson*, 971 S.W.2d at 442; *Save Our Springs Alliance v. City of Austin*, 149 S.W.3d 674, 683 (Tex.App.-Austin 2004, no pet.). The claimant will not bear the burden of showing that an actual injury has already occurred, but the injury must be imminent or sufficiently likely. *Waco Indep. Sch. Dist. v. Gibson*, 22 S.W.3d 849, 852 (Tex. 2000); *Patterson*, 971 S.W.2d at 442. To determine ripeness under Texas law, a court will examine whether the issues are fit for judicial determination as well as the hardship that a plaintiff would face if the court denied judicial review. *Office of Pub. Util. Counsel v. Public Util. Comm'n*, 843 S.W.2d 718, 724 (Tex.App.—Austin 1992, writ denied).

### 2. Analysis of Ripeness under Federal Law

Under federal law, the question of ripeness goes to the court's subject matter jurisdiction and is to be treated as a motion to dismiss under Federal Rule of Civil Procedure Rule 12(b)(1). Since it goes to the court's subject matter jurisdiction, ripeness may be raised by the court's own initiative. *Metropolitan Washington Airport Authority v. Citizens for Abatement of Airport Noise*, 501 U.S. 252, 265, 111 S.Ct. 2298, 115 L.Ed.2d 236, 252 (1991). The

ripeness inquiry should be raised when the lawsuit arises, and the matter must remain live through the litigation. *Steffel v. Thompson*, 415 U.S. 452, 459, 94 S.Ct. 1209, 39 L.Ed.2d 505, 1974. A court should dismiss a case for lack of ripeness "when the case is abstract or hypothetical." *Urban Developers LLC v. City of Jackson*, 468 F.3d 281, 295 (5th Cir. 2006) (quotations omitted).

Ripeness is a function of the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration. *Id*. (citations omitted); *see Jobs, Training & Servs. v. East Tex. Council of Gov'ts*, 50 F.3d 1318, 1327 (5th Cir. 1995). As addressed above, unless the case is ripe, the court cannot be sure the facts have been sufficiently developed and the matter sufficiently concrete for the court to render a decision that will generally dissolve the dispute among the parties. *Abbott Labs*, 387 U.S. at 148, 87 S.Ct. 1507, 18 L.Ed.2d 681. Three basic factors are considered by courts to determine whether a matter is ripe for controversy: (1) a legal dispute that is real and not hypothetical; (2) a concrete factual predicate so as to allow a reason for adjudication; and (3) a legal controversy that can sharpen the issues for judicial resolution. *Flast v. Cohen*, 392 U.S. 83, 96, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968). *See Jobs, Training & Servs*, 50 F.3d at 1325 (concluding district court should have declined to entertain federal law claims against TDOC as not ripe for judicial resolution) (citing *Merchants Fast Motor Lines, Inc. v. I.C.C.*, 5 F.3d 911, 919-20 (5th Cir. 1993)).

For ripeness, it is not necessary that the litigant have already suffered harm; it is sufficient that there is a reasonable probability of harm. *See, e.g., Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 82 (U.S. 1978) (lawsuit by power company seeking review of judgment which determined that environmental organizations and individuals who resided within close proximity to planned nuclear power facility had standing to bring claim for declaratory relief, and that Price-Anderson Act, 42 U.S.C.S. § 2210 et seq., was unconstitutional The court concluded the case was presently ripe for adjudication where the court was persuaded that it "will be in no better position later than [it is] now" to decide this question, and reversed the finding that the Price-Anderson Act was unconstitutional because Congress had not acted in an arbitrary or irrational manner in enacting the statute. The need to statutorily limit the liability of the nuclear power industry was rationally related to need to develop private sector interest, and the liability ceiling was based on the remote possibility of an accident where liability would exceed that limitation.) (*quoting Regional Rail Reorganization Act Cases*, 419 U.S. 102, 143-145 (1974)). However, the anticipated harm must be reasonably specific. *See Laird v. Tatum*, 408 U.S. 1 (1972); *United Public Workers v. Mitchell*, 330 U.S. 75 (1947) (concluding claims of plaintiffs who had not yet violated the Hatch Act were not ripe). Even if plaintiffs confront a threat sufficient to confer standing, a dispute may remain "too 'ill-defined' to be appropriate for judicial resolution until further developments have more sharply framed the issues for decision." Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—and Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 670 (June 2006) (*quoting* Richard H. Fallon, Jr. et al., *Hart & Wechsler's The Federal Courts and the Federal System* 224 (5th ed. 2003) (*quoting United Pub. Workers of Am. (CIO) v. Mitchell*, 330 U.S. 75, 90 (1947)).

### 3. Declaratory Judgments: A Potentially Gray Area

A declaratory judgment action is a special proceeding which seeks a judicial declaration of the rights of the respective parties, as opposed to those legal actions which seek money damages or specific coercive relief. Declaratory judgment actions are most appropriate in those situations involving disputes between parties as to their respective responsibilities. For this reason, declaratory judgment actions have proven to be a useful tool in the context of insurance contracts, where disputes often arise concerning an insurer's duties to defend and indemnify insureds in suits brought by third parties.

Declaratory judgment actions do not exist at common law. They are statutory creatures, dependent upon specific legislation for their authority. In Texas, declaratory judgment actions are authorized by the Texas Declaratory Judgment Act, § 37.001 of the Texas Civil Practice & Remedies Code. The Federal Declaratory Judgment Act, 28 U.S.C. § 2201, provides authority for declaratory judgment actions in the federal courts. (he purposes of the two statutory authorizations are essentially the same, but be aware that the statutes do contain specific differences which are not addressed in this article.

Under Texas or federal law, declaratory relief is only appropriate when there is an actual case or controversy. *See, e.g., Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993); *Trinity Univ. Ins. Co. v. Sweatt*, 978 S.W.2d 267 (Tex. App.--Fort Worth 1998, no pet.) (whether policy was void or loss was covered presented justiciable controversy); *American States Ins. Co. v. Bailey*, 133 F.3d 363, 368 (5th Cir. 1998). A trial court has discretion to enter declaratory judgment if it "will serve a useful purpose or will terminate the controversy between the parties." *Bonham State Bank v. Beadle*, 907 S.W.2d 465, 467 (Tex. 1995). A declaratory judgment action may be ripe even if the underlying matter is the case has not fully matured. The existence of another remedy, or unresolved issues, does not preclude declaratory relief. *See, e.g., Standard Fire Ins. Co. v. Fraiman*, 514 S.W.2d 343, 346 (Tex. App.--Houston [14th Dist.] 1974, no writ).

In some respects, a request for declaratory judgment action is a request that the court delineate the rights of the parties prior to the time that the future action will be undertaken by the parties. Declaratory judgment actions are also limited by the case or controversy requirement in general and the ripeness doctrine in particular. While a declaratory judgment cannot present a controversy that is uncertain or speculative, it, by its nature, generally will attempt to adjudicate a future injury. According to the U.S. Supreme Court:

> [T]he difference between an abstract question and "controversy" contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy.

*Maryland Cas. Co. v. Pacific Coal & Oil Co.*, 315 U.S. 270, 61 S.Ct. 510, 85 L.Ed. 826 (1941). This rule has evolved to require that a declaratory judgment present "a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *North Carolina v. Rice*, 404 U.S. 244, 246, 92 S.Ct. 402, 30 L.Ed.2d 413 (1971).

In determining "ripeness" with regards to first party insurance contracts, the courts have allowed a declaratory judgment action to be brought once events which might give rise to a claim have occurred. In the context of life insurance, the Supreme Court has gone so far as to allow a declaratory judgment action even though no events have occurred that would give rise to a claim. *See, e.g., Empire Life Ins. Co. v. Moody*, 584 S.W.2d 855 (Tex. 1979) (allowing declaratory judgment action to determine whether or not an entity possessed insurable interests in the life of another under Texas Declaratory Judgment Act). However, a more difficult question is presented with respect to liability policies, which historically have involved two issues: the duty to defend and the duty to indemnify. The appropriate standard for determining the ripeness of a private party contract dispute is whether there is a potential controversy between parties having an adverse legal interest, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. *Principal Life Ins. Co. v. Robinson*, 394 F.3d 665, 670-672 (9th Cir. 2005).

The duty to defend is often ripe once suit has been filed against an insured. The Texas courts have consistently held that once suit has

been filed against an insured, a justiciable controversy is presented with respect to the duty to defend. *Fireman's Ins. Co. v. Burch*, 442 S.W.2d 331, 333 (Tex. 1968); *Ruth v. Imperial Ins. Co.*, 579 S.W.2d 523 (Tex.Civ.App.--Houston [14th Dist.] 1979, no writ); *Fort Worth Lloyd's v. Garza*, 527 S.W.2d 195 (Tex. Civ. App.--Corpus Christi 1975, writ ref'd n.r.e.). Because of the presence of a justiciable controversy, an action aimed at determining the insurer's duty to defend may be maintained under the Texas Declaratory Judgment Act. Similarly, federal courts have also allowed declaratory judgment actions pertaining to the duty to defend to be brought under the federal Declaratory Judgment Act. In *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227 (1937), the Supreme Court held that antagonistic assertions for benefits under a liability policy could be adjudicated under the Act. Thereafter, in *Maryland Cas. Co. v. Pacific Coal and Oil Co.*, 312 U.S. 270 (1941), the Supreme Court held that an "actual controversy" existed in an insurance company's suit against the insured to determine non-coverage. There the underlying court action had not proceeded to judgment. *Id.* Furthermore, in *Western Heritage Ins. Co. v. River Entertainment*, 998 F.2d 311 (5th Cir. 1993), the Fifth Circuit reversed and rendered a district court's ruling granting a defendant's motion to dismiss plaintiff's cause of action which sought a determination regarding the duty to indemnify its insured when the underlying liability action was still pending. The Fifth Circuit held that the indemnity issue was ripe for determination notwithstanding the fact that the underlying suit was still pending; there was no duty to defend under the policy and that foreclosed the possibility of there being a duty to indemnify. *Id.*

The duty to indemnify presents a more difficult question when examining ripeness. The existence of a contingency, such as can arise with the duty to indemnify, can result in a court determining that a matter is not yet ripe for review. An example of such a contingency in a non-insurance action can be found in *Armstrong World Industries v. Adams*, 961 F.2d 405, 411 (3rd Cir. 1992). In that case, the plaintiffs attempted to challenge the constitutionality of a statute that would be triggered by, and would require directors to take certain actions, if the corporation were to be subject to a takeover attempt. The declaratory judgment action was dismissed on jurisdictional grounds. The court held there was not only one contingency but two contingencies that must be triggered in order for the controversy to come into play and that the potential injury was too speculative to constitute an actual controversy. *Id.* Similarly, in Texas, an insurer can have a duty to defend which can be declared through a declaratory judgment but the duty to indemnify may not be ripe due to contingencies in the underlying litigation. For example, a petition may raise causes of action that triggers the duty to defend, such as negligence, but it may also contain allegations that would negate the duty to indemnify, such as intentional conduct. In this scenario, whether there is a duty to indemnify the insured could not be determined until the trial was concluded and the jury had determined whether the insured was negligent and/or acted intentionally. While the duty to defend would be ripe in this example, the duty to indemnify would not. *See Farmers Texas County Mut. Ins. Co. v. Griffin*, 955 S.W.2d 81, 82 (Tex. 1997).

Factors contributing to the ripeness of declaratory judgment actions on the duty to defend and the duty to indemnify are based on the fact that there are limited options available for the resolution of such issues. An insurer cannot be joined as a defendant in an underlying liability suit. Tex.R.Civ.Proc. 38(c) provides that."[t]his rule shall not be applied, in tort cases, so as to permit the joinder of a liability or indemnity insurance company, unless such company is by statute or contract liable to the person injured or damaged." Further, most insurance policies include a "no action" provision that provides that a third party's right of action against the insured does not arise until there is a settlement, to which the insurer has agreed, or a judgment against the insured. *See Great American Ins. Co. v. Murray*, 437 S.W.2d 264, 265-66 (Tex. 1969); *Getty Oil v. Ins. Co. of N. Am.*, 845 S.W.2d 794, 801 (Tex. 1992), cert. denied sub nom. *Youell & Cos v. Getty Oil Co.*, 510 U.S. 820 (1993); *Service Mutual Ins. Co. of Texas v. Erskine*, 169 S.W.2d 731 (Tex. Civ.

App.--Waco 1943, no writ); *Superior Ins. Co. v. Kelliher*, 343 S.W.2d 278 (Tex. Civ. App.--Fort Worth 1961, writ ref'd n.r.e.) (auto liability insurer seeking declaratory relief was not subject to cross-action by injured party, or consolidation of liability and coverage suit). Similarly, courts have held that an insurance company has no right to intervene in the liability action against the insured to seek a coverage determination. *See, e.g., State Farm Fire & Cas. Co. v. Taylor*, 706 S.W.2d 352 (Tex. App.--Fort Worth 1986, writ ref'd n.r.e.). Nor can an insurer join the claimants and address the issues through interpleader. *See Owens v. Allstate Ins. Co.*, 996 S.W.2d 207 (Tex. App.--Dallas 1998, pet. denied). All these factors contribute to allowing declaratory judgments to proceed even when the underlying case is not ripe. Whether the duty to defend and/or the duty to indemnify is ripe will be determined on a case-by-case basis.

## B. JOINDER

Joinder is defined as '[t]he uniting of parties or claims in a single lawsuit." BLACK'S LAW DICTIONARY 853 (8th ed. 2004). For the sake of judicial economy, the rules encourage parties to combine multiple claims and parties into a single lawsuit. There are however, limits to what claims and parties can be joined. There are several ways in which parties and claims can be brought into a lawsuit, such as in a petition where the plaintiff decides who the parties are and what the claims are, or through cross-actions such as, counterclaims, cross-claims, third-party practice, and the joinder of responsible third parties. Other ways to join either parties or claims are through a plea in intervention, which is the procedure for a person to join a lawsuit already in progress; a bill of interpleader, which is the procedure for a person in possession of property claimed by others to transfer that property and the dispute to the court; a motion to consolidate, which asks the court to consolidate two or more suits with a common question of law or fact; and a motion for joint trial asking the court to hold one trial for two or more suits.

### 1. Proper Parties under Texas Law

The Texas Declaratory Judgment Act contains a rather general provision regarding proper parties to such an action, providing that "all persons who have or claim any interest that would be affected by the declaration must be made parties." TEX. CIV. PRAC. & REM. CODE, § 37.006(a). In the past, Texas law was clear that only the insured and the insurer were the proper parties to a declaratory judgment action in Texas to determine the duty to defend. Consequently, Texas courts have held that no justiciable controversy exists between the insurer and the tort plaintiff who has a suit pending against the insured. *Burch*, 442 S.W.2d at 332-33; *National Savings Ins. Co. v. Gaskins*, 572 S.W.2d 573, 575-76 (Tex. Civ. App.--Fort Worth 1978, no writ); *Providence Lloyd v. Blevins*, 741 S.W.2d 604, 606 (Tex. App.--Austin 1987, no writ).

Although duty to defend determinations are often based upon the same issues as a determination of coverage, the courts have nevertheless been reluctant to allow the joinder of tort claimants because they generally have no interest in the duty to defend. Claimants have an interest of sorts, but it is contingent. Under Texas law, however, non-parties to the insurance contract may enforce the insurance contract if the non-party is the legally intended beneficiary of the contract or is a judgment creditor of the insured. *See Dairyland County Mut. Ins. Co. v. Childress*, 650 S.W.2d 770, 775-76 (Tex. 1983) (legally intended beneficiary may enforce contract); *Cowley v. Texas Snubbing Control, Inc.*, 812 F.Supp. 1437, 1445 (S.D. Miss. 1992) (applying Texas law) (judgment creditor of insured is considered a third-party beneficiary of insured's policy), *aff'd sub nom. Cowley v. Stapleton*, 15 F.3d 180 (5th Cir.), *cert. denied*, 115 S.Ct. 80 (1994).

### 2. Proper Parties under Federal Law

The Federal Declaratory Judgment Act (the "Act") does not clearly indicate which parties are necessary and/or proper in a Declaratory Judgment action. Instead, the issue of proper parties is left to the general rules of federal practice. *See* FED. R. CIV. P. 19, 20, 57. FED. R. CIV. P. 20 provides as follows:

> (a) **Permissive Joinder.** All persons may join in one action as plaintiffs if they assert

> any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. All persons (any vessel, cargo or other property subject to admiralty process in rem) may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

Clearly, the provisions of FED. R. CIV. P. 20 relative to proper parties are exceedingly flexible and broad. Further, a person may be joined as a defendant not for the purpose of seeking relief against him, but to give him an opportunity to appear and more especially to make the judgment against the principal defendant binding upon him. *See generally*, *Roland H. Long, The Law of Liability Insurance*, Ch. 26 (1995), p. 21.

The issues raised in *Standard Fire Ins. Co. v. Sassin*, 894 F. Supp. 1023, 1027 (N.D. Tex. 1995) are important to note. The federal court in *Sassin* was presented with a scenario in which an insurer filed a declaratory judgment action seeking a declaration that each had no duty to defend or indemnify for damages in the underlying state court suit. The insurer filed suit against not only the insureds, but also the tort plaintiff. The *Sassin* court declared that although federal law governed whether a "justiciable controversy" existed with the purview of the Act, such did not render state law irrelevant to the "case or controversy" question. *Sassin*, 894 F.Supp. at 1026. The court stated the following:

> Where...substantive law governing the rights of the parties is relevant to the Court's analysis, state law applies. *Sassin*, 894 F. Supp. at 1026.

The court examined the substantive law of Texas, particularly the fact that a person injured by the insured is not a third-party beneficiary until a judgment is obtained against the insured, as well as the fact that Texas law prohibits direct actions. *Id.* at 1027. The court noted that the Fifth Circuit recognized that the prohibition on direct actions enforced the substantive relationship between the insurer and the tort plaintiff and noted that the Fifth Circuit regarded the availability of a direct action against an insurer constituted a question of substantive law which required a court sitting in diversity to apply state law. *Id.* Thus, the court concluded that the insurer's claims against the tort plaintiff failed to present a "case or controversy" and therefore, granted the tort plaintiff's motion to dismiss. *Id.* at 1028. It is important to note, however, that the insurers had previously dismissed the insureds from the declaratory judgment action.

Due to the case law in this area, it is difficult to make a blanket statement regarding which parties are proper parties to a federal declaratory judgment action. A conservative viewpoint dictates that only the insureds and the insurers should comprise the parties to a declaratory judgment action. However, the facts and circumstances of each case should be evaluated to determine whether it might be advantageous to add the underlying tort plaintiff and whether the tort plaintiff might consent to being a party in the action.

### 3. Improper Joinder

With increased filings of first party insurance cases in Texas due to hurricane damage, suits against adjusters may be on the rise. One reason for suing an in-house or independent adjuster may be to destroy federal diversity jurisdiction when the other defendant is an out-of-state insurance carrier.

Generally, 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," which is 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.* As we will discuss below, 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) plaintiff's 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 (5th Cir. 2004).

The typical scenario is as follows: Plaintiff files suit in state court against his insurance carrier who happens to be an out-of-state citizen. Plaintiff also includes as a party to the lawsuit the in-house adjuster or independent adjuster whom the carrier assigned to assist in the investigation of the claim, or as in the following case discussed below, the construction company hired to provide a repair cost estimate. This additional party (the adjuster or the construction company) is a Texas citizen. One or more defendants remove the case to federal court alleging diversity jurisdiction on the grounds that the Texas defendant has been improperly named/joined as a party since plaintiff cannot establish independent liability against the in-state defendant. Plaintiff moves to remand the case to state court, and at this point the federal court begins its inquiry to determine whether remand is proper.

#### a. The Browning Case

In *Browning v. Sentinel Ins. Co.*, 2011 WL 240338, at *1 (S.D. Tex. Jan. 24, 2011) (NO. H-10-4478) Sentinel issued an insurance policy to Plaintiff Browning, a Texas resident. After his home was damaged in September 2008 during Hurricane Ike. Browning submitted to Sentinel a claim under the insurance policy for the property damage. Plaintiff alleges that Sentinel "assigned Cavalry Construction Co. ("Cavalry") to adjust the claim. *Id*. Uncontroverted evidence submitted by Plaintiff, however, establishes that Cavalry is not an adjuster and, instead, merely provided an estimate for repair work for Browning's home. *Id.*

Browning filed this lawsuit in the 11th Judicial District Court of Harris County, Texas, alleging that Cavalry, a non-diverse defendant, violated provisions of the Texas Insurance Code (Although Plaintiff asserts causes of action against Sentinel under the Texas Insurance Code and for fraud, breach of contract, and breach of the duty of good faith and fair dealing, the only cause of action asserted against Cavalry is for violations of the Texas Insurance Code). *Id.* Sentinel removed the case to federal court, arguing that Cavalry had been improperly joined and, as a result, its Texas citizenship should not be considered when determining whether there is diversity jurisdiction. *Id.* Plaintiff filed a Motion to Remand. *Id.*

##### i. Improper Joinder Analysis

Sentinel asserts that Cavalry was improperly joined. A non-diverse defendant may be found to be improperly joined if either there is "actual fraud in the plaintiff's pleading of jurisdictional facts" or the removing defendant demonstrates that plaintiff cannot establish a

cause of action against the non-diverse defendant. *Kling Realty Co., Inc. v. Chevron USA, Inc.*, 575 F.3d 510, 513 (5th Cir.2009) (citing *Campbell v. Stone Ins., Inc.*, 509 F.3d 665, 669 (5th Cir.2007)). There is no allegation of actual fraud in Plaintiff's pleading of the jurisdictional facts in this case. The test under the second prong "is whether the defendant has demonstrated that there is no possibility of recovery by the plaintiff against an in-state defendant, which stated differently means that there is no reasonable basis for the district court to predict that the plaintiff might be able to recover against an in-state defendant." *Id.* (quoting *Smallwood v. Ill. Cent. R.R. Co.*, 385 F.3d 568, 573 (5thCir.2004) (*en banc* )).

The party asserting improper joinder bears a heavy burden of persuasion. *Id.* at 514. "[A]ny doubt about the propriety of removal must be resolved in favor of remand." *Gasch v. Hartford Acc. & Indem. Co.*, 491F.3d 278, 281-82 (5th Cir.2007). If necessary, the district court may "pierce the pleadings" and consider other evidence to determine whether, under controlling state law, the non-removing party has a basis in fact for a valid claim against the non-diverse defendant. *See Campbell v. Stone Ins., Inc.*, 509F.3d 665, 669 (5th Cir.2007); *see also Menendez v. Wal-Mart Stores, Inc.*, 364 F. App'x 62, 70 (5th Cir. Feb.1, 2010). This is particularly appropriate where the plaintiff has "misstated or omitted discrete facts" that are relevant to or dispositive of the improper joinder analysis. *See McDonald v. Abbott Labs.*,408 F.3d 177, 183 n. 6 (5th Cir.2005); *Smith v. Petsmart Inc.*,278 F. App'x 377, 379 (5th Cir. May 15, 2008).***2*** The Texas Insurance Code prohibits certain practices by persons "engaged in the business of insurance." *See* TEX. INS. CODE § 541.002.

In this case, the uncontroverted evidence establishes that Cavalry is a construction company that was hired by Sentinel to provide an estimate or appraisal of repair costs for the damage to Plaintiff's home. It is well-established that Texas law does not recognize a claim under the Texas Insurance Code against independent firms who are hired to provide engineering or similar services to the insurance company. *See Dagley v. Haag Eng'g Co.*, 18 S.W.3d 787, 793 (Tex.App.-Houston [14th Dist.] 2000, no pet.) (engineering services); *Woodward v. Liberty Mut. Ins. Co.*, 2009 WL 1904840, *4 (N.D.Tex. July 2, 2009) (appraisal services); *Bunting v. State Farm Lloyds*, 1999 WL 134642, * 1 (N.D.Tex. Mar.4, 1999) (appraisal services). Plaintiff has not cited any case, and the Court's independent research has revealed none, in which an independent construction firm hired by the insurance company to provide an estimate or appraisal of repair costs is held to be a person engaged in the business of insurance for purposes of the Texas Insurance Code. *See Browning*, 2011 WL 240338, at *2.

In this case, there is no evidence that Cavalry participated in any way in the sale or servicing of Plaintiff's insurance policy; made any representations to Plaintiff regarding the coverage available under the policy; or adjusted Plaintiff's insurance claim. *Id.* Instead, the uncontroverted evidence establishes that Cavalry provided an estimate of repair costs, a service consistently held by courts in Texas – both state and federal – not to constitute engaging in the business of insurance for purposes of a claim under the Texas Insurance Code. *Id.* As a result, there is no reasonable basis for this Court to predict that Plaintiff could recover against Cavalry on his Texas Insurance Code claim. *Id.*

For the foregoing reasons, the Court concluded that Cavalry was improperly joined and its citizenship could not be considered in determining whether the Court had subject matter jurisdiction based on diversity of citizenship. Due to complete diversity between Browning and Sentinel, and because the amount in controversy exceeded the jurisdictional amount, the Court had subject matter jurisdiction in this case. Therefore, the motion to remand was denied.

It is important to keep in mind that there are several remedies if there is a misjoinder or improper joinder of parties. As in *Browning*, the court may deny a motion to remand. Alternatively, the court may add or drop parties, consolidate separate actions, sever actions improperly joined, or even order separate trials

within the same case. Ultimately, the rules encourage the combination of multiple claims and parties into a single lawsuit for the sake of judicial economy.