

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

LEAH K. OLSON, ERIC OLSON, EMILY J.
OLSON, HANNAH M. OLSON, THOMAS E.
LISTER and EXCELLUS BLUECROSS BLUESHIELD,

Plaintiffs,

MEMORANDUM AND ORDER

v.

06-C-456-S

LEE W. LACEY, FIRST FINANCIAL INSURANCE
COMPANY and ERIE INSURANCE GROUP,

Defendants.

Plaintiffs Leah K. Olson, Eric Olson, Emily J. Olson and Hannah M. Olson commenced this personal injury action against defendants Lee W. Lacey, First Financial Insurance Company and Erie Insurance Group in LaCrosse County Circuit Court seeking monetary relief.¹ Defendants Lee W. Lacey and First Financial Insurance Company removed this action pursuant to 28 U.S.C. § 1441 alleging 28 U.S.C. § 1332 as grounds for removal.² The matter is presently before the Court on plaintiffs' motion to remand. Also presently before the Court is defendants Lee W. Lacey and First Financial

¹Plaintiffs Emily J. Olson and Hannah M. Olson commenced this action by their Guardian ad Litem Thomas E. Lister. Plaintiff Excellus BlueCross BlueShield was named as an involuntary plaintiff because of its potential subrogation interest.

²Upon review of said defendants' petition for removal it is apparent that defendant Erie Insurance Group did not consent to removal. However, plaintiffs waived this defect by failing to object to removal on this basis in their motion to remand. See Gossmeier v. McDonald, 128 F.3d 481, 489 (7th Cir. 1997).

Insurance Company's motion to reclassify defendant Erie Insurance Group as an involuntary plaintiff. The following facts relevant to the parties' present motions are undisputed.

BACKGROUND

Plaintiffs Leah K. Olson, Eric Olson, Emily J. Olson and Hannah M. Olson (hereinafter Olson plaintiffs) are citizens of the State of Wisconsin residing in Warrens, Wisconsin. It is alleged that involuntary plaintiff Excellus BlueCross Blueshield is a New York company with its principal place of business in Rochester, New York. Defendant Lee W. Lacey (hereinafter Lacey) is a citizen of the State of Indiana residing in Argos, Indiana. Defendant First Financial Insurance Company (hereinafter First Financial) is an Illinois company with its principal place of business in Burlington, North Carolina. Defendant Erie Insurance Exchange³ (hereinafter Erie) is a reciprocal insurance exchange organized under the Insurance Company Law of Pennsylvania. However, control of defendant Erie is collectively vested in its subscribers (i.e. policyholders) some of whom are citizens of both the State of Indiana and the State of Illinois. Defendant Erie has subscribers in other states as well.

On December 20, 2004 plaintiff Leah K. Olson and her

³Plaintiffs' complaint lists Erie Insurance Group as a named defendant. However, in its answer said defendant affirmatively asserts that its correct designation is as Erie Insurance Exchange. Accordingly, the Court will refer to said defendant as Erie Insurance Exchange.

passengers plaintiffs Emily J. Olson and Hannah M. Olson were involved in an automobile accident with defendant Lacey in which said Olson plaintiffs allegedly sustained multiple and severe injuries. Before said accident occurred, defendant Erie had issued an automobile liability insurance policy to the Olson plaintiffs which provided (among other things) medical coverage for such injuries. Accordingly, defendant Erie provided health care benefits to Leah, Emily, and Hannah Olson in conformance with the terms of its policy. As such, the Olson plaintiffs concede that defendant Erie may seek subrogation in this action.

On July 19, 2006 the Olson plaintiffs commenced this action in LaCrosse County Circuit Court. On August 2, 2006 defendant First Financial was served with a copy of the summons and complaint. On August 18, 2006 defendants Lacey and First Financial filed their notice of removal alleging diversity jurisdiction under 28 U.S.C. § 1332 as grounds for removal. On September 7, 2006 the Olson plaintiffs filed their motion to remand.

MEMORANDUM

The Olson plaintiffs assert defendant Erie is a real party in interest to this controversy. Additionally, the Olson plaintiffs assert defendant Erie is an unincorporated association with subscriber citizens in Wisconsin, Indiana and Illinois. Accordingly, the Olson plaintiffs argue their motion to remand should be granted regardless of whether Erie is classified as a

defendant or as an involuntary plaintiff because complete diversity does not exist pursuant to 28 U.S.C. § 1332 under either designation. As such, the Olson plaintiffs argue the Court lacks subject matter jurisdiction over this action.

Defendants Lacey and First Financial assert defendant Erie is considered a nominal party to this controversy rather than a real party in interest because it possesses only subrogation rights in this action. Accordingly, defendants Lacey and First Financial argue defendant Erie's citizenship is irrelevant in determining diversity jurisdiction under 28 U.S.C. § 1332 and as such the Olson plaintiffs' motion to remand should be denied. Additionally, defendants Lacey and First Financial argue defendant Erie should be reclassified as an involuntary plaintiff because the Olson plaintiffs have not alleged any substantive claims against said defendant.⁴

Generally, removal is appropriate only if a federal district court has original jurisdiction over the action. Doe v. Allied-Signal, Inc., 985 F.2d 908, 911 (7th Cir. 1993) (*citing* 28 U.S.C. § 1441). The party seeking removal bears the burden of establishing federal jurisdiction and removal statutes are narrowly construed. Id. (*citing* Wilson v. Republic Iron & Steel Co., 257 U.S. 92, 42 S.Ct. 35, 66 L.Ed. 144 (1921); Ill. v. Kerr-McGee Chem. Corp., 677

⁴Defendant Erie has advised the Court that it takes no position on either the Olson plaintiffs' motion to remand or defendant Lacey and First Financial's motion to reclassify.

F.2d 571, 576 (7th Cir. 1982), *cert. denied*, 459 U.S. 1049, 103 S.Ct. 469, 74 L.Ed.2d 618 (1982)). Additionally, any doubt regarding jurisdiction should be resolved in favor of the states. Id. (citing Jones v. Gen. Tire & Rubber Co., 541 F.2d 660, 664 (7th Cir. 1976)).

The removal statute provides in relevant part as follows:

...any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the...defendants...

28 U.S.C. § 1441(a). It is undisputed that this action does not involve a federal question. Accordingly, the Court has original jurisdiction of this action only if diversity of citizenship exists. The diversity statute provides in relevant part as follows:

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

(1) citizens of different States...

(c) For the purposes of this section and section 1441 of this title-

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business...

28 U.S.C. § 1332. It is apparent from the face of the Olson plaintiffs' complaint that their alleged claims (if proven) satisfy the jurisdictional amount in controversy. However, what is disputed is whether defendant Erie is truly a real party in

interest whose citizenship is relevant in determining diversity jurisdiction under 28 U.S.C. § 1332.

In determining whether diversity jurisdiction exists courts must look beyond the named parties and consider only the citizenship of the real parties in interest. Navarro Sav. Ass'n v. Lee, 446 U.S. 458, 460-461, 100 S.Ct. 1779, 1781-1782, 64 L.Ed.2d 425 (1980) (citations omitted). Accordingly, if defendant Erie is simply a nominal party its citizenship is irrelevant in determining whether diversity jurisdiction exists regardless of its classification. As such, the Court must first determine whether defendant Erie is a real party in interest to this controversy.

The focus of the real party in interest inquiry is on the essential nature and effect of the proceedings. Adden v. Middlebrooks, 688 F.2d 1147, 1150 (7th Cir. 1982) (citing Ex parte New York, 256 U.S. 490, 500, 41 S.Ct. 588, 590, 65 L.Ed. 1057 (1921)). Accordingly, a party must have a "substantial stake in the outcome of the case" to be considered a real party in interest. State of Wis. v. Abbott Laboratories, Amgen, Inc., 341 F.Supp.2d 1057, 1061 (W.D.Wis. 2004) (citation omitted). Defendants Lacey and First Financial argue that defendant Erie does not have a substantial stake in the outcome of the case because its only interest is in subrogation. However, the Supreme Court has determined that such a subrogated interest qualifies an insurer as a real party in interest.

Federal Rule of Civil Procedure 17 states that “[e]very action shall be prosecuted in the name of the real party in interest.” The Supreme Court has determined that an insurer-subrogee qualifies as such a real party in interest. United States v. Aetna Cas. & Sur. Co., 338 U.S. 366, 380, 70 S.Ct. 207, 215, 94 L.Ed. 171 (1949). Specifically, the Court held that “[i]f the subrogee has paid an entire loss suffered by the insured, it is the only real party in interest and must sue in its own name...[i]f it has paid only part of the loss, both the insured and insurer...have substantive rights...which qualify them as real parties in interest.” Id. at 380-381, 70 S.Ct. at 215 (internal citation omitted).

It is undisputed that defendant Erie has paid for part of the Olson plaintiffs’ loss. Specifically, defendant Erie has paid health care benefits to Leah, Emily, and Hannah Olson for injuries they allegedly sustained in the December 20, 2004 accident which gives it subrogation rights under Wisconsin law. Accordingly, pursuant to the Supreme Court’s holding in Aetna Cas. & Sur. Co., defendant Erie as a subrogee has substantive rights which qualifies it as a real party in interest to this controversy. Id. at 380-381, 70 S.Ct. at 215. As such, defendant Erie’s citizenship is relevant in determining whether diversity jurisdiction exists.

With the real party in interest inquiry resolved, the Court must now determine whether this action is between citizens of

different States. Defendant Erie is a reciprocal insurance exchange organized under the Insurance Company Law of Pennsylvania. However, control of defendant Erie is collectively vested in its subscribers some of whom are citizens of both the State of Indiana and the State of Illinois. Additionally, the Olson plaintiffs assert that defendant Erie has subscribers who are citizens of the State of Wisconsin. Specifically, the Olson plaintiffs allege in their complaint that defendant Erie has a subscriber in Brookfield, Wisconsin. Defendants Lacey and First Financial failed to dispute that defendant Erie is a reciprocal insurance exchange with subscriber citizens in Indiana, Illinois, and Wisconsin.

When a firm is not a corporation (as is the case with defendant Erie) its citizenship is the citizenship of its owners, partners, or other principals. Meyerson v. Harrah's E. Chicago Casino, 299 F.3d 616, 617 (7th Cir. 2002). Additionally, the citizenship of unincorporated associations (such as defendant Erie) must be traced through "however many layers of partners or members there may be." Id. (citations omitted). Failure to go through all the layers can result in dismissal for want of jurisdiction. Id. When all of the layers of defendant Erie are traced it leads to the conclusion that diversity jurisdiction does not exist in this action. Accordingly, the Olson plaintiffs' motion to remand must be granted for want of jurisdiction.

It is undisputed that defendant Erie has subscriber citizens in both the State of Indiana (which is defendant Lacey's state of citizenship) and the State of Illinois (which is defendant First Financial's state of citizenship.) Additionally, it is undisputed that defendant Erie has subscriber citizens in the State of Wisconsin (which is the Olson plaintiffs' state of citizenship.) As the parties seeking removal, defendants Lacey and First Financial bear the burden of establishing federal jurisdiction based on diversity. Doe, at 911 (citations omitted). Said defendants have failed to meet this burden because regardless of whether Erie is classified as a defendant or as an involuntary plaintiff diversity jurisdiction does not exist under 28 U.S.C. § 1332.⁵ Accordingly, the Olson plaintiffs' motion to remand must be granted because the Court lacks original jurisdiction over this action. Doe, at 911.

⁵If defendant Erie remains classified as a defendant diversity jurisdiction does not exist because the Olson plaintiffs are Wisconsin citizens and Erie has subscribers who are citizens of the State of Wisconsin. Additionally, if defendant Erie is reclassified as an involuntary plaintiff diversity jurisdiction still does not exist because Erie has subscribers who are citizens of both the State of Indiana and the State of Illinois which are defendants Lacey and First Financial's states of citizenship. Accordingly, the Court need not decide defendants Lacey and First Financial's motion to reclassify defendant Erie as an involuntary plaintiff leaving resolution of said motion to the Circuit Court for LaCrosse County.

ORDER

IT IS ORDERED that plaintiffs Leah K. Olson, Eric Olson, Emily J. Olson, and Hannah H. Olson's motion to remand is GRANTED.

IT IS FURTHER ORDERED that this matter is remanded to the Circuit Court for LaCrosse County, Wisconsin.

Entered this 19th day of October, 2006.

BY THE COURT:

s/

JOHN C. SHABAZ

District Judge