Battling for the Forum: Strategies Employed by Insurers and Policyholders to Secure and Protect the Most Advantageous Forum for Their Coverage Disputes[1]

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Sun Tzu famously advised that "every battle is won or lost before it's ever fought." Following this adage, trial lawyers take great pride in their preparedness for trial, knowing that mastery of detail is among the factors that lead to victory. In insurance litigation, an outcome may be well be determined even earlier, by the choice of a specific state or federal court forum permitted to apply the law of a specific state to resolve the dispute.

As a basic rule, plaintiffs will generally prefer state courts, while defendants tend to prefer to litigate in federal courts. Insurance disputes follow these general preferences. Policyholders, typically plaintiffs, perceive they will receive more favorable treatment in the state court system; insurance carriers almost invariably will steer towards the federal courts when bringing or defending such actions. This paper will address some of the considerations and strategies employed by policyholders and insurance companies to secure and protect what they perceive to be the more advantageous forum for their cause.

II. GENERAL CONSIDERATIONS

A. Choice of Law

1. State Law Governs

The substantive law of insurance is left to the states under the McCarran-Ferguson Act, 15 U.S.C. § 1012(a). Consequently, all 50 states (plus the District of Columbia and various U.S. Territories) have their own statutory, administrative, and/or case law with regard to insurance. It follows that (1) there are potential and actual conflicts of law among the various states' application of the law of insurance and interpretations of insurance policies; and (2) the states apply different conflicts of law principles to determine the applicable law once a conflict is seen.

2. Possible Conflicts Among Potentially Applicable State Law

The infinite number of ways in which the substantive law of insurance coverage may differ among the states is well beyond the scope of this paper. Suffice it to say that potential and actual differences may appear anywhere and everywhere. By way of example only, states differ as to the insurability of punitive damages. In New York, directly assessed punitive damages and vicariously assessed punitive damages are deemed uninsurable. *Zurich Ins. Co. v. Shearson Lehman Hutton, Inc.*, 642 N.E.2d 1065 (N.Y. 1994); in California, directly assessed punitive damages may not be insurable (Cal. Ins. Code § 533; *PPG Industries, Inc. v. Transamerica Ins. Co.*, 975 P.2d 652 (Cal. 1999), but vicariously assessed punitive damages probably are, *see Arenson v. Nat'l Auto. and Cas. Ins. Co.*, 286 P.2d 816 (Cal. 1955) (section 533 has no application to situation where insured not personally at fault) and *J.C. Penney Cas. Ins. Co.*, 804 P.2d 689 (§ 533 does not preclude coverage for negligent acts); and in Arizona, no public policy prohibits insurance coverage for punitive damages arising out of gross negligence, wantonness, or recklessness. *Price v. Hartford Accident & Indem. Co.*, 502 P.2d 522 (Ariz. 1972). In Texas,

[2] The authors express their gratitude to Rhonda Thompson and Robert Gessinger for their contributions to portions of this paper.

punitive damages are insurable unless they arise from "extreme and avoidable conduct that causes injury." *See Am. Int'l Specialty Lines Ins. Co. v. Res-Care, Inc.*, 529 F.3d 649 (5th Cir. 2008) (applying Texas law).

Similarly, in California, an insurance company may have a right to reimbursement for costs of defense paid to defend claims that were never even potentially covered. *Buss v. Superior Court*, 16 Cal.4th 35 (1997). In Illinois, no such right exists unless it is expressly set forth in the policy. *Gen. Agents Ins. Co. of Am. v. Midwest Sporting Goods, Co*., 215 Ill.2d 146, 165, 828 N.E.2d 1092 (2005); *Excess Underwriters at Lloyd's, London v. Frank's Casing Crew & Rental Tools, Inc.*, 246 S.W.3d 42 (Tex. 2008) (same).

3. Differing Principles to Resolve Conflicts of Law

Each state court will apply its own conflict of law rules, while the federal courts will apply the law of the state in which they sit. Restatement (Second) of Conflict of Laws ("Second Restatement") §6; *Klaxon v. Stentor Elec. Mfg. Co*., 313 U.S. 487 (1941). Just as different states apply different substantive law, they may differ with regard to the rules they apply to resolve conflicts.

Some states still apply the traditional rule of *lex loci contractus*, enforcing the law of the state where the contact was made. *See Lexie v. State Farm Mt. Auto Ins. Co*., 469 S.E.2d 61, 63 (Va. 1996). Other states have abandoned *lex loci* in favor of the Second Restatement which, absent a controlling statutory directive, looks to:

> *(a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the laws to be applied.*

Second Restatement, §6. *See, e.g., Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 420-21 (Tex. 1984).

Still other states apply one variety of hybrid or another. Florida applies *lex loci*, subject to a narrow exception where necessary to protect a Florida citizen and enforce a "paramount" state policy. *See State Farm Mt. Auto Ins. Co. v. Roach*, 945 So. 2d 1160 (Fla. 2006). Tennessee does as well, subject to a statutory exception for policies made to benefit a citizen of the state. *Ohio Cas. Ins. Co. v. Travelers Indem. Co.*, 493 S.W.2d 465 (Tenn. 1973); Tenn Code §56-7-102.

Even application of *lex loci* is not mechanical. Determining the place in which a contract was made, or made and delivered, may entail disputed facts. Was the contract made where the policyholder received a copy? Where the broker received a copy? If a policy was distributed to more than one location, which is the operative delivery?

Finally, counsel must carefully review all applicable contract materials to determine whether the contracting parties agreed to a choice of applicable law, however unlikely that may be. Even

then, there is no guarantee the parties' choice of law will be enforced. *See e.g.*, *Industrial Indem. Ins. Co., v. United States*, 757 F.2d 982 (9th Cir. 1985) (declining to enforce Illinois choice-of-law provision to policy having no relationship with Illinois); *DeSantis v. Wackenhut Corp.,* 793 S.W.2d 670, 677 (Tex. 1990) (courts will enforce the parties' choice of law provision unless the chosen jurisdiction has no relation whatever to them or their agreement thwarts Texas public policy).

B. Perceived Advantages of State Forum to Policyholders

Typically, policyholders consider themselves advantaged if they can proceed in state court. As a general proposition, insurers consider themselves better off in federal court. While counsel should re-examine these assumptions in every case, some basic considerations underlying the conventional wisdom include the following.

1. Pleading Standards

Whether an initial claim has sufficient merit to proceed beyond the pleading stage may be viewed leniently under the procedural law of many states.

In Texas, for example, pleadings brought before state courts must contain a "statement in plain and concise language, of the plaintiff's cause of action or the defendant's grounds of defense . . ." Tex. R. Civ. P. 45(b). As a benchmark for determining which complaints are litigated and which dismissed, this "fair notice" standard imposes a limited onus on the plaintiff. The court will consider "whether the opposing party can ascertain from the pleading the nature and basic issues of the controversy and what testimony will be relevant." *Horizon/CMS Healthcasre Corp. v. Auld*, 34 S.W.3d 887, 896 (Tex. 2000); *but see Plascencia v. State Farm Lloyds*, No. 14-CV-524-A, Doc. No. 17, at 9 (N.D. Tex. Sept 25, 2014) (McBryde, J.) (concluding that TRCP 91a renders the issue of federal pleading standard versus state pleading standard somewhat moot). Allegations that include legal conclusions will not establish grounds for objection, as long as fair notice is communicated by the complaint as a whole. Tex. R. Civ. P. 45(b).

Plaintiffs may also benefit from the broader interpretive latitude usually afforded state court judges. In states with liberal notice pleading requirements, an original petition should typically be construed liberally in favor of the pleader, and the court "should uphold the petition as to a cause of action that may be reasonably inferred from what is specifically stated, even if an element of the cause of action is not specifically alleged." *Boyles v. Kerr*, 855 S.W.2d 593, 601 (Tex. 1993).

In sum, the insurance carrier being sued in most state courts will encounter a forum simply more amenable to the allegations set forth in the complaint filed against it. Of course, while such a defendant might eventually prevail over the course of trial, the prospects for defeating the suit early on, at the pleadings stage, are significantly curtailed.

2. Pre-Trial Discovery

Most state courts continue to permit extremely broad pre-trial discovery. *See, e.g.,* Cal. Code Civ. Proc. § 2017.010 (unless limited by order, "any party may obtain discovery regarding any matter [that] appears reasonably calculated to lead to the discovery of admissible evidence").

Federal Courts may be more likely to limit pre-trial discovery, as evidenced by recent changes to the Federal Rules.

3. Summary Judgment

Many state courts tend to be reluctant to grant motions for summary judgment. Federal courts, by contrast, tend to be less hostile to an early disposition of the case.

4. Trial Procedure

Federal judges are generally more likely to place time limitations on the parties during trial. Policyholders, generally wearing the plaintiff hat and often seeking damages for bad faith, perceive limited trial time to be unfavorable.

5. Non-unanimous Jury Verdicts

Unless stipulated otherwise, jury verdicts in federal court must be unanimous. Fed. R. Civ. P. 48(b). Thus, failure to win a single juror will prevent the plaintiff (usually the policyholder) from prevailing. Many states, however, do not require unanimous verdicts; in California, three-fourths of the jury is sufficient to deliver an effective verdict after trial. Cal. Code Civ. P. § 618. In Texas, a minimum of ten members of the jury must concur in the verdict. Tex. R. Civ. P. 292(a).

6. Other Provincialism

As discussed below, coverage cases in the federal courts almost always involve an insurer "foreign" to the forum state. Policyholders perceive the local courts to be more solicitous of protecting the citizenry of the forum state; insurers typically perceive the federal courts to be less partial to the policyholder resident in the forum state. Insurers tend to fear the latitude the typical state court judge has in making rulings, from evaluating the pleadings to deciding motions for new trial and for judgment notwithstanding the verdict.

C. Necessity of Thorough Pre-Suit Analysis

Given the breadth of considerations such as those identified above, careful coverage counsel must at the earliest stage of a developing dispute examine all of the circumstances and attempt to decide

- which forums are potentially available for litigation under applicable rules of personal jurisdiction, subject matter jurisdiction, and venue;
- which states' laws are potentially applicable;
- which state's (or states') laws would be most beneficial to her client, and on which issue(s);
- which forum is most likely to apply the law deemed most favorable; and
- whether there will be competition between state and federal forums.

Only after questions such as these are examined as fully as possible can counsel apply principles such as those discussed below to try to secure the most favorable forum.

III. FORUM CHOICE AND PRESERVATION TACTICS

A. Diversity Jurisdiction

Coverage litigation between a policyholder and an insurance carrier frequently involves an insurer domiciled in one state, and a policyholder domiciled in another. Section 28 U.S.C. 1332(a) confers original jurisdiction upon federal district courts for civil suits where: (1) the amount in controversy exceeds $75,000, and (2) diversity of citizenship exists. As an initial proposition, insurers battling their customers would seem to hold the upper hand as far as presenting their case in the preferred federal forum.

1. Requirement of Complete Diversity

The federal courts' diversity jurisdiction depends, of course, upon *complete* diversity of the plaintiffs and the defendants. 28 U.S.C. § 1332. Frequently, however, attorneys for policyholders have resourceful methods for preserving state court adjudication.

2. Joinder of Non-Diverse Defendants

One tactic to eliminate complete diversity has been to join non-diverse persons or entities involved in the placement of the policy or adjustment of the claim. In order to do so, the claimant must analyze the facts under an array of jurisdiction specific common law and statutory rules and structure the allegations to capitalize on a theory most supportive of joinder. These theories include, but are not limited to, negligence, breach of contract, breach of fiduciary duty, and the violation of various Consumer Fraud and Deceptive Business Practices Acts. *See e.g. Brennan v. Hall*, 904 N.E.2d 383 (Ind. Ct. App. 2009) (negligence); *Ex parte Certain Underwriters at Lloyd's of London*, 2001 WL 283262 (Ala. 2001) (breach of contract); *Triarsi v. BSC Group Services, LLC*, 422 N.J. Super. 104, 27 A.3d 202 (App. Div. 2011) (fiduciary duty); *Esteban v. State Farm Lloyds*, 23 F. Supp. 3d 723 (N.D. Tex. 2014) (claim against independent insurance adjuster for unfair or deceptive practices in the business of insurance under Texas Insurance Code). By filing suit against the insurance company and joining non-diverse persons also involved in business activities related to the policy, such as local claim adjusters, agents, and brokers, policyholders can potentially preclude federal jurisdiction over their claim.

a. Local Claims Adjusters

Insurance companies will in many instances dispatch locally based representatives, either as employees or independent contractors, to act as their claims adjusters. Several states have enacted statutes that create liability against these individuals.[3]

For example, in *Vail v. Texas Farm Bureau Mut. Ins. Co.*, 754 S.W.2d 129, 132 (Tex. 1988), the Texas Supreme Court acknowledged adjusters as persons attributed statutory duties pursuant to the Texas Insurance Code ("TIC"). Specifically, the *Vail* opinion expressly stated that the adjustment of claims and losses were covered under the TIC. *Id.*; *see also Western States Asset*

[3] If your state has adopted a Deceptive Trade Practices Act, evaluate the facts of your case carefully to determine if such an act might apply. It is uncommon for states to extend the application of such statutes to claims handling practices particularly if there is a Fair Claims Handling Act.

Mgmt., Inc. v. AIX Specialty Ins. Co., No. 13-CV-0234-M, 2013 WL 3349514, at *4 (N.D. Tex. July 3, 2013).

Despite these statutory enactments, an adjuster's own direct actions are the most relevant factors in determining liability in most cases, whether such individual is actually employed by the insurer or merely acting as an independent contractor. *See, e.g., Garza v. Geovera*, No. 13- CV-525, 2014 WL 66830, at *2 (S.D. Tex. Jan. 18, 2014); *Rocha v. Geovera Specialty Ins. Co.*, No. 13–CV–0589, 2014 WL 68648, at *2 (S.D. Tex. Jan. 8, 2014); *see also Gasch v. Hartford Indem. Co.*, 491 F.3d 278, 282 (5th Cir. 2007). "[T]he Code itself indicate[s] that an adjuster has an individual duty that arises when he engages in the business of insurance and that is not derived from the duty owed to the insured by an insurer." *Esteban v. State Farm Lloyds*, No. 13-CV-3501-B, 2014 WL 2134598, at *6 (N.D. Tex. May 22, 2014) (citing TEX. INS. CODE ANN. §§ 541.002, 541.151).

Nevertheless, federal court authority occasionally recognizes that an adjuster who is a state resident, quite often, is simply named in a case because he or she showed up for work, particularly when an allegation of fraud is at play. *See Waters v. State Farm Mutual Automobile Ins Co.*, 158 F.R.D. 107, 108-109 (S.D. Tex. 1994); *Herrman Holdings, Ltd v Lucent Techs., Inc.*, 302 F.3d 552, 564-65 (5th Cir. 2002).

In that respect, decisions such as the Texas Supreme Court's in *Natividad v. Alexsis, Inc*., 875 S.W.2d 695 (1994), are an additional resource for insurers. *Natividad* focused on an alleged breach of the duty of good faith and fair dealing by an independent insurance adjuster. The Texas Supreme Court reiterated the policy rationale that the duty of good faith and fair dealing arises from the type of unequal bargaining power that is typically present in insurance placements; furthermore, according to the Court, this duty is non-delegable. *Id*. at 698. As a result, the duty of good faith and fair dealing does not apply to independent contractors who are not in direct privity with the policyholder.[4]

Insurance carriers often argue that, according to decisions similar to *Natividad*, policyholders cannot sue an independent adjuster under any theory of law when contractual privity is lacking. By and large, this position has proven unpersuasive in attempts to defeat motions for remand. The court in *Esteban*, for example, clarified that *Natividad* "only precluded an independent adjuster's liability for breach of the duty of good faith and fair dealing and did not insulate an insurance agency's employee-adjuster from liability under the Texas Insurance Code." *Esteban*, at *5 (citing *Gasch*, 491 F.3d at 282).

[4] *See id.* at 698 ("When the insurance carrier has contracted with agents or contractors for the performance of claims handling services, the carrier remains liable for actions by those agents or contractors that breach the duty of good faith and fair dealing owed to the insured by the carrier…Because [the agents] were not parties to a contract with Natividad giving rise to a 'special relationship,' [they] owed Natividad no duty of good faith and fair dealing."); *see also Johnson v. Doodson Ins. Brokerage of Texas, LLC*, 1 F. Supp. 3d 776 (E.D. Mich. 2014) (For any plaintiff to sustain a claim for professional negligence against an insurance broker in Texas, the plaintiff and the broker must be in privity of contract); *Wormsbacher v. Seaver Title Co.*, 284 Mich. App. 1, 772 N.W.2d 827 (2009) (A title insurer and its agents do not have a professional duty of care to those who employ them, apart from their contractual obligations).

As such, the legal cover provided in this context to representatives of insurance companies for breaching the duty of good faith and fair dealing constitutes a typically fairly narrow exception. Leaving good faith aside, the statutes of various appear to establish a broad basis on which to hold third-parties liable for unfair and/or deceptive acts and practices.

b. Local Insurance Agents and Brokers

Claims adjusters are not the only non-diverse joinder candidates which policyholders may target as a means for keeping their lawsuits in state court. The common-law and statutes of many jurisdictions establish duties that create the possibility for both agent and broker liability in the context of a coverage action.

These common-law and statutory duties encompass adjusters, agents and brokers inclusively, and may or may not draw a distinction between insurance agents affiliated with an insurer and independent insurance brokers that can procure insurance from various insurers. *Webb v. Unumprovident Corp.*, 507 F. Supp. 2d 668, at 683 (W.D. Tex. 2005). However, the respective functions of each in placing policies and adjusting claims are, of course, fundamentally different.

Whereas adjuster liability stems mostly from actions undertaken after the policyholder has submitted its claim, a lawsuit against agents and brokers often alleges misconduct closer to the point of sale. *See, e.g. Nahmias Realty, Inc. v. Cohen*, 484 N.E.2d 617, 620 (Ind. Ct. App. 4th Dist. 1985) ("If an insurance agent undertakes to procure insurance for his principal and through his fault or neglect fails to do so, the agent is liable to the principal for any damages resulting from his failure."); *Bucksaw Resort, LLC v. Mehrtens*, 414 S.W.3d 39 (Mo. Ct. App. W.D. 2013) (failure to procure insurance); *Clements v. Thornton*, 268 Or. 367, 520 P.2d 893, 898 (1974) (same); *but see Baranowski v. Safeco Ins. Co. of America*, 119 Conn. App. 85, 986 A.2d 334 (2010) (Insurance is a highly regulated industry by state, so the standard of care applicable to an insurance agent varies from state to state).

In the event that the coverage that the insured believed it was purchasing is not actually provided by the policy and the insured cannot successfully reform the policy, the insured might have a remedy against its insurance broker. An insurance broker is obligated to act in good faith and with reasonable care, skill, and diligence in transacting business on behalf of the insured. *See e.g., In Royal Ins. Co. of America v. Cathy Daniels, Ltd.*, 684 F. Supp. 786, 792-93 (S.D.N.Y. 1988) (broker procured a policy that was rescinded because of the broker's failure to disclose certain facts to the insurer, and court held that the broker had breached its duty to exercise skill, care, and diligence in procuring coverage for the insured and broker was liable for the losses that the insured could have recovered if the policy had been properly obtained).

Along those lines and due to the particular roles of insurance agents and brokers, some of the more notable cases addressing joinder focus on misrepresentations made by brokers/agents to purchasers. For example, in *Peterson v. Big Bend Ins. Agency, Inc.*, the Washington Court of Appeals held that liability may be imposed on an insurance agent for making negligent misrepresentations as to how policy limits are to be determined where the client justifiably relies on the representations. *Peterson v. Big Bend Ins. Agency, Inc.*, 150 Wash. App. 504, 202 P.3d 372 (Div. 3 2009), as amended on reconsideration, (July 14, 2009). In a similar ruling, *May v. United Servs. Ass'n of Am.*, 844 S.W.2d 666, 669 (Tex. 1992), the Texas Supreme Court

explained, "it is established in Texas that an insurance agent who undertakes to procure insurance for another owes a duty to a client to use reasonable diligence in attempting to place the requested insurance and to inform the client promptly if unable to do so." Under Texas law, an agent or broker would thus violate such obligation when he has "induced the plaintiff to rely on his performance of the undertaking to procure insurance, and the plaintiff reasonably, but to his detriment, assumed that he was insured against the risk that caused his loss." *Id.*

As a result, if a policy does not provide the coverage that the insured hired the broker to obtain, and the broker does not apprise the insured of that fact, the insured may have a remedy against the broker for the equivalent of the missing policy benefit in the event of a later occurrence that was supposed to have been, but was not, covered. *See, e.g., Commercial Ins. Consultants, Inc. v. Frenz Enterprises, Inc.*, 696 So. 2d 871, 873 (Fla. Dist. Ct. App. 5th Dist. 1997) (if broker fails to procure insurance, it is liable "to the same extent as the insurer had the insurance been properly obtained"); *Clements v. Ohio State Life Ins. Co.*, 33 Ohio App. 3d 80, 514 N.E.2d 876, 881 (1st Dist. Hamilton County 1986) ("An insurance agent who advises a client that the coverage sought is in effect with the knowledge that the insurance company has not yet agreed to provide the coverage thereby incurs personal liability as an insurer…. In addition, if the agent is negligent in failing to acquire coverage he has undertaken to procure, he may be liable for resulting damage"); *Lazzara v. Howard A. Esser, Inc.*, 802 F.2d 260, 266, 6 Fed. R. Serv. 3d 54 (7th Cir. 1986) (Illinois law) ("damages for a broker's failure to procure or maintain insurance are determined by the terms of the policy that the broker failed to procure").

Thus, between adjusters, agents and brokers, a variety of non-diverse targets may land in a policyholder's crosshairs. Insurance carriers defending a suit involving those non-diverse defendants, however, are hardly devoid of avenues for subverting such designs.

B. Federal Finagling

1. Removal and Remand

When a coverage action is filed initially in state court, a defendant may have the option to remove it to federal court under 28 U.S.C. § 1446. Most frequently, the basis for removal is diversity of citizenship.

First, the removing party must consider the amount in controversy. Sometimes it will be apparent from the face of the complaint. At other times, the complaint filed in state court will allege with specificity only the amount of damages necessary for the state court's jurisdiction, such as damages in an amount of at least $15,000. Indeed, some states prohibit a plaintiff from specifying the demand. And many states even prohibit plaintiffs from alleging a specific number for certain claims. *See, e.g.*, Cal. C.C.P. § 425.10(b) ("where an action is brought to recover actual or punitive damages for personal injury or wrongful death, the amount demanded shall not be stated"); N.Y. C.P.L.R. § 3017(c) ("In an action to recover damages for personal injuries or wrongful death, the complaint . . . shall not state the amount of damages to which the pleader deems himself entitled."). Where the amount in controversy cannot be determined from the complaint itself, the information may be derived from a judgment in the underlying claim, a demand letter, discovery responses in the underlying action relating to damages, and similar sources. The removal statute incorporates a "preponderance of the evidence" standard, which

means that a removing party need not prove the amount in controversy to a "legal certainty." 28 U.S.C. § 1446(c)(2)(B).

Second, the removing party must establish diversity. A "corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business . . . ." 28 U.S.C. § 1332(c)(1). The corporation's "principal place of business" is determined by the corporation's "nerve center." *Hertz Corp. v. Friend*, 559 U.S. 77 (2010). For the purpose of diversity jurisdiction, partnerships are citizens of the states where each partner or limited partner is a citizen. *Carden v. Arkoma Assocs.*, 494 U.S. 185, 186 (1990). "[T]he citizenship of an LLC for purposes of the diversity jurisdiction is the citizenship of its members." *Cosgrove v. Bartolotta*, 150 F.3d 729, 731 (7th Cir. 1998); *see also Zambelli Fireworks Mfg. Co. v. Wood*, 592 F.3d 412 (3d Cir. 2010) (same); *Delay v. Rosenthal Collins Grp.*, 585 F.3d 1003 (6th Cir. 2009) (same); *Harvey v. Grey Wolf Drilling Co.*, 542 F.3d 1077 (5th Cir. 2008) (same); *Johnson v. Columbia Props. Anchorage, LP*, 437 F.3d 894 (9th Cir. 2006) (same).

Again, the citizenship of the parties may have been alleged in the original complaint. Where it is not, the federal court may accept the averment of the removing party regarding the citizenship of the parties. However, some federal courts will issue a show cause order requiring the removing party to adduce further proof of the citizenship of the parties. *See, e.g., Univ. of St. Augustine for Health Servs. v. Allied World Surplus Lines Ins. Co.*, 3:15-cv-00608-BJD-JRK, Dkt. No. 5 (M.D. Fla. May 20, 2015); *Fin. Strategy Grp. v. Cont'l Cas. Co.*, No. 2:14-cv-2154, Dkt. No. 24 (W.D. Tenn. Sept. 9, 2014). The facts concerning citizenship may be derived from public records of which the federal court may take judicial notice. The types of documents of which the federal court may take judicial notice are defined by Rule 201(b) of the Federal Rules of Evidence. They include court records and certain information published on government websites. For example, individual states' Secretary of State or Office of Corporations-type departments may have publicly available certificates of incorporation for corporations. Prior statements about citizenship of parties may be available from court filings in Pacer or Securities and Exchange Commission filings. Websites maintained by the parties may also contain admissible proof of citizenship.

It is critical that the removing party get the facts straight at the time of removal. If diversity jurisdiction was not correctly determined, the jurisdictional question can be raised by another party or the court at any time and thereby defeat even years of litigation effort. *See, e.g., Ind. Gas Co. v Home Ins. Co.*, 141 F.3d 317 (7th Cir. 1998) (dismissal by appellate court, *sua sponte*, after three years of litigation where appellate court first raised the question about whether valid diversity jurisdiction existed at oral argument).

Even if diversity exists, though, a defendant cannot remove an action to federal court if any defendant that has been properly "joined and served" is a citizen of the state in which the case was filed. 28 U.S.C. § 1441(b). The "resident defendant" exception to removal means that a defendant sued in its home state court cannot remove the case to federal court, even if diversity jurisdiction exists. The "joined and served" requirement in the exception provides a small loophole, though. If the resident defendant has not yet been formally served with the state court complaint, the removing party may act quickly to remove the action and obtain jurisdiction in the federal forum. *See, e.g., Thomson v. Novartis Pharma. Corp.*, No. 06-6280 (JBS), 2007 WL

1521138 (D.N.J. May 22, 2007); *see also Murphy v. Studio 6*, No. 09-2212-STA, 2010 WL 503126, at *8 (W.D. Tenn. Feb. 5, 2010) ("Service of process [is] not a prerequisite to a defendant exercising its right of removal under 28 U.S.C. § 1446.").

If the federal court concludes *sua sponte* or upon motion of a plaintiff that any of the requirements for proper removal have not been met, the matter may be remanded to the state court where it was initially filed.

2. LLC's and Lloyd's Parties

The Third Circuit recently addressed removal and proof of diversity jurisdiction where the defendant is an unincorporated association such as a partnership or limited liability company ("LLC") in *Lincoln Benefit Life Co. v. AEI Life LLC,* 800 F.3d 99 (3d Cir. 2015). After the insurer filed a declaratory judgment action in federal court seeking a determination that the insurance policies were improperly procured, the trial court had granted the LLC defendants' motion to dismiss, concluding that the insurer failed to adequately plead complete diversity. The trial court had required the insurer to show the citizenship of each member of each defendant LLC in order to plead complete diversity. The Third Circuit reversed and reinstated the action, holding that the party asserting diversity jurisdiction must conduct a reasonable factual inquiry before alleging that none of an unincorporated association's members are citizens of a particular state. At that point, the burden shifts to the unincorporated association party make a factual challenge by identifying any member who "destroys diversity." The allocation of the burden to establish diversity in this way makes sense because, as the Third Circuit recognized, "[t]he membership of an LLC is often not a matter of public record." *Id* at 108. The insurer in the case pointed out that it had not been able to discern the identity or citizenship of the LLC members, despite a search of public databases, civil dockets and business-related search engines.

Lincoln Benefit provides a better-reasoned approach to determination of diversity given the unequal knowledge the parties about the unincorporated association's members at the time of filing or removal. This approach should also aptly apply to cases involving Lloyd's of London parties. The determination of a Lloyd's of London party's citizenship usually requires a determination of the citizenship of each to the Names subscribing to a policy, although some courts hold that a Lloyd's syndicate is a citizen of the state in which only its lead underwriter is a citizen. *See, e.g., Underwriters at Lloyd's, London v. Osting-Schwinn*, 613 F.3d 1079, 1092 (11th Cir. 2010) (where Lloyd's is suing in a representative capacity, rather than a specific name suing as an individual, each name must be diverse for diversity jurisdiction to be invoked); *E.R. Squibb & Sons, Inc. v. Acc. & Cas. Ins. Co*., 130 F.3d 925 (2d Cir. 1998) (holding that where the lead underwriter is sued in its individual capacity, the citizenship of the other subscribing underwriters is not relevant). The information about the Names, like the members of an unincorporated association, likely is difficult to discern from publicly available materials. Query whether a "reasonable factual inquiry" as to the citizenship of the relevant Names or syndicates should suffice for at least threshold pleading of diversity by a non-Lloyd's party.

3. Improper Joinder

An effective counter to the policyholder's motion to remand is to argue that the non-diverse defendant was improperly joined in the state court proceeding. This maneuver enlists the federal

court to reexamine the policyholder's original joinder, in order to uncover any procedural or factual defects.

Improper joinder may be proven by either: (1) actual fraud in the pleading of jurisdictional facts; or (2) inability on behalf of the plaintiff to raise a legitimate cause of action against the non-diverse defendant in state court. *Smallwood v. Ill. Cent. R.R. Co.*, 385 F.3d 568, 573 (5th Cir. 2004) (en banc); *SFM Holdings, Ltd. v. Fisher*, 465 Fed. Appx. 820, 821 (11th Cir. 2012). There are very few cases in which a court has found outright fraud committed by a policyholder in order to influence forum selection. *See e.g.*, *Schur v. L.A. Weight Loss Centers, Inc.*, 577 F.3d 752, 763 (7th Cir. 2009) ("Actual fraud in alleging jurisdictional facts will suffice to invoke the doctrine, but the more typical ground is that a plaintiff brought a claim against a nondiverse defendant 'that simply has no chance of success, whatever the plaintiff's motives.'") (internal citations omitted). *But see Plascencia v. State Farm Lloyds*, Doc. No. 17, at 16 (finding that a "standard form petition developed for use in similar cases" which appears "purposefully designed to defeat federal court jurisdiction" is badge of improper joinder sufficient to defeat remand). Far more often, judicial scrutiny will concentrate on the second prong of the improper joinder analysis.

a. Manipulation of the Pleadings

While the route into federal court through improper joinder is certainly feasible, the requirements to sustain that position are substantial. The Fifth Circuit in *Smallwood* noted that the "defendant bears a heavy burden of proving that the joinder of the in-state party was improper." *Smallwood*, 385 F.3d at 574. To overcome remand, the removing party must show that "there is absolutely no possibility that the plaintiff will be able to establish a cause of action against the non-diverse defendant in state court." *Griggs v. State Farm Lloyds*, 181 F.3d 694, 699 (5th Cir. 1999); *See also Schur*, 577 F.3d at 763. The Ninth Circuit has described the standard as this: "Joinder is fraudulent "[i]f the plaintiff fails to state a cause of action against a resident defendant, and the failure is obvious according to the settled rules of the state.'" *Hunter v. Philip Morris USA*, 582 F.3d 1039, 1043 (9th Cir. 2009); *Hamilton Materials*, 494 F.3d at 1206 (quoting *McCabe v. Gen. Foods Corp.*, 811 F.2d 1336, 1339 (9th Cir. 1987)) (alteration in original). Clearly, therefore, the level of judicial scrutiny which an insurer must overcome is exacting.

b. 12(b)(6)—Lite

The judicial probe into whether joinder of a non-diverse defendant was improper may involve two distinct lines of inquiry. First, the court might conduct a Rule 12(b)(6)-type analysis. This process will consider whether the complaint on its face asserts a sufficient claim against the in-state defendant, for which recovery might be obtained. As elaborated in *Struder v. State Farm Lloyds*, No. 13-CV-413, 2014 WL 234352, at *3 (E.D. Tex. Jan. 21, 2014), "if there is 'a reasonable basis for predicting that the state law might impose liability on the facts involved,' then there is no fraudulent joinder," and the case must be remanded for lack of diversity. *See also Sid Richardson Carbon & Gasoline Co. v. Interenergy Resources, Inc.*, 99 F.3d 746, 751 (5th Cir. 1996); *Crowe v. Coleman*, 113 F.3d 1536, 1542 (11th Cir. 1997).

This begs the question of course as to what constitutes an "arguably reasonable basis," such as the court references. The *Studer* decision addressed this point by commenting that "whether the

plaintiff has stated a valid state law cause of action depends upon and is tied to the factual fit between the plaintiff's allegations and the pleaded theory of recovery." *Struder*, 2014 WL 234352, at *4 (citing *King v. Provident Life and Accident Ins. Co.*, No. 09-CV-983, 2010 WL 2730890, at *4 (E.D. Tex. June 4, 2010)). A "factual fit" means "that the state-court petition must allege facts sufficient to establish the essential elements of each asserted cause of action." *Struder*, 2014 WL 234352, at *4 (citing *Tuchman v. DSC Communications Corp.*, 14 F.3d 1061, 1067 (5th Cir. 1994)); *See also Swanson v. Citibank, N.A.*, 614 F.3d 400, 404 (7th Cir. 2010).

Moreover, policyholders are advised that "merely lumping diverse and non-diverse defendants together in undifferentiated liability averments of a petition does not satisfy the requirement to state specific actionable conduct against the non-diverse defendant." *Griggs*, 181 F.3d at 699; *see also Triggs v. John Crump Toyota, Inc.*, 154 F.3d 1284, 1287 (11th Cir. 1998). Insurers should also be alert to point out, when appropriate, that policyholders "asserting a laundry list of statutory violations without factual support as to how a non-diverse defendant violated the statute will not suffice" to establish a valid joinder. *Struder*, 2014 WL 234352, at *4. As federal courts continue to test whether a state resident defendant is joined simply to defeat diversity, more and more scrutiny is given to the factual assertions presented by a particular petition.

When a federal court scrutinizes the joinder of an in-state defendant, a key issue becomes whether to apply the state or federal standard of review. An interesting split between the Texas federal district courts has developed along these lines, which currently remains unresolved. *See Yeldell v. GeoVera Speciality Ins. Co.*, No. 12–CV–1908–M, 2012 WL 5451822, at *2 (N.D. Tex. Nov. 8, 2012). On the one hand, the federal judges in the Eastern District of Texas appear to uniformly adhere to the federal framework. *See Doucet v. State Farm Fire & Cas. Co.*, No. 09–CV–142, 2009 WL 3157478, at *5 (E.D. Tex. Sept. 25, 2009); *First Baptist Church of Mauriceville, Tex. v. Guideone Mut. Ins.Co.*, No. 07-CV-988, 2008 WL 4533729, at *4 (E.D. Tex. Sept. 29, 2008); *King v. Provident Life and Accident Ins. Co.*, No. 09-CV-983, 2010 WL 2730890, at *4 (E.D. Tex. June 4, 2010). By contrast, other federal courts in Texas have held that, when reviewing the sufficiency of joinder in this context, the notice pleading standard under state law should control the determination. *Esteban v. State Farm Lloyds*, No. 13-CV-3501-B, 2014 WL 2134598, at *7 (N.D. Tex. May 22, 2014) ("the Texas pleading standard is more appropriate under these circumstances, given that the federal pleading standard . . . is arguably more stringent, and '[f]undamental fairness compels that the standard applicable at the time the initial lawsuit was filed in state court should govern.'") (citing *Durable Specialities, Inc. v. Liberty Ins. Corp.*, No. 3:11–CV–739–L, 2011 WL 6937377, at *4 (N.D. Tex. 2011)); *Edwea, Inc. v. Allstate Ins. Co.*, No. H-10-2970, 2010 WL 5099607, *8 (S.D. Tex. Dec. 8, 2010). *See also De La Hoya v. Coldwell Banker Mex. Inc.*, 125 F. App'x 533, 537–38 (5th Cir. 2005) (applying the Texas "fair notice" standard in an improper joinder case). This is significant, of course, because of the fundamentally more lenient and permissive elements of notice pleading available under Texas state law. Again, the rubric for notice pleading requires simply that the complaint state a cause of action and give the defendant fair notice of the relief sought.

This issue has obviously not been resolved by Texas federal courts. *Edwea* advises that "the majority of courts have held that a federal court should not look to the federal standard for pleading sufficiency under Rule 8 and 12(b)(6) to determine whether the state court decision provides a reasonable basis for predicting that the plaintiff could recover against the in-state defendant." Yet, this view stands in contract with the federal district courts in the Eastern

District of Texas which appear to uniformly observe the federal pleading-sufficiency standard when analyzing improper joinder. The Northern District of Texas took notice of this tension and has recently held that consideration of Texas Rule of Civil Procedure 91a renders the tension moot.[5] Judge Lindsay recognized the effect of the relatively new Texas Rule 91a when he, while applying the Texas pleading standards, noted that the allegations of the pleading now must be examined "in the context of Rule 91a". *Bart Turner & Assoc. v. Krenke*, Civil Action No. 13-CV-2921-L, 2014 WL 1315896, at *3 (N.D. Tex. Mar. 31, 2014); *see also Sazy v. Depuy Spine Inc.*, No. 13-CV-4379-L, 2014 WL 4652839, at *4 (N.D. Tex. Sept. 18, 2014) ("[t]his new rule [TRCP 91a] now allows a state court to do what a federal court is allowed to do under Federal Rule of Civil Procedure 12(b)(6)").

Whether or not a federal court will follow this trend and rely upon TRCP 91a as the tool to determine if allegations are sufficient against a Texas resident, federal rules require more substance than broadly articulated allegations and legal conclusions. Judicial scrutiny of alleged improper joinder, which more closely parallels the actual strictures of Rule 12(b)(6), will therefore benefit the party seeking to maintain federal court jurisdiction. Specifically, to qualify under the federal standard, a complaint "must contain sufficient factual allegations, as opposed to legal conclusions, to state a claim for relief that is 'plausible on its face.'" *JNT Enterprises v. Nationwide Prop. and Cas. Ins. Co.*, No. H-13-1982, Doc. No. 23, at 6 (S.D. Tex. April 15, 2014) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

Additionally, regardless of how well-pleaded the factual allegations may be, they must demonstrate that the plaintiff is entitled to relief under a valid legal theory. *See Neitzke v. Williams*, 490 U.S. 319, 327 (1989); *McCormick v. Stalder*, 105 F.3d 1059, 1061 (5th Cir. 1997). In some cases, a court may find this procedural review of the policyholder's pleading to be indeterminate for the purposes of settling the issue of improper joinder. Under such circumstances, the federal judge could resort to a summary review of the underlying facts and circumstances of the lawsuit in order to decide whether joining a local defendant should be allowed to defeat removal.

c. Piercing the Pleading

The second, separate test for whether a policyholder has asserted a valid claim against a non-diverse defendant in state court focuses on evidentiary considerations. A federal district court may, at its discretion, "pierce the pleadings" and consider summary judgment-type evidence. *See Ridgeview v. Philadelphia Indem. Ins. Co.* No. 13-CV-1818-B, 2013 WL 5477166 at *3 (N.D. Tex. Sept. 30, 2014). In doing so, the decision maker will "determine whether, under controlling state law, the non-removing party has a valid claim against the non-diverse parties." *Hornbuckle v. State Farm Lloyds*, 385 F.3d 538, 542 (5th Cir. 2004). Through this lens, keeping the case in federal court or remanding it back to the state court level depends "not upon whether the Plaintiff has pleaded causes of action that meet the threshold of stating a [legitimate] claim, .

[5] Tex. R. Civ. P. 91, adopted effective March 1, 2013, provides in pertinent part:

"[A] party may move to dismiss a cause of action on the grounds that it has no basis in law or fact. A cause of action has no basis in law if the allegations, taken as true, together with inferences reasonably drawn from them, do not entitle the claimant to the relief sought. A cause of action has no basis in fact if no reasonable person could believe the facts pleaded."

. . but upon whether the Plaintiff has any *evidence* at all that would support any of [its] claims." *Id.* at 545 (emphasis in original). A local defendant would be deemed improperly joined "not only when there is no reasonable basis for predicting that the local law would recognize the cause of action pled against that defendant, but also when, as shown by piercing the pleadings in a summary judgment type procedure, there is no arguably reasonable basis for predicting that the plaintiff would produce sufficient evidence to sustain a finding necessary to recovery against that defendant." *Id.*

While this process imitates somewhat that which is exercised during summary judgment, its parameters in the context of reviewing questions of improper joinder are of course more limited. The court's focus will remain narrowly tailored to assessing whether or not the non-diverse party (such as the insurance broker, agent, or adjuster) has been legitimately joined to the dispute. The court will not engage in a merits inquiry of the policyholder's action, but will consider any "discrete and undisputed facts and legal issues . . . that would preclude recovery against the in-state defendant." *Smallwood*, 385 F.3d at 573-574. Moreover, "a court must view all factual allegations in the light most favorable to the plaintiff, and any contested issues of fact or ambiguities of state law must be resolved" in favor of remand. *Travis*, 326 F.3d at 649. Nonetheless, this summary inquiry may be used to identify certain vulnerabilities upon which the insurer might capitalize.

4. Realignment of the Parties

The United States Supreme Court has held that "[d]iversity jurisdiction cannot be conferred upon the federal courts by the parties' own determination of who are plaintiffs and who defendants. It is [the] duty, . . . of the federal courts, to 'look beyond the pleadings, and arrange the parties according to their sides in the dispute.'" *City of Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63, 69 (1941) (internal citation omitted); *see also U.S. Fid. & Guar. Co. v. Thomas Solvent Co.*, 955 F.2d 1085, 1089 (6th Cir. 1992) (explaining that the parties must "be aligned in accordance with the primary dispute in the controversy, even where a different, legitimate dispute between the parties supports the original alignment.").

Accordingly, if a policyholder files an action in state court against a diverse insurer and a non-diverse underlying claimant, the matter may still be removable provided that the insurer can establish that the claimant, which has an interest in the policy proceeds, is properly aligned with the policyholder, which likewise has an interest in the policy proceeds. *See, e.g.*, *Nat'l Union Fire Ins. Co. v. Rodriguez*, Nos. 03-71738 & 03-74442, 2004 WL 3257089, at *9 (E.D. Mich. Feb. 12, 2004) ("The primary dispute in this case is whether the Policy excludes coverage for Ms. Rodriguez's claim against American Axle. Clearly, Ms. Rodriguez has the same interest as American Axle in ensuring that the $25,000,000.00 excess Policy covers her claim."); *Richman, Berenbaum & Assoc., P.C. v. Carolina Cas. Co.*, No. 02-3195, 2002 WL 1895900, at *2 (E.D. Pa. Aug. 14, 2002) (concluding that underlying claimant should be aligned with the insured and adverse to insurer in insurance coverage dispute "because his interests are aligned with those of the [insured] for purposes of this declaratory action"); *Truck Ins. Exch. v. Ashland Oil Inc.*, 951 F.2d 787, 788 (7th Cir. 1992) ("The insurance company brought the present suit in order to disclaim any liability it might have either to[] the insured [], or to [the insured's] victims; therefore the [plaintiff insurer] really is the adversary of all the defendants.") (internal citation omitted).

Note that consent of all defendants is typically required for removal. 28 U.S.C. § 1446(b)(2)(A). This is known as the "rule of unanimity." However, when a non-diverse defendant is realigned as a plaintiff for the purposes of determining diversity and potential removal, that party need not provide consent as a precondition to the removal. *See, e.g., State of Ohio ex rel. Skaggs v. Brunner*, 588 F. Supp. 2d 819, 827 (S.D. Ohio 2008), rev'd on other grounds, 549 F.3d 468 (6th Cir. 2008) (ruling that the "rule of unanimity" was no longer an issue where the court had realigned the non-consenting defendant with the plaintiffs); *Rodriguez*, 2004 WL 3257089 (realigning a tort claimant defendant who had objected to removal who and argued that she should not be realigned as a plaintiff). *See also Rico v. Flores*, 481 F.3d 234, 239 (5th Cir. 2007) ("[A] moving party need not obtain the consent of a co-defendant that the removing party contends is improperly joined."); *Coyne v. Am. Tobacco Co.*, 183 F.3d 488, 493 (6th Cir. 1999) ("[F]raudulent joinder of non-diverse defendants will not defeat removal on diversity grounds.").

5. The Second Filed But More Comprehensive Action

Where a state-filed case cannot be removed, a party seeking a federal forum has the option to file its own, separate action in federal court. If that federal court action is filed after the state court action is initiated, the federal court may be reluctant to retain jurisdiction if the matters are substantially identical. To enhance the likelihood of retaining federal jurisdiction, the party filing in federal court may file a more comprehensive action by, among other things, including additional insurers or claimants that are not parties to the state court action. The availability of a more comprehensive vehicle for dispute resolution may well result in the dismissal of the first filed state court action based on that fact and other forum non conveniens factors. *See, e.g., AIG Fin. Prods. Corp. v. Penncara Energy LLC*, 922 N.Y.S.2d 288 (App. Div. 2011) (the pendency of a more comprehensive action in a forum that has a direct stake in the resolution of the parties' disputes may render the original jurisdiction an unsuitable forum for litigation); *cf. Cont'l Ins. Co. v. Hexcel Corp.*, No. 12-cv-05352, 2013 WL 1501565 (N.D. Cal. Apr. 10, 2013) (dismissing federal action in favor of "more comprehensive" state court action filed by policyholder naming many more insurers as defendants).

For example, in *Penncara*, the court considered whether the trial court properly stayed the first-filed New York action in favor of a second-filed action in Pennsylvania. The court held that the first filed action was properly stayed. Among the factors the court found supported the stay were that the second-filed action was more comprehensive, was commenced reasonably close in time to [the first] one and 'offers more' than [the first] action because it includes plaintiff's affiliates as parties and will address defendant's claims." *Penncara*, 922 N.Y.S.2d at 289, quoting *Cont'l Ins. Co. v Polaris Indus. Partners*, 606 N.Y.S.2d 164, 165 (App. Div. 1993)). The court also rejected a mechanical "first-filed" analysis as not dispositive of whether the court should proceed with the action. Id.

6. Time Constraints and Procedures

A removal filing must be timely. The removing party must file the notice of removal with the federal court within thirty (30) days of the removing party's receipt "through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based," as provided by 28 U.S.C. § 1446(b). If discovery or records in the state court proceeding reveal that the amount in controversy exceeds the $75,000 federal

court jurisdiction requirement, a defendant may remove within 30 days after this information is revealed. 28 U.S.C. §§1446(b)(3), (c)(3)(A). Pursuant to 28 U.S.C. § 1446(a), the removing party must file with its notice of removal all process, pleadings, motions or orders received in connection with the state-filed action.

The removing party must serve written notice of the filing of the notice of removal on the plaintiff and also file a copy of the notice of removal with the state court where the action was initially filed.

Previously, the removal rules prohibited removal of a diversity case more than one year after the state court action was filed. Currently, a court may allow removal on diversity grounds after one year if the court "finds that the plaintiff has acted in bad faith in order to prevent a defendant from removing the action." 28 U.S.C. § 1446(c)(1). A plaintiff's deliberate failure "to disclose the actual amount in controversy to prevent removal" constitutes bad faith under this exception. 28 U.S.C. § 1446(c)(3)(B).

IV. ADDITIONAL AMMO

A. Abstention: Stay or Dismissal of Proceedings

1. Background: The *Brillhart* Factors

The Federal Declaratory Judgment Act ("DJA"), 28 U.S.C. § 2201, has since its enactment in 1934 empowered federal courts to award declaratory relief in cases otherwise within their jurisdiction. Where such jurisdiction exists, typically through diversity, the insurer may seek a federal forum in which to pursue declaratory relief. But the federal court's exercise of jurisdiction under the DJA is *discretionary*.[6] Thus, a party who perceives a state court forum to be more favorable (typically the policyholder) may initiate state court proceedings and request that the federal court "abstain" from exercising its discretion and stay (or even dismiss) a federal action while parallel proceedings continue in the state court.

The Supreme Court early on recognized the DJA increased the potential for "uneconomical as well as vexatious" parallel actions in state and federal courts, and urged avoidance of "[g]ratuitous interference with the orderly and comprehensive disposition of a state court litigation." *Brillhart v. Excess Ins. Co.*, 316 U.S. 491, 495 (1942). In *Brillhart*, the Court set forth three major factors to guide a district court in deciding whether to stay, dismiss or retain jurisdiction under the DJA. Specifically, lower courts should

- Avoid needless determination of state law issues;
- Discourage litigants from filing declaratory actions as a means of forum shopping; and
- Avoid duplicative litigation.

[6] The DJA provides: "any court of the United States, upon the filing of an appropriate pleading, *may* declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought …." 28 U.S.C. § 2201 (emphasis added).

Brillhart was reaffirmed in *Wilton v. Seven Falls Co.*, 515 U.S. 277 (1995). The Court in *Wilton* acknowledged other authorities which emphasized the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." *See e.g., Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). Nonetheless, the *Wilton* Court held that *in declaratory judgment actions*, the principle that federal courts should adjudicate claims within their jurisdiction "yields to considerations of practicality and wise judicial administration." *Wilton*, 515 U.S. at 288. The DJA thus gives district courts "unique and substantial discretion" to decide whether to exercise jurisdiction to issue a declaratory judgment. Indeed, a district court's decision to abstain under *Brillhart* is reviewable only for abuse of discretion. *Wilton*, 515 U.S. at 286, 289-90.

The "*Brillhart* factors" were never intended to be comprehensive, and every circuit which has spoken on the issue has articulated in somewhat different language additional considerations a district court should address in considering whether to abstain. By way of example, in the Ninth Circuit, a district court supplements the *Brillhart* factors with the "*Dizol*" considerations:

- whether the declaratory action will settle all aspects of the controversy;
- whether the declaratory action will serve a useful purpose in clarifying the legal relations at issue;
- whether the declaratory action is being sought merely for the purposes of procedural fencing or to obtain a *res judicata* advantage;
- whether the use of a declaratory action will result in entanglement between the federal and state court systems; and
- the convenience of the parties, and the availability and relative convenience of other remedies.

Government Employees. Ins. Co. v. Dizol, 133 F.3d 1220, 1225 n.5 (9th Cir. 1998).[7]

2. Application of *Brillhart* Factors

a. Needless determination of state law issues.

A "needless determination of state law" may involve an ongoing parallel state proceeding, or an area of law Congress expressly reserved to the states, or a lawsuit with no compelling federal interest, such as a diversity action. *See Continental Casualty Co. v. Robsac Indus.*, 947 F.2d 1367, 1371 (9th Cir. 1991) (overruled on other grounds by *Dizol*).

[7] While each Court of Appeal which has spoken on the subject has implemented the *Brillhart* factors in different language, "each circuit's formulation addresses the same three aspects of the analysis:" the proper allocation of decision-making between state and federal courts, fairness, and efficiency. *Sherwin-Williams Co. v. Holmes Cty*, 343 F.3d 383, 390 (5th Cir. 2003). There is as yet no indication the differing tests applied by the circuits constitute a substantive split, or would lead to different results under similar facts. Nonetheless, a party seeking to invoke federal DJA jurisdiction might wish to consider the different articulations that would be applied by different federal courts in determining whether to abstain in favor of the state forum. A list of the different articulations is contained in Appendix A.

i. Parallel Action. The existence of a "parallel" action in state court is one threshold trigger for federal court abstention. A state proceeding is "parallel" to a federal declaratory relief action when: (1) the actions arise from the same factual circumstances; (2) there are overlapping factual questions in the actions; or (3) the same issues are addressed by both actions. *Golden Eagle Ins. Co. v. Travelers Cos.*, 103 F.3d 750, 755 (9th Cir. 1996) (overruled in part on other grounds by *Dizol*); *Employers Reinsurance Corp. v. Karussos*, 65 F.3d 796, 800 (9th Cir. 1995) (overruled in part on other grounds by *Dizol*). Courts construe the term "parallel action" liberally. *Golden Eagle*, 103 F.3d at 754-55 (citing *American Nat'l Fire Ins. Co. v. Hungerford*, 53 F.3d 1012, 1017 (9th Cir. 1995)); *Keown v. Tudor Ins. Co.*, 621 F. Supp. 2d 1025, 1037 (D. Hawaii 2008). Underlying state actions need not involve the same parties or the same issues to be considered "parallel:" it is enough that the state proceedings "arise from the same factual circumstances." *Golden Eagle*, 103 F.3d at 754-55.

The "parallel" action threshold is generally satisfied when the insurer seeks a coverage determination in the federal court, and the policyholder seeks an opposite coverage determination in the state court. *E.g. N. Pac. Seafoods, Inc. v. Nat'l Union Fire Ins. Co.*, No. C06-795RSM, 2008 U.S. Dist. LEXIS 1714, at *11 (W.D. Wash. Jan. 3, 2008); *State Auto. Mut. Ins. Co. v. Reed*, No. 1:06-cv-1616-DFH-WTL, 2008 U.S. Dist. LEXIS 29712, at *2 (S.D. Ind. Mar. 28, 2008); *State Farm Fire & Cas. Co. v. Meridian Indus. Corp.*, No. C-95-2479 SI, 1995 U.S. Dist. LEXIS 16500, at *10 (N.D. Cal. Oct. 31, 1995).

Less intuitively obvious, DJA suits by insurers have frequently been found to be "parallel" to the *underlying* state court action against the policyholder which gives rise to the coverage dispute. In *Employers Reinsurance Corp. v. Karussos*, 65 F.3d 796 (9th Cir. 1995) (overruled in part on other grounds by *Dizol*), the plaintiff insurer sought declaratory relief from the federal court adjudicating coverage. The insurer was not a party to the underlying state court action, and the state and federal cases raised non-identical factual issues. Nevertheless, the court of appeals held the district court abused its discretion when it retained jurisdiction over the insurance coverage dispute because the resolution of the coverage issues "[turn] on factual questions that overlap with those at issue in the underlying state court litigation." *Id*. at 800. *See also*, *Polido v. State Farm Mut. Auto. Ins. Co.*, 110 F.3d 1418, 1423 (9th Cir. 1997) (overruled in part on other grounds by *Dizol*) (rejecting State Farm's argument that the federal declaratory relief action was *not* parallel to an underlying state court proceeding because State Farm was not a party to the state suit: "[D]ifferences in factual and legal issues between the state and federal court proceedings are not dispositive because the insurer could have presented the issues that it brought to federal court in a separate action to the same court that will decide the underlying tort action.") (internal quotations omitted).

ii. Unsettled issues of state law. Abstention also is appropriate where state law is unclear and there is no strong federal interest in the matter. *Mitcheson v. Harris*, 955 F.2d 235, 238 (4th Cir. 1992) (*reversing* failure to abstain); *Allstate Ins. Co. v. Davis*, 430 F. Supp. 2d 1112, 1120 (D. Haw. 2006) (absent strong countervailing federal interest, federal court "should not elbow its way" to render what may be "uncertain and ephemeral" interpretation of state law).

iii. The federal court's interest in exercising jurisdiction. There is no compelling federal interest in resolving disputes concerning insurance coverage. Because

the McCarran-Ferguson Act leaves the substantive law of insurance to the states, states "have a free hand in regulating the dealings between insurers and their policyholders." *Karussos*, 65 F. 3d at 799; *Dizol*, 133 F.3d at 1232 (because insurance industry is "wholly state regulated," federal interest is "minimal"). Where the sole basis of federal subject matter jurisdiction is diversity, the federal interest is "at its nadir." *Robsac*, 947 F.2d at 1371. Federal courts should "decline to assert jurisdiction in insurance coverage and other declaratory relief actions presenting only issues of state law during the pendency of parallel proceedings in state court unless there are circumstances present to warrant an exception to that rule." *American Nat'l Fire Ins. Co. v. Hungerford*, 53 F.3d 1012, 1019 (9th Cir. 1995) (internal quotations omitted).

b. Discourage forum shopping.

The second *Brillhart* factor addresses forum shopping. Federal courts have a duty to discourage forum shopping and decline to entertain "reactive declaratory actions." *Dizol*, 133 F.3d at 1225. A declaratory judgment action by an insurer during the pendency of state court proceedings presenting the same issues of state law is an "archetype" of such "reactive" litigation. *Robsac*, 947 F.2d at 1372-1373 ("Reactive litigation can occur in response to a claim an insurance carrier believes to be not subject to coverage even though the claimant has not yet filed his state court action: the insurer may anticipate that its insured intends to file a non-removable state court action, and rush to file a federal action before the insured does so…. permitting [a reactive lawsuit] to go forward when there is a pending state court case presenting the identical issue would encourage forum shopping in violation of the second *Brillhart* principle.").

A number of courts have characterized an insurer's declaratory relief action filed during the pendency of parallel underlying proceedings as "reactive" in this way—*i.e.*, unwarranted forum shopping—and found abstention proper. *See e.g., Federated Servs. Ins. Co. v. Les Schwab Warehouse Ctr., Inc.*, 2004 U.S. Dist. LEXIS 9252, at *11-14 (D. Or. Feb. 9, 2004) (court would impermissibly encourage forum shopping if it exercised jurisdiction over suit that raised some of same issues pending in underlying state court actions); *Great Am. Assur. Co. v. Bartell*, 2008 U.S. Dist. LEXIS 38720, at **11-12 (D. Ariz. Apr. 28, 2008) (Plaintiff was forum shopping by filing in federal court because it could have filed its action in state court, where action could have been coordinated with pending state court actions); *AMCO Ins. Co. v. AMK Enters.*, 2006 U.S. Dist. LEXIS 50806, at *12 (N.D. Cal. July 13, 2006) (exercising jurisdiction would encourage forum shopping because insurer could have brought action in state court, where underlying action pending).

c. Avoidance of duplicative litigation.

The third *Brillhart* factor aims to avoid duplicative litigation. If the federal coverage litigation seeks to adjudicate matters which have yet to be addressed in the underlying dispute, or which can or may be addressed in state court coverage proceedings, the party seeking abstention may have a strong argument. Where the state and federal claims are "inherently intertwined," a stay is indicated. *The Burlington Ins. Co. v. Panacorp, Inc.*, 758 F. Supp. 2d 1121, 1142 (D. Haw. 2010); *see also Phoenix Assur. PLC v. Marimed Found. for Island Health Care Training*, 125 F. Supp. 2d 1214, 1222 (D. Haw. 2000) (avoidance of duplicative litigation favored stay where district court would have to decide many of same issues to be decided in pending state court litigation). And where duplicative litigation runs the risk of providing inconsistent factual

findings and judgments, a stay or dismissal of proceedings is particularly appropriate. *See, e.g.*, *One Beacon Ins. Co. v. Parker, Kern, Nard & Wenzel*, 2009 U.S. Dist. LEXIS 88043 *15 (E.D. Cal. Sept. 9, 2009).

3. Stay or Dismissal?

Where a district court declines to exercise DJA jurisdiction, it may stay or dismiss the action in the sound exercise of its discretion. *Wilton*, 515 U.S. at 288. That said, "a stay will often be the preferable course, because it assures that the federal action can proceed without risk of a time bar if the state case, for any reason, fails to resolve the matter in controversy." *Id.* at 288 n.2. *Int'l. Ass'n. of Entrepreneurs of Am. v. Angoff*, 58 F.3d 1266, 1271 (8th Cir. 1995) (stay preferable when "further federal proceedings may prove necessary").

On the other hand, where the state court has disposed of the issue in dispute and there is no need for further proceedings, dismissal is appropriate. *E.g.*, *Nationwide Mut. Ins. Co. v. C.R. Gurule, Inc.*, No. CIV 15-0199 JB/KBM, 2015 U.S. Dist. LEXIS 162689, at *61-62 (D.N.M. Oct. 31, 2015).

4. Application of *Brillhart* Where the Federal Suit Seeks Declaratory *and* Coercive Relief?

If the federal courts have broad discretion under the DJA to exercise their jurisdiction or abstain from exercising it, what happens if an insurer joins a claim for "coercive" relief—*i.e.*, damages or rescission—with a plea for a declaratory judgment? The circuits are split as to whether the discretionary standard of *Brillhart* and *Wilton*, or the "unflagging obligation" standard of *Colorado River*, applies in such a situation. *See State Farm Mut. Auto. Ins. Co. v. Physicians Grp. of Sarasota, L.L.C.*, 9 F. Supp. 3d 1303, 1308 (M.D. Fla. 2014) (summarizing circuit split); *Regions Bank v. Commonwealth Land Title Ins. Co.*, No. 11-23257-CIV-SCOLA, 2012 U.S. Dist. LEXIS 47466, at *7 (S.D. Fla. Apr. 4, 2012) (same).

In the Fifth, Tenth, and Second Circuits, the *Wilton* standard does not apply where non-declaratory claims are joined with declaratory ones, and any abstention decision must be reached by reference to the "exceptional cases" standard of *Colorado River*. *New England v. Barnett*, 561 F.3d 392, 395 (5th Cir. 2009) ("a declaratory action that also seeks coercive relief is analyzed under the *Colorado River* standard"); *United States v. City of Las Cruces*, 289 F.3d 1170, 1181-82 (10th Cir. 2002); *Village of Westfield v. Welch's*, 170 F.3d 116, 125 n.5 (2d Cir. 1999) ("*Wilton* does not apply here. Although Welch did seek a declaration of rights…the federal action did not seek purely declaratory relief").[8]

The Ninth and Seventh Circuits have declined to apply *Brillhart* where the coercive claims are "independent" of any claim for purely declaratory relief. *Gov't Emps. Ins. Co. v. Dizol*, 133 F.3d 1220, 1226 n.6 (9th Cir. 1998) ("Because claims of bad faith, breach of contract, breach of fiduciary duty and rescission provide an independent basis for federal diversity jurisdiction, the district court is without discretion to remand or decline to entertain these causes of action"); *R.R.*

[8] One Fifth Circuit case suggests courts should determine whether coercive claims are "frivolous" before determining whether *Brillhart* or *Colorado River* applies. *Kelly Inv. v. Cont'l Common Corp.*, 315 F.3d 494, 497 n.4 (5th Cir. 2002)

St. & Co. v. Vulcan Materials Co., 569 F.3d 711, 716-17 (7th Cir. 2009) ("Where state and federal proceedings are parallel and the federal suit contains claims for both declaratory and non-declaratory relief, the district court should determine whether the claims seeking non-declaratory relief are independent of the declaratory claim. If they are not, the court can exercise its discretion under *Wilton/Brillhart* and abstain from hearing the entire action. But if they are, the *Wilton/Brillhart* doctrine does not apply and, subject to the presence of exceptional circumstances under the *Colorado River* doctrine, the court must hear the independent non-declaratory claims.").[9]

The Eighth Circuit and certain district courts have taken yet a different approach and look to the "essence" of the lawsuit. If the "essence" of the lawsuit is a declaratory judgment action, *Brillhart* applies. *See Royal Indem. Co. v. Apex Oil Co.*, 511 F.3d 788, 793-94 (8th Cir. 2008) ("a court may still abstain in a case in which a party seeks damages as well as a declaratory judgment so long as the further necessary or proper relief would be based on the court's decree so that the essence of the suit remains a declaratory judgment action"). *See also* Nissan *N. Am., Inc. v. Andrew Chevrolet, Inc.*, 589 F.Supp.2d 1036, 1040 (E.D. Wis. 2008) ("The third approach, which the Court will apply in the instant case, looks to the 'heart of the action' to determine if the standard of *Wilton* or that of *Colorado River* should apply") (quoting *Lexington Ins. Co. v. Rolison*, 434 F. Supp. 2d 1228, 1236 (S.D. Ala. 2006)*; ITT Indus. v. Pac. Emplrs. Ins. Co.*, 427 F. Supp. 2d 552, 557 (E.D. Pa. 2006) ("[T]he considerations underlying the decisions in *Colorado River* and *Wilton* regarding a district court's obligation to exercise jurisdiction over an action are better served by the fact-driven 'heart of the matter' approach than the application of a bright-line rule"). In *Coltec Industries, Inc. v. Continental Ins. Co.*, 2005 U.S. Dist. LEXIS 8837, 2005 WL 1126951, *2 (E.D. Pa. May 11, 2005), the Court explained the test as follows: "if the outcome of the coercive claims hinges on the outcome of the declaratory ones, *Wilton*'s standard governs; conversely, if the opposite applies, *Colorado River*'s standard controls."

In sum, pending clarification from the Supreme Court, a party to an insurance dispute seeking a federal forum finds itself in an ironic situation. It may file a declaratory relief action in the federal court in the hope of securing what it perceives to be a substantively more sympathetic forum. It may, in anticipation of a request for abstention from the opponent, join a request for coercive relief in the hope of discouraging federal court abstention. But the extent to which the request for coercive relief will change the result and assist the party to secure the federal forum it deems *substantively* advantageous will depend, in potentially significant measure, on the *procedural* abstention analysis of the circuit in which it files.

B. Transfer to Another Venue

Under 28 U.S.C. § 1404(a), a federal court may transfer a case not only to a district where the case "might have been brought" (which was all that was permitted before changes to the rule in 2012), but also "to any district or division to which all parties have consented." Through transfer after removal, the removing party may obtain not only its preferred forum in federal court, but

[9] To determine whether coercive claims are "independent" these courts ask whether, if the declaratory relief claim were dropped, subject-matter jurisdiction would continue to exist. *Dizol*, 133 F.3d at 1226 n.6; *R.R. St.*, 569 F.3d at 717.

also a more convenient federal court or a federal court that already has before it one or more related matters.

28 U.S.C. § 1404(a) can also be used to transfer to the forum identified in an insurance policy's forum selection clause. For example, in *Union Elec. Co. v. Energy Ins. Mutual Ltd.*, No. 4:10-cv-1153 (CEJ), 2014 WL 4450467, at *2, *6 (E.D. Mo. Sept. 10, 2014), the court decided a venue transfer was appropriate in light of recent United States Supreme Court jurisprudence limiting discretion to disregard forum selection clauses, notwithstanding the court's earlier reluctance to enforce such a clause. The policyholder initially filed the action in federal court in Missouri. The insurer moved to dismiss the action under Fed. R. Civ. P. 12 because the policy contained a forum selection clause, providing that "the United States District Court for the Southern District of New York shall have exclusive jurisdiction" over disputes between the insurer and the policyholder that are not subject to arbitration. The Missouri federal court initially granted the dismissal, but that decision was reversed by the appellate court. On remand and in light of the instructions from the appellate court, the Missouri district court determined that the forum selection clause was unenforceable because it required arbitration and Missouri public policy prohibited enforcement of mandatory arbitration provisions in insurance contracts.

The insurer then moved to transfer venue pursuant to 28 U.S.C. § 1404(a). The insurer relied on the Supreme Court's then-recent decision in *Atlantic Marine Construction Co. v. U.S. District Court for the Western District of Texas*, 134 S. Ct. 568 (2013), which held that a proper application of § 1404(a) requires that a forum selection clause be "given controlling weight in all but the most exceptional cases." *Id.* at 579, 583 (internal citation omitted). This time around, the Missouri district court concluded that the requisite Section 1404(a) analysis could not be defeated by a single state policy prohibiting mandatory arbitration provisions in insurance contracts. Moreover, the insurer's waiver of its right to seek arbitration mooted the public policy concerns about arbitration.

V. CONCLUSION

Counsel in coverage disputes must assess at the very outset whether the dispute might be susceptible to resolution under the law of more than one state; whether any potentially applicable law favors the client; whether the dispute is susceptible to resolution in more than one forum and, if so which forum is most likely to apply the favorable law under its own conflict of laws principles; and, finally, how this matrix of considerations meshes with the various procedural advantages or disadvantages of potentially available state and federal forums. Only after addressing these considerations can counsel tailor a litigation strategy to maximize the chances of securing a potentially case-dispositive forum.

APPENDIX A

Differing Articulations of How to Apply the Brillhart Abstention Standard

Third Circuit: The Third Circuit adds the following factors to those set forth in *Brillhart*: "(1) the likelihood that a federal court declaration will resolve the uncertainty of obligation which gave rise to the controversy; (2) the convenience of the parties; (3) the public interest in settlement of the uncertainty of obligation; (4) the availability and relative convenience of other remedies; (5) a general policy of restraint when the same issues are pending in a state court; (6) avoidance of duplicative litigation; (7) prevention of the use of the declaratory action as a method of procedural fencing or as a means to provide another forum in a race for res judicata; and (8) (in the insurance context), an inherent conflict of interest between an insurer's duty to defend in a state court and its attempt to characterize that suit in federal court as falling within the scope of a policy exclusion." *Reifer v. Westport Ins. Corp.*, 751 F.3d 129, 146 (3d Cir. 2014). Additionally, in insurance cases, courts should consider "(1) A general policy of restraint when the same issues are pending in a state court; (2) An inherent conflict of interest between an insurer's duty to defend in a state court and its attempt to characterize that suit in federal court as falling within the scope of a policy exclusion; [and] (3) Avoidance of duplicative litigation." *State Auto Ins. Cos. v. Summy*, 234 F.3d 131, 134 (3d Cir. 2000).

Fourth Circuit: The Fourth Circuit has re-stated the *Brillhart* factors as follows: (1) whether the state has a strong interest in having the issues decided in its courts; (2) whether the state courts could resolve the issues more efficiently than the federal courts; (3) whether the presence of "overlapping issues of fact or law" might create unnecessary "entanglement" between the state and federal courts; and (4) whether the federal action is mere "procedural fencing," in the sense that the action is merely the product of forum-shopping. *United Capitol Ins. Co. v. Kapiloff*, 155 F.3d 488, 494-95 (4th Cir. 1998); *see also Nautilus Ins. Co. v. Winchester Homes, Inc.*, 15 F.3d 371, 376 (4th Cir. 1994).

Fifth Circuit: The Fifth Circuit uses the factors laid down in *St. Paul Ins. Co. v. Trejo*, 39 F.3d 585, 586 (5th Cir. 1994): (1) whether there is a pending state action in which all the matters in the controversy may be litigated; (2) whether the declaratory judgment plaintiff filed suit "in anticipation" of a lawsuit to be filed by the declaratory judgment defendant; (3) whether the declaratory judgment plaintiff engaged in "forum shopping" in bringing the declaratory judgment action; (4) whether possible inequities exist in allowing the declaratory judgment plaintiff to gain precedence in time or to change forums-analyze whether the plaintiff is using the declaratory judgment process to gain access to a federal forum on improper or unfair grounds; (5) whether the federal court is a convenient forum for the parties and witnesses and whether retaining the lawsuit would serve judicial economy-primarily address efficiency considerations; and (6) whether the federal court is being called on to construe a state judicial decree involving the same parties and entered by the court before whom the parallel state suit between the same parties is pending. *Sherwin-Williams Co. v. Holmes Cty.*, 343 F.3d 383, 390 (5th Cir. 2003).

Sixth Circuit: (1) Whether the judgment would settle the controversy; (2) whether the declaratory judgment action would serve a useful purpose in clarifying the legal relations at issue; (3) whether the declaratory remedy is being used merely for the purpose of "procedural fencing" or "to provide an arena for a race for res judicata"; (4) whether the use of a declaratory

action would increase the friction between our federal and state courts and improperly encroach on state jurisdiction; (5) whether there is an alternative remedy that is better or more effective; (6) whether the underlying factual issues are important to an informed resolution of the case; (7) whether the state trial court is in a better position to evaluate those factual issues than is the federal court; and (8) whether there is a close nexus between the underlying factual and legal issues and state law and/or public policy, or whether federal common or statutory law dictates a resolution of the declaratory judgment action. *Scottsdale Ins. Co. v. Roumph*, 211 F.3d 964, 968 (6th Cir. 2000); *see also Omaha Property & Casualty Ins. Co. v. Johnson*, 923 F.2d 446, 447-48 (6th Cir. 1991); *Allstate Ins. Co. v. Mercier*, 913 F.2d 273, 277 (6th Cir. 1990); *Grand Trunk W. R.R. v. Consolidated Rail Corp.*, 746 F.2d 323, 326 (6th Cir. 1984).

Seventh Circuit: "[1] whether the declaratory suit presents a question distinct from the issues raised in the state court proceeding, [2] whether the parties to the two actions are identical, [3] whether going forward with the declaratory action will serve a useful purpose in clarifying the legal obligations and relationships among the parties or will merely amount to duplicative and piecemeal litigation, and [4] whether comparable relief is available to the plaintiff seeking a declaratory judgment in another forum or at another time." *Nationwide Ins. v. Zavalis*, 52 F.3d 689, 692 (7th Cir. 1995).

Eighth Circuit: Whether the state court proceeding presents "same issues, not governed by federal law, between the same parties," and "whether the claims of all parties in interest can satisfactorily be adjudicated in that proceeding, whether necessary parties have been joined, [and] whether such parties are amenable to process in that proceeding." *Royal Indem. Co. v. Apex Oil Co.*, 511 F.3d 788, 793 (8th Cir. 2008).

Ninth Circuit: Whether exercising jurisdiction over a declaratory judgment suit would: (1) needlessly determine state law issues; (2) discourage litigants from filing declaratory actions as a means of forum shopping; (3) avoid duplicative litigation; and (4) conflict or overlap with parallel state proceedings. *Gov't Employees Ins. Co. v. Dizol*, 133 F.3d 1220, 1225 (9th Cir. 1998). The pertinent factors can also include (5) whether the declaratory judgment action will settle the controversy or clarify the legal issues; (6) whether the declaratory action is sought only for "procedural fencing," including an unfair advantage in achieving res judicata; and (7) whether deciding the declaratory judgment would improperly entangle the federal and state court systems; and the availability and convenience of other remedies. Id. at 1225 n.3; *see also Huth v. Hartford Ins. Co.*, 298 F.3d 800, 803 (9th Cir. 2002).

Tenth Circuit: "[1] whether a declaratory action would settle the controversy; [2] whether it would serve a useful purpose in clarifying the legal relations at issue; [3] whether the declaratory remedy is being used merely for the purpose of procedural fencing or to provide an arena for a race to res judicata; [4] whether use of declaratory action would increase friction between our federal and state courts and improperly encroach upon state jurisdiction; and [5] whether there is an alternative remedy which is better or more effective." *United States v. City of Las Cruces*, 289 F.3d 1170, 1187 (10th Cir. 2002).

Eleventh Circuit: "(1) the strength of the state's interest in having the issues raised in the federal declaratory action decided in the state courts; (2) whether the judgment in the federal declaratory action would settle the controversy; (3) whether the federal declaratory action would

serve a useful purpose in clarifying the legal relations at issue; (4) whether the declaratory remedy is being used merely for the purpose of "procedural fencing" - that is, to provide an arena for a race for res judicata or to achieve a federal hearing in a case otherwise not removable; (5) whether the use of a declaratory action would increase the friction between our federal and state courts and improperly encroach on state jurisdiction; (6) whether there is an alternative remedy that is better or more effective; (7) whether the underlying factual issues are important to an informed resolution of the case; (8) whether the state trial court is in a better position to evaluate those factual issues than is the federal court; and (9) whether there is a close nexus between the underlying factual and legal issues and state law and/or public policy, or whether federal common or statutory law dictates a resolution of the declaratory judgment action." *Ameritas Variable Life Ins. Co. v. Roach*, 411 F.3d 1328, 1331 (11th Cir. 2005).

First Circuit: The First Circuit has not weighed in, but its district courts appear to ask: "(1) whether the same parties are involved in both cases; (2) whether the claims made in the declaratory judgment action can be adjudicated in the state court action; (3) whether resolution of the declaratory judgment action turns on factual questions that will be litigated in the state court action; (4) whether the issues presented are governed by state or federal law; and (5) what effect the declaratory judgment action is likely to have on potential conflicts of interest between the insurer and the insured." *Essex Ins. Co. v. Gilbert Enters.*, No. 13-432ML, 2013 U.S. Dist. LEXIS 135766, at *14 (D.R.I. Sep. 3, 2013); *see also Liberty Ins. Underwriters Inc.*, 2011 U.S. Dist. LEXIS 112634, 2011 WL 4527330, at *6 (D.R.I. Sept. 29, 2011); *Hartford Fire Ins. Co. v. Gilbane Bldg. Co.*, 2011 U.S. Dist. LEXIS 64082, 2011 WL 2457638, at *2 n.2 (D.R.I. June 16, 2011).

Second Circuit: The Second Circuit also has not spoken on a specific formulation of the *Brillhart* factors, but its district courts appear to examine: "(1) the scope of the pending state proceeding and the nature of the defenses available there; (2) whether the claims of all parties in interest can satisfactorily be adjudicated in that proceeding; (3) whether the necessary parties have been joined; and (4) whether such parties are amenable to process in that proceeding; (5) avoiding duplicative proceedings; (6) avoiding forum shopping; (7) the relative convenience of the fora; (8) the order of filing; and (9) choice of law." *Glenclova Inv. Co. v. Trans-Resources, Inc.*, 874 F. Supp. 2d 292, 307 (S.D.N.Y. 2012) (internal citations omitted); *see also Managing Dirs.' Long Term Incentive Plan v. Boccella*, 2015 U.S. Dist. LEXIS 59432, at *13 (S.D.N.Y. May 5, 2015).

D.C. Circuit: District courts in the D.C. Circuit have considered whether the parallel pending state action is equivalent to the federal action before it, including "(1) whether all the claims brought in the federal action may be considered in the parallel state action, (2) whether necessary parties may be joined, and (3) whether such parties are amenable to process." *Maryland Ins. Co. v. Newpark Towers Assoc.*, No. 89-0649-LFO, 1990 U.S. Dist. LEXIS 15317, at *17 (D.D.C. Nov. 5, 1990); *see also Holman v. Cook*, 879 F. Supp. 113, 114 (D.D.C. 1995).