THOUGHT LEADERSHIP

News

SOUTHERN DISTRICT DISALLOWS POST-SUIT ADJUSTER ELECTIONS UNDER INSURANCE CODE 542A

Newsbrief
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Last week, the Southern District of Texas joined the Eastern District of Texas in holding that if an insurer elects to accept responsibility for its adjuster and wishes to use that election as the basis for removal to federal court on diversity grounds, it must make the election ***before*** a lawsuit is filed. In *Shenavari v. Allstate Veh. & Prop. Ins. Co.*, No. 4:19-CV-4159, 2020 WL 1430529 (S.D. Tex. Mar. 23, 2020) (slip op.), the policyholder sued Allstate and its adjuster for damages arising out of a Hurricane Harvey claim. After being served with the lawsuit, Allstate filed an Election of Legal Responsibility for its adjuster and removed the case to federal court, arguing that because of its election, the adjuster was improperly joined.

Considering the motion to remand, the court acknowledged that while the Fifth Circuit has not yet addressed this vexing issue, two distinct lines of case law have developed among the federal district courts of Texas. One, led primarily by the Western District, holds that a post-suit election is a valid basis for removal because it precludes any recovery against the adjuster, and thus passes the improper joinder test. The other, led by the Southern and Eastern Districts, holds the potential for recovery against the adjuster must be determined at the time the suit is filed, and therefore, a later-filed election is not effective to prevent remand.

Unsurprisingly, the court followed the lead set by existing opinions out of the Southern District, holding Allstate's election came too late. Allstate also attempted a traditional improper joinder approach, arguing the pleadings were too generic and vague to state a viable claim against the adjuster, which was also rebuffed.

Editor's Note: The split among the districts on this issue continues to become starker, setting the stage for the right case to allow the issue to go before the Fifth Circuit for resolution. However, because remand orders are not immediately appealable, that hypothetical test case will probably have to proceed to trial in state court before the Fifth Circuit can weigh in.

It is not clear from the court's opinion whether Allstate received the mandatory pre-suit notice to which it was legally entitled under the Insurance Code and DTPA. If it did receive notice, that would have been Allstate's only opportunity to make the election prior to being suit. But policyholder attorneys often do not comply with the notice provisions, and if the Southern District's view prevails, that trend will only increase.