No. 19-312

IN THE
Supreme Court of the United States

ALI EKHLASSI,
Petitioner,
v.
NATIONAL LLOYDS INSURANCE COMPANY
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

SCOT G. DOYEN
STATE BAR NO. 00792982
Counsel of Record
DOYEN SEBESTA, LTD., LLP
PARAGON CENTER ONE
450 GEARS ROAD, SUITE 350
HOUSTON, TEXAS 77067
TELEPHONE: (713) 580-8900
FACSIMILE: (713) 580-8910
SDOYEN@DS-LAWYERS.COM

Counsel for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

IN THE
Supreme Court of the United States

No.

ALI EKHLASSI, PETITIONER,

v.

NATIONAL LLOYDS INSURANCE COMPANY,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

ADDITIONAL STATUTORY AND REGULATORY PROVISIONS INVOLVED

44 C.F.R. Part 61, Appendix A states in part:

> ***D. Amendments, Waivers, Assignment***
>
> This policy cannot be changed nor can any of its provisions be waived without the express written consent of the Federal Insurance Administrator. No action we take under the terms of this policy constitutes a waiver of any of our rights. You may assign this policy in writing when you transfer title of your

property to someone else except under these conditions:

1. When this policy covers only personal property; or

2. When this policy covers a structure during the course of construction.

***

R. Suit Against Us

You may not sue us to recover money under this policy unless you have complied with all the requirements of the policy. If you do sue, you must start the suit within one year after the date of the written denial of all or part of the claim, and you must file the suit in the United States District Court of the district in which the covered property was located at the time of loss. This requirement applies to any claim that you may have under this policy and to any dispute that you may have arising out of the handling of any claim under the policy.

***

IX. What Law Governs

This policy and all disputes arising from the handling of any claim under the policy are governed exclusively by the flood insurance regulations issued by FEMA, the National Flood Insurance Act of 1968, as amended (42 U.S.C. 4001, *et seq.)*, and Federal common law.

INTRODUCTION

Petitioner seeks certiorari representing a "split" among Circuits concerning whether 42 U.S.C. 4072 applies to claims against a private insurer that administered FEMA flood insurance, with a majority of Circuits, including the Fifth Circuit below, applying one statue for jurisdiction while the Seventh Circuit long ago applied another. But Petitioner downplays the total lack of practical significance to this purely academic dispute.

In 2000, FEMA rendered the "Circuit split" meaningless when it amended its regulations to provide that all claims, public or private, are subject to the same standard—an insured must initiate suit in federal court against FEMA or a private insurer within one year of denial of a claim. Thus, for almost two decades, no matter who the parties are or where they are located, there is no dispute that all claims should be treated the same regardless of whether jurisdiction originates from 42 U.S.C. 4072 as most courts have held, or 28 U.S.C. 1331, as other courts have alternatively acknowledged. Because this Court's review will not impact the outcome of any case, including this one, the Court should deny the petition for writ of certiorari.

STATEMENT

This case concerns a flood insurance policy Respondent issued to Petitioner under the National Flood Insurance Program, 42 U.S.C. 4001-4129 ("NFIP"). For more than forty years the program has been administered by the Federal Emergency Management Agency. Order No. 12127, 44 Fed. Reg. 19367 (Mar. 31, 1979), reprinted in 15 U.S.C. 2201. FEMA's administrator is

authorized by statute to use private insurance companies such as Respondent to act "as fiscal agents of the United States" in issuing policies, including the one in question. Otherwise known as the "Write-Your-Own Program" ("WYO Program"), private insurers issue policies under FEMA regulations that must mirror the statutory requirements as if FEMA itself had issued the policy. *See* 44 C.F.R. 62.23.

A. The Statutes, Regulations, and Policy all Require Filing within One Year in Federal Court

In 2000, FEMA updated its regulations regarding the NFIP and the relationship to the WYO Program to ensure that both had the same scope concerning jurisdiction and timing for suit. The comments to the regulations state:

> **Exclusive Federal Jurisdiction and Applicable Law**
>
> Standard Flood Insurance Policies are sold by a number of private Write Your Own (WYO) insurance companies and directly to the public by the Federal Insurance Administration. Because the National Flood Insurance Program is national in scope and accomplishes a number of programmatic missions in addition to making affordable flood insurance generally available to the public, the SFIP provides that its terms cannot be altered, varied or waived except by the written authority of the Federal Insurance Administrator. **The Administrator intends that the same benefits should be available to insureds wherever the insured property is located, or whether the policy is purchased from a WYO insurance company or from the**

> **Federal government.** Thus, there is a need for uniformity in the interpretation of and standards applicable to the policies and their administration. Therefore, we have clarified the policy language pertaining to jurisdiction, venue and applicable law to emphasize that matters pertaining to the Standard Flood Insurance Policy, including issues relating to and arising out of claims handling, must be heard in Federal court and are governed exclusively by Federal law.

65 FR 60758, 60767 (2000) (emphasis added).

Since 2000, FEMA has required that all WYO policies be issued using the terms and conditions of the Standard Flood Insurance Policy ("SFIP") found in 44 C.F.R. Part 61, Appendix A. 44 C.F.R. 61.4(b), 61.13(d), (e), 62.23(c). The standard terms and conditions include where the suit should be filed and when:

> You may not sue us to recover money under this policy unless you have complied with all the requirements of the policy. If you do sue, you must start the suit within one year after the date of the written denial of all or part of the claim, and you must file the suit in the United States District Court of the district in which the covered property was located at the time of loss. This requirement applies to any claim that you may have under this policy and to any dispute that you may have arising out of the handling of any claim under the policy.

44 C.F.R. Pt. 61, App. A, Art. VII(R) ("Conditions for Filing a Lawsuit"). The provision required by federal regulation and FEMA was present in Petitioner's policy as well.

B. Petitioner Filed Suit Too Late and in the Wrong Court

Between May 23 and 25, 2015, a severe storm caused heavy flooding in Houston. Petitioner made a claim for of $274,940.05 for the flood damage with Respondent shortly thereafter. A few days after the claim's submission, Respondent sent an insurance adjuster to inspect the property. Respondent's adjuster estimated losses totaling $3,768.15 for "flood loss clean-up and other covered damages," but found that all other damages were excluded under the policy.

On October 6, 2015, Respondent sent Petitioner a letter denying his claim in part, except for the $3,768.25 Respondent would pay upon receipt of Petitioner's signed and sworn proof of loss form. The letter informed Petitioner that he had 240 days from the date of loss to provide the form. The October 6, 2015 letter was explicit in its denial of the claim: "We are denying payment for any building and contents items not subject to direct physical loss by or from flood, pursuant to the Standard Flood Insurance Policy....In accordance with the Standard Flood Insurance Policy, we are denying payment for all non-covered items located below the lowest elevated floor of your post-FIRM elevated building...." The letter also stated that "[i]f you do not agree with our decision to deny your claim, in whole or in part, Federal law allows you to appeal that decision within 60 days of the date of this denial letter."

On December 28, 2015, Petitioner provided the sworn proof of loss to Respondent, again stating an amount of $274,940.05, representing his view of a loss of $276,190.05 less the deductible. On January 11, 2016, Respondent sent a second letter confirming that only the previously determined amount of $3,768.25 was payable and referring Petitioner to the October 6, 2015 denial letter for the reasons.

On January 11, 2017, more than fifteen months after the October 6, 2015 written denial, and exactly one year after Respondent's January 11, 2016 follow-up letter, Petitioner sued Respondent in Texas state court alleging breach of contract, violations of Chapters 541 and 542 of the Texas Insurance Code, and violations of the Texas Deceptive Trade Practices Act. After being served with the suit on March 29, 2017, Respondent timely removed the suit to federal court on April 24, 2017.

C. The District Court Rendered Summary Judgment

In January 2018, the district court issued summary judgment for Respondent based on the late filing of the lawsuit. Citing to the policy language requiring suit in federal court within a year of the denial of a claim, the district court held there was no genuine issue of material fact that Petitioner's claim under the policy was time barred, as it was filed in state court, and then timely removed, more than 15 months after Respondent's October 6, 2015 denial of the claim.

On appeal to the Fifth Circuit, Petitioner argued that the district court's reasoning was flawed because in his view, the denial was not effective until Respondent responded to the signed and verified proof of loss form, which Petitioner asserts did not occur until the January 11, 2017 letter. In filing its appellant brief,

Petitioner acknowledged jurisdiction in the United States District Court pursuant to 42 U.S.C. 4072, involving suits against the FEMA Administrator.

Before oral argument, the Fifth Circuit requested supplemental briefing concerning the basis for jurisdiction in federal court. Ultimately, the majority concluded that 42 U.S.C. 4072 provided for jurisdiction, as held by prior Fifth Circuit opinions and various other circuits, while the concurrence found jurisdiction instead was provided under 28 U.S.C. 1331, as held by the Seventh Circuit. The concurrence thus agreed jurisdiction existed in the court below and also found Respondent's suit was not filed in federal district court within one year after the denial of the claim at issue and thus was time barred.

REASONS FOR DENYING CERTIORARI

A. The Fifth Circuit Properly Found Jurisdiction and Affirmed Dismissal

The district court appropriately issued summary judgment in this case as there is no dispute of material fact concerning the untimeliness of Respondent's suit under any standard. Respondent did not abide by the clear policy language and "start the suit within one year after the date of the written denial of all or part of the claim," which required filing "in the United States District Court of the district in which the covered property was located at the time of loss." Respondent started the suit in state court 15 months after the written denial of the claim, and the suit did not appear in federal court until 18 months after that denial. Even if the district court were to have considered the second January 2016 letter as the operative written denial, the suit was not brought in federal court until April 2017—three months too late.

As the Fifth Circuit reasoned, bringing suit more than a year after the written denial of the claim violated 42 U.S.C. 4072, which required Petitioner to institute an action "within one year after the date of mailing or notice of disallowance or partial disallowance by the Administrator" in the United States District Court for the district in which the insured's property was situated. Slip. Op. at 8-9. As the majority reasoned, the statute itself supplies exclusive jurisdiction because a suit against a WYO company is functionally a suit as against the Administrator, given that claims and defense costs are borne by FEMA and "only FEMA bears the risk under the flood insurance program." *Id.* at 9-10 (quoting *Van Holt v. Liberty Mut. Fire Ins. Co.*, 163 F.3d 161, 166-67 (3d Cir. 1998)).

Yet, Petitioner argues that he sued Respondent and not the "Administrator," citing *Downey v. State Farm Fire & Cas. Co.*, 266 F.3d 675 (7th Cir. 2001). But Petitioner ignores that the only issue in *Downey* was whether federal question jurisdiction existed at all over a claim against a WYO company. And while the Seventh Circuit did not believe it had jurisdiction under 42 U.S.C. 4072, it did find federal question jurisdiction existed under 28 U.S.C. 1331. *Id.* at 681. Petitioner also ignores that the original concern over jurisdiction became moot once FEMA amended its standard policy and regulations in 2000, in which it "clarified the policy language pertaining to jurisdiction, venue and applicable law to emphasize that matters pertaining to the Standard Flood Insurance Policy, including issues relating to and arising out of claims handling, must be heard in Federal court and are governed exclusively by Federal law." 65 FR 60758, 60767 (2000); 44 C.F.R. Pt. 61, App. A, Art. VII(R) ("Conditions for Filing a Lawsuit").

Petitioner similarly ignores that as a result of the 2000 rulemaking and policy language, the issue of whether 42 U.S.C. 4072 or the insurance policy itself compels an insured to bring suit in United States District Court within a year is virtually irrelevant. The Seventh Circuit acknowledged as much on rehearing in *Downey*, citing to the new regulations and policy language to find that "FEMA can, and did, preclude filing in state court in the first place" instead of in United States District Court within a year after the denial. *Downey v. State Farm & Cas. Co.*, 276 F.3d 243, 245 (7th Cir. 2001) (per curiam).

In other words, while Petitioner and the amicus curiae engage in a long drawn-out analysis concerning which court applied the right jurisdictional statute many years ago, they ignore that the issue became moot when FEMA solved the issue through regulations and more explicit policy language 19 years ago. No one contests that federal question jurisdiction exists in this suit. And whether the requirement to file in United States District Court within a year of a written denial is a statutory or contractual requirement, Petitioner failed any requirement nonetheless.

B. Respondent seeks an advisory opinion that will not change the outcome of the case

Indicative of the fatal flaw in Petitioner's claim here, Petitioner buries at the end of his petition an assertion that the Court might itself be able to reach some alternative method to excuse the untimeliness of Petitioner's claim. But the petition does not explain how reversal is possible because Petitioner has no path to reversal. For example, Petitioner argued below, without citing to any authority, that Respondent waived the one-year requirement of the contract by removing

the case to federal court. Surely it is settled by now that removal to federal court is consistent with enforcement of a federal protection, in this case forum selection and a one-year deadline to sue in that forum—not a waiver of it. *Greenberg v. Giannini*, 140 F.2d 550, 553 (2d Cir. 1944) ("When a defendant removes an action from a state court in which he has been sued, he consents to nothing and 'waives' nothing; he is exercising a privilege unconditionally conferred by statute . . . .") (L. Hand, J.). If Petitioner and the amicus brief have demonstrated anything, it is that federal courts are uniform in holding that federal question jurisdiction exists over all cases under the National Flood Insurance Program, whether the basis for jurisdiction is 28 U.S.C. 1331, as they contend here, or 42 U.S.C. 4072, as the Fifth Circuit held below.

Invoking federal question jurisdiction by removal does not waive Petitioner's additional requirement to start the suit in United States District Court within one year from the written denial of his claim, which explains why the concurrence below, questioning which statute controlled, was a concurrence and not a dissent. Taking this case to resolve which statute provides jurisdiction, when jurisdiction is not at issue, would at best provide an advisory opinion for future litigants on which statute to cite, something this Court has been clear it will rarely do. *Flast v. Cohen*, 392 U.S. 83, 96 (1968) ("[T]he the oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions") (internal citation omitted).

C. An advisory opinion would not be helpful to the jurisprudence nonetheless

Resolving the question of whether 28 U.S.C. 1331 or 42 U.S.C. 4072 provides jurisdiction in this case will have no effect on the outcome of virtually any future case for the same reasons it has no impact here. Yet, Petitioner and the amicus curiae conjure up outcomes in other cases they claim would change depending on which statute applied.

For example, Petitioner claims that if the Fifth Circuit's decision was allowed to stand and 42 U.S.C. 4072 were found to provide exclusive jurisdiction of WYO policy claims, unsuspecting litigants filing in state court could be prejudiced. In Petitioner's words, "[i]t invites gamesmanship and sandbagging, and creates an obvious incentive for private insurers to wait out the clock and then object that a suit was filed in the wrong location." Pet. at 24. But this alleged incentive would equally apply to a claim filed in state court, even if not governed by 42 U.S.C. 4072, as such a claim would be inconsistent with what the Petitioner terms the policy's "forum selection clause." As Petitioner acknowledges, if an insured files in state court, a WYO insurer could choose to file a motion to dismiss the case on the basis of the forum selection clause in the policy. The incentive to do so and when is no different than filing a motion to dismiss under 42 U.S.C. 4072, as either basis for dismissal can be asserted well after the one-year deadline for the insured to file suit in the appropriate United States District Court.

The amicus curiae offers a different but unlikely scenario, pointing to three cases in which it claims that litigants lost a right to pursue the suit because their suits were removed to federal court pursuant to 42

U.S.C. 4072 and not pursuant to 28 U.S.C. 1331. But none of the opinions the amicus curiae cites holds that if removal had been sought on 28 U.S.C. 1331 instead of 42 U.S.C. 4072, the claims would not have be barred. Instead, the cases cited observe because the federal court filing requirement is so apparent on the face of the policy itself, any litigant who violates the requirement by filing in state court hardly has a basis to claim tolling or some other excuse for timely filing the claim. *See Gibson v. Am. Bankers Ins. Co.*, 289 F.3d 943, 948 (6th Cir. 2002) ("In light of the lack of any judicial authority supporting the filing of plaintiffs' suit in state court and given that plaintiffs were explicitly put on notice of the need to sue defendant in federal court ***through the specific contractual language of the SFIP***, there are no exceptional circumstances that justify the tolling of the statute of limitations.") (emphasis added); *cf. Robbins v. Forgash*, No. 13-0624, 2014 WL 12588683, at *3 (D. N.J. July 31, 2014). Under any analysis, if a case only ends up in federal court because removal occurs more than a year after the claim was denied, the statute of limitations applies to bar that claim.

Finally, both Petitioner and the amicus curiae assert that the Fifth Circuit's reliance on 42 U.S.C. 4072 is potentially harmful to an unsophisticated insured, with the amicus curiae going so far to assert the lack of "notice" is unconstitutional because a plain reading of the statute only applies to the "Administrator." But the standard terms of the insurance policy available to all insureds, including Petitioner, plainly states "you must start the suit within one year after the date of the written denial of all or part of the claim, and you must file the suit in the United States District Court of the district in which the covered property was

located at the time of loss." Whether this language derives from 42 U.S.C. 4072 or the mirroring regulations, everyone is on notice by virtue of the insurance policy itself that filing in state court risks a successful limitations defense if the suit does not make its way to the applicable United States District Court within a year of the denial of the claim. Petitioner should have so known, yet he chose to file late and in state court. There is nothing this Court needs to do to foreclose such a mistake by future litigants.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

SCOT G. DOYEN
STATE BAR NO. 00792982
Counsel of Record
DOYEN SEBESTA, LTD., LLP
PARAGON CENTER ONE
450 GEARS ROAD, SUITE 350
HOUSTON, TEXAS 77067
TELEPHONE: (713) 580-8900
FACSIMILE: (713) 580-8910
SDOYEN@DS-LAWYERS.COM

Counsel for Respondent

DECEMBER 6, 2019