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Fifth Circuit examines mechanisms to secure federal jurisdiction in class action and arbitration contexts

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Takeaway: When litigating class certification and motions to compel arbitration, defense attorneys virtually always prefer federal over state courts. In two cases involving home security provider ADT, L.L.C. (ADT), and a rogue employee of ADT who literally spied on ADT customers in their homes, ADT deployed different mechanisms to secure federal jurisdiction. In the first, a putative class action filed against the rogue employee (but not ADT) in Texas state court, ADT resorted to a Texas Rule of Civil Procedure authorizing unilateral intervention in the action as a defendant, and then used its newly-conferred status as a party-defendant to remove the case to federal court under the Class Action Fairness Act (CAFA). In the second, involving individual claims against ADT and the non-diverse employee that could not be removed to federal court, ADT initiated an independent action in federal court to compel arbitration of the dispute. In recent appellate decisions in these two cases, the Fifth Circuit (1) agreed with ADT's strategy of intervening as a defendant and then removing, and (2) indicated a federal petition to compel arbitration (concerning a dispute initially filed in state court) could work, so long as the rogue non-diverse employee is not an indispensable party to the petition to compel arbitration.

In *Madison v. ADT, L.L.C.,* 11 F.4th 325 (5th Cir. 2021), Texas resident Taylor Madison contracted with ADT to install a security system in her home. But the ADT employee who installed that system, Telesforo Aviles, used his access privileges to spy on ADT customers in their homes, including, presumably, Ms. Madison. Indeed, Mr. Aviles allegedly spied on over 200 ADT customers located in and around Dallas, Texas.

ADT discovered Aviles misconduct and terminated him. ADT also reported him to the authorities, and Mr. Aviles ended up being sentenced to prison.

Ms. Madison and her mother, Angie Dickson, filed a putative class action against Mr. Aviles in Texas state court, seeking millions of dollars in damages. But they did not name ADT as a defendant. ADT learned about the case when plaintiffs served it with third party discovery. ADT then intervened in the suit under Texas Rule of Civil Procedure 60, which provides that "[a]ny party may intervene by filing a pleading, subject to being stricken out by the court for sufficient cause on the motion of any party." *Madison v. Aviles*, --- F. Supp. 3d ----, No. 3:20-CV-2516-B, 2021 WL 2291016, at *1, *3 (N.D. Tex., June 4, 2021). Having unilaterally intervened in the state court case as a party-defendant, ADT then removed the case to federal court (the Northern District of Texas), as permitted by CAFA.

The plaintiffs moved to remand the case to Texas state court, and the district court granted the motion, invoking CAFA's "home state" exception to federal jurisdiction. Under that exception, a federal court must abstain from exercising jurisdiction and remand the case to state court if "two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens

of the State in which the action was originally filed." *Madison*, 11 F.4th at 327 (quoting 28 U.S.C. § 1332(d)(4)(B)).

ADT sought permission to appeal the district court's ruling. The Fifth Circuit accepted the appeal and reversed the district court's ruling.

The appeal primary addressed whether ADT qualified as a "primary defendant" under CAFA, given ADT's status as a non-citizen of Texas. If ADT constituted a primary defendant, then CAFA's "home state" exception would not apply, and the district court would have subject matter jurisdiction. The Fifth Circuit, relying on a Third Circuit decision finding that the "real target" of litigation qualifies as a "primary defendant," as well as an earlier Fifth Circuit case examining the controversy's "primary thrust" to make that determination, concluded ADT certainly constituted a "primary defendant": "Madison and Dickson claim to represent a class of plaintiffs seeking millions in recovery for the invasion of their privacy, although, as of yet, they have asserted claims against only the offending employee (who is imprisoned). But the thrust of this suit is to gain access to ADT's deep pockets, and ADT, having properly intervened, must be considered a primary defendant under CAFA." *Id*. at 328.

In another case arising out of the same underlying facts, *ADT, L.L.C. v. Richmond*, 18 F.4th 149 (5th Cir. 2021), Kamala and Darryl Richmond filed a (non-class) suit against Mr. Aviles and ADT in Texas state court seeking millions in damages. The Richmonds, however, had executed a contract with ADT requiring the arbitration of any and all legal disputes between them. Without complete diversity between the parties to allow removal (both plaintiffs and defendant Aviles were Texas citizens), ADT instead filed an independent action in federal court against the Richmonds under the Federal Arbitration Act (FAA) to compel arbitration of the dispute.

Petitions to compel arbitration under the FAA require an independent jurisdictional basis. In other words, a party that petitions a federal court to compel arbitration cannot rely on federal question jurisdiction as a jurisdictional basis for the suit. ADT relied on diversity jurisdiction to anchor its federal court petition, and thus did not name Mr. Aviles as a party in its federal court action.

The district court, however, concluded that it had to "look through" ADT's petition to the Richmonds' state court complaint to determine the parties to the "whole controversy." Based on that "look through," the district court concluded diversity jurisdiction did not exist and dismissed ADT's petition without prejudice.

On appeal, the Fifth Circuit reversed. The panel held that the parties named in the petition to compel arbitration – plaintiff ADT (a citizen of Delaware and Florida) and the Richmond defendants (citizens of Texas) – constitute the "parties" for jurisdictional purposes. But the panel also concluded that diversity jurisdiction could be destroyed in the event Mr. Aviles (also a Texas citizen) constituted an indispensable party that should have been named.

Accordingly, the panel vacated the district court's judgment of dismissal and remanded the case to the district court, with the instruction that the district court determine Mr. Aviles's status as an indispensable party under Federal Rule 19 to ADT's petition to compel arbitration. But even if ADT loses this jurisdictional battle, it has not lost the arbitration war, as the Texas Arbitration Act also provides ADT with a mechanism to compel arbitration of the state court dispute.