

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

TEXIENNE PHYSICIANS MEDICAL §
ASSOCIATION, PLLC, §

Plaintiff, §

v. §

HEALTH CARE SERVICE §
CORPORATION d/b/a BLUE CROSS AND §
BLUE SHIELD OF TEXAS, §

Defendant. §

CIVIL ACTION No. _____

(Removed from the District Court of
Montgomery County, Texas, 457th Judicial
District, Cause No. 21-11-15221)

NOTICE OF REMOVAL

COMES NOW, HEALTH CARE SERVICE CORPORATION, a mutual legal reserve company operating in Texas as Blue Cross and Blue Shield of Texas (“HCSC”), and hereby removes Cause No. 21-11-15221, *Texienne Physicians Medical Association, PLLC v. Health Care Service Corporation d/b/a Blue Cross and Blue Shield of Texas*, from the 457th Judicial District Court of Montgomery County, Texas (the “State Action”), pursuant to 28 U.S.C. § 1331, 1332, 1441, and 1446. Removal of this action is proper because diversity jurisdiction exists and the amount in controversy exceeds \$75,000, and also because federal question jurisdiction exists.

I. BACKGROUND

A. Plaintiff’s Petition and Allegations

1. On November 1, 2021, Texienne Physicians Medical Association, PLLC (“Plaintiff”) filed the State Action.¹

¹ See Plaintiff’s Original Petition (the “Petition”), attached hereto as Exhibit A.

2. In the Petition, Plaintiff, a physician group practice with numerous offices in Texas,² asserts two claims against HCSC, a health insurer, for breach of contract³ and liability under Section 502(a)(1)(B) of the Employee Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C. § 1132(a)(1)(B).⁴

3. Plaintiff seeks to recover actual damages, costs, pre- and post-judgment interest, statutory penalties and interest, and attorneys’ fees, among other things.⁵

B. Plaintiff’s Failed Attempts to Serve HCSC

4. On January 25, 2022, HCSC received a citation dated January 5, 2022, and a copy of the Petition via certified mail from the Texas Secretary of State.⁶

5. For the reasons stated herein, this attempt at service of process was defective under Texas law, and it is HCSC’s position that it has not been properly served in the State Action. Because HCSC has not yet been served by valid formal process, its time to remove has not begun to run.⁷

6. Nevertheless, HCSC is filing this Notice of Removal within thirty (30) days of its receipt of the Petition on January 25, 2022, in an abundance of caution.

7. Plaintiff’s attempt at service through the Secretary of State is defective under Texas law for the following reasons.

² *Id.* ¶ 6.

³ *Id.* ¶¶ 8-14.

⁴ *Id.* ¶ 15-21.

⁵ *Id.* ¶¶ 13-14, 19, 21-22, 24.

⁶ See Return Receipt, Letter from Secretary of State, Citation, and attached Petition, attached hereto as Exhibit B.

⁷ 28 U.S.C. § 1446(b); *Murphy Bros. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 347-48 (1999) (holding that a defendant’s time to remove is not triggered “by mere receipt of the complaint unattended by any formal service”).

8. The Petition alleges that HCSC “does not maintain an agent in the State of Texas for the service of process and therefore may be served via the Texas Secretary of State with service forward to 300 East Randolph, Chicago, Illinois 60601.”⁸ This allegation is incorrect.

9. Foreign insurance companies doing business in Texas are required to appoint an agent for service of process “[a]s a condition to being issued a certificate of authority to engage in the business of insurance in” Texas.⁹ Consistent with this statutory requirement, HCSC’s registered agent in Texas is Corporation Service Company, 211 East 7th Street, Suite 620, Austin, Texas 78701.

10. The Texas Department of Insurance (“TDI”), and not the Texas Secretary of State, maintains the list of registered agents for insurers who operate in Texas. The identity and address of HCSC’s registered agent is publicly available and searchable on TDI’s website.¹⁰

11. Under certain circumstances, the Texas Insurance Code designates the Commissioner of Insurance as the agent for service of process to insurance companies.¹¹ Pursuant to Section 804.103(c) of the Texas Insurance Code, the Commissioner is a foreign insurance company’s agent on whom process may be served only if: (1) the foreign company fails to appoint or maintain an agent for service of process; (2) the appointed agent cannot with reasonable diligence be found; or (3) the company’s certificate of authority is revoked.¹²

⁸ See Petition, at ¶ 2.

⁹ Tex. Ins. Code § 804.103(b).

¹⁰ *Guidelines for Service of Process*, TEX. DEPT. OF INS., <https://www.tdi.texas.gov/consumer/attyforservice.html> (last updated Apr. 21, 2020) (providing searchable link “[t]o find the agent for service of process for an insurance company”).

¹¹ *Id.* (stating that “[t]he Commissioner of Insurance is the agent for service of process for these types of companies and organizations,” and listing such types).

¹² Tex. Ins. Code § 804.103(c).

12. Here, HCSC is a foreign insurance company doing business in Texas under a valid certificate of authority, and maintains an agent for service of process that can be found by searching the TDI's publicly available records.

13. Given that HCSC maintains a registered in Texas whose identity and contact information is on file with TDI, Plaintiff would have to demonstrate reasonable diligence in attempting to serve that agent before effectuating service via the Commissioner of Insurance under Section 804.103(c). Plaintiff has failed to demonstrate that it acted with any diligence, let alone reasonable diligence, in attempting to identify or serve HCSC's registered agent. Instead, Plaintiff unreasonably failed to contact the TDI, review the TDI's publicly searchable records, or otherwise investigate whether HCSC maintained a registered agent in Texas. Therefore, none of the circumstances set forth in Section 804.103(c) of the Texas Insurance Code are present here.¹³

14. For these reasons, Plaintiff's attempt to serve HCSC – a foreign insurance company operating in Texas pursuant to a certificate of authority under the Insurance Code – by serving the Texas Secretary of State did not constitute valid service. Even assuming *arguendo* that insurers were subject to service via the Secretary of State and not via the process set forth in the Insurance Code, Plaintiff failed to offer sufficient prove that it acted with reasonable diligence in identifying and attempting to serve HCSC's registered agent for the reasons already stated, and thus has failed to meet the statutory requirements to even seek that method of service.¹⁴

¹³ See also *Copeland v. Bonner*, No. 3:13-cv-02440-P, 2014 U.S. Dist. LEXIS 203881, at *5 & n.1 (N.D. Tex. Mar. 11, 2014) (finding that service of process on insurance company was defective, though the insurer was on notice of the suit because it had received a copy of the complaint and summons, where the plaintiff did not attempt to serve the insurer's registered agent, and stating that “[f]oreign insurance companies doing business in Texas are also required to appoint an agent for service of process” under Section 804.103 of the Texas Insurance Code).

¹⁴ Tex. Bus. Orgs. Code § 5.251 (“The secretary of state is an agent of an entity for purposes of service of process, notice, or demand on the entity if: (1) the entity is a filing entity or a foreign filing entity and: (A) the entity fails to appoint or does not maintain a registered agent in the state; or (B) the registered agent of the entity cannot with reasonable diligence be found at the registered office of the entity[.]”); see also *Paramount Credit, Inc. v. Montgomery*, 420 S.W.3d 226 (Tex. App.—Houston [1st Dist.] 2013) (“The law requires strict compliance with the[] conditions [set forth in Section 5.251(1) of the Texas Business Organizations Code; ‘[o]nly after the registered agent of a

15. According to a purported affidavit of service filed in the State Action on December 7, 2021, Plaintiff had previously attempted to serve HCSC on December 7, 2021, by having an Illinois process server deliver unspecified documents to HCSC's Illinois headquarters on November 30, 2021.¹⁵ HCSC did not learn of the State Action or receive a copy of the Petition at that time.

16. This attempt at service was likewise defective under the Texas Insurance Code because it was not directed to HCSC's registered agent in Texas.¹⁶ It was also facially defective for several additional reasons, including that the purported affidavit of service was not verified or signed under penalty of perjury and was not signed by a sheriff, constable, or court clerk.¹⁷

17. Accordingly, though Plaintiff's attempts at service of process were facially defective and improper, HCSC became aware of the State Action and received a copy of the Petition on January 25, 2022.

II. DIVERSITY JURISDICTION

18. This Court possesses original jurisdiction over this matter pursuant to 28 U.S.C. § 1332, and removal is thus proper under 28 U.S.C. § 1441(b) and 1446. Under 28 U.S.C. § 1332, federal courts have original federal jurisdiction over "all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is in between citizens of different States."

corporation cannot be found with reasonable diligence at the registered office can the Secretary of State act as agent of the corporation for service of process." (citation omitted) (alteration in original)).

¹⁵ Affidavit of Service, attached as Exhibit D, p. 12.

¹⁶ Tex. Ins. Code § 804.103(b).

¹⁷ See Tex. R. Civ. P. 107; *Green v. Evans*, No. 14-20-00054-CV, 2021 Tex. App. LEXIS 3832, at *5 (Tex. App.—Houston [14th Dist.] May 18, 2021) (holding such deficiencies were "fatal to effective service").

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