FILED
United States Court of Appeals
Tenth Circuit

June 26, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ALEXIS BROWN,

Plaintiff - Appellant,

v.

NATIONWIDE INSURANCE COMPANY, a corporation,

Defendant - Appellee.

No. 21-4122
(D.C. No. 2:21-CV-00126-DBB)
(D. Utah)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, **MORITZ**, and **ROSSMAN**, Circuit Judges.

After receiving an unfavorable result in arbitration, Appellant Alexis Brown sued her insurance company in state court under Utah's underinsured motorist statute (UIM statute).[1] *See* Utah Code Ann. § 31A-22-305.3

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

[1] Ms. Brown asserts her insurance company is Nationwide Insurance Company. Appellee contends Nationwide is not a legal entity but a tradename under which Depositors Insurance Company (Ms. Brown's actual insurer) operates. According to the arbitration decision, the "relevant insurance policy [was] with Depositors Insurance." App. at 16. We note this dispute here but discuss it in more detail in Section II.A.

[hereinafter § 305.3]. The insurer removed the lawsuit to federal court and then moved to dismiss it. The district court granted the motion to dismiss, concluding Ms. Brown failed to timely serve the complaint within the 20-day statutory deadline. *See* § 305.3(8)(p)(ii). Ms. Brown now appeals the dismissal of her lawsuit with prejudice. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I. BACKGROUND

In 2014, Ms. Brown, then a teenager, was involved in a car accident. She was a passenger in a car driven by her mother when the side of their vehicle was swiped by a negligent driver. Ms. Brown suffered soft tissue injuries to her neck and back. The negligent driver's insurer accepted liability and settled with Ms. Brown for $100,000.

In July 2020, Ms. Brown made a claim with her insurance company under the underinsured motorist provision of the policy. That provision allowed Ms. Brown to collect up to $500,000 to compensate her for damages incurred over the amount covered by the at-fault driver's insurance. The parties arbitrated the claim. On January 20, 2021, the arbitrator conducted a hearing by videoconference and issued a decision the next day. The arbitration decision—captioned "Alexis Corporon Brown v. Depositors Insurance

(UIM)"—determined Ms. Brown sustained $80,000 in damages. App. at 18-19.[2]

On February 1, 2021, Ms. Brown filed a complaint against Nationwide Insurance Company in Utah state court as permitted under the UIM statute. The complaint alleged breach of contract and breach of good faith and fair dealing (the "bad-faith claim") based on Nationwide's refusal to provide underinsured motorist benefits. Also on February 1, Ms. Brown's counsel emailed a copy of the complaint to the attorney who defended the arbitration, Mr. Clifford J. Payne.

After getting no response, counsel for Ms. Brown followed up via email a week later to confirm Mr. Payne had received the complaint. Mr. Payne wrote, "I received the Complaint and will not be defending that case." *Id.* at 255. On February 9, Ms. Brown served CT Corporation in Midvale, Utah via a process server.

On February 16, Mr. Payne emailed Ms. Brown's counsel, stating Ms. Brown's UIM claim "is now concluded" based on Ms. Brown's "choice not to challenge [the Arbitration] decision through filing a Complaint for a Trial De Novo within the time period required under the statute." *Id.* at 276. In

[2] The arbitration award determined Ms. Brown's damages were less than what she had settled for with the at-fault driver's insurer, so the terms of her policy prevented recovery of any underinsured motorist benefits.

response, Ms. Brown's counsel pointed to the complaint filed in Utah state court on February 1 and emailed to Mr. Payne. Mr. Payne replied "[t]hat Complaint is being handled by someone else, not me." *Id.* at 275. The same day, Ms. Brown filed an amended complaint in Utah state court, adding the words "trial de novo" into the caption, allegations, and prayer for relief but otherwise making no changes. Ms. Brown's counsel emailed the amended complaint to Mr. Payne and asked if he "could pass it on to whomever will be handling the case on your side." *Id.* at 274; Aplt. Br. at 14.

On March 2, 2021, Depositors Insurance Company filed a notice of removal to federal court under 28 U.S.C. §§ 1332, 1441, and 1446. In the notice, Depositors stated Nationwide "is not a legal entity" but, based on context, "Depositors knows Brown intended to name Depositors, the insurer under the insurance policy and the party to the underlying binding arbitration." App. at 7. And "[s]hould the Court deem it necessary that the non-entity Nationwide Insurance Company make an appearance," Depositors explained, "the Court should consider this removal to also be on behalf of Nationwide Insurance Company." *Id.* at 7 n.1.

A week later Depositors moved to dismiss under Federal Rules of Civil Procedure 12(b)(2) and (4)-(6). First, Depositors argued there was deficient

process.[3] Depositors maintained Ms. Brown failed to comply with the requirements of Rule 4 of the Utah Rules of Civil Procedure because the process documents did not mention the arbitration, did not name the opposing party to the arbitration, and made no request for a trial de novo. Next, Depositors explained CT Corporation was not authorized to receive service on its behalf.[4] Depositors also contended Ms. Brown failed to file and serve her complaint within the 20-day statutory deadline provided in Section 305.3(8)(p)(ii).[5] Finally, Depositors insisted res judicata barred the bad-faith claim and the claim was "fairly debatable" under Utah law.[6]

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[3] "An objection under Rule 12(b)(4) concerns the form of the process rather than the manner or method of its service. Technically, therefore, a Rule 12(b)(4) motion is proper only to challenge noncompliance with the provisions of Rule 4(b) or any applicable provision incorporated by Rule 4(b) that deals specifically with the content of the summons." Wright & Miller, 5B Fed. Prac. & Proc. Civ. § 1353 (3d ed.).

[4] CT Corporation was the registered agent for Depositors in Utah until 2014 but was not eligible to receive service of process for Depositors in 2021.

[5] Depositors also argued Ms. Brown failed to state a claim for relief because she did not allege the arbitration award was the result of corruption, fraud, or other undue means, which Depositors argued was required under the UIM statute. The district court did not address this issue, and Ms. Brown does not raise it on appeal; thus, we do not pass on it.

[6] Under Utah law, "when an insured's claim is fairly debatable, the insurer is entitled to debate it and cannot be held to have breached the implied covenant if it chooses to do so." *Billings* v. *Union Bankers Ins. Co.*, 918 P.2d 461, 465 (Utah 1996) (citation omitted).

Ms. Brown did not contest removal but opposed the motion to dismiss on the merits. According to Ms. Brown, Depositors relied on "additional facts . . . that were not provided in Brown's complaint," which she claimed violated Rule 12(b)(6). App. at 311. Ms. Brown also explained this was "the first time [she had] seen 'Depositors Insurance Company' listed as an alleged party to this case." *Id.* at 309. She requested "additional briefing" and "a stay" to "conduct discovery into who Depositors Insurance Company is and its involvement in [this] case." *Id.* at 311. Ms. Brown also maintained the facts alleged in her complaint satisfied the UIM statute. Not only was the form of process correct, Ms. Brown contended, but she also had perfected service of process by emailing the complaint to Nationwide's attorney of record within the 20-day statutory deadline. Ms. Brown offered no response to the arguments made by Depositors seeking dismissal of the bad-faith claim.

On September 7, 2021, in a written order granting the motion to dismiss, the district court determined Ms. Brown's "failure to serve [Depositors] within the statutory period extinguishe[d] her claim." *Id.* at 349. Ms. Brown's action was dismissed with prejudice. This timely appeal followed.

II. DISCUSSION

Ms. Brown seeks reversal on four grounds. First, Depositors improperly removed the case. Second, the district court erroneously interpreted the UIM statute. Third, the district court erred in dismissing her bad-faith claim.

Fourth, the district court should have granted leave to amend. We consider each argument, and discerning no error, we affirm.

A. Ms. Brown's challenges to removal—whether based on procedural or jurisdictional defects—are unavailing.

Ms. Brown's removal argument on appeal has both a procedural and a jurisdictional component. As we will explain, to the extent Ms. Brown has identified a defect in the removal procedure, that argument is waived because Ms. Brown did not contest removal in the district court. To the extent Ms. Brown contends the district court lacked subject matter jurisdiction to dismiss her complaint with prejudice, that argument is properly before us but lacks merit.

1. Ms. Brown waived any challenge to the removal procedure.

Ms. Brown contends removal by Depositors was improper because Depositors was not a party to the lawsuit. Since her complaint named Nationwide, Ms. Brown insists Depositors needed to "obtain an order substituting parties, or permitting intervention" before removing the case from state to federal court. Aplt. Br. at 20. According to Depositors, there was no defect in the removal procedure, but in any event, Ms. Brown cannot advance that challenge for the first time on appeal. We agree with Depositors.

"We review the district court's ruling on the propriety of removal de novo." *Frederick* v. *Hartford Underwriters Ins. Co.*, 683 F.3d 1242, 1245 (10th

Cir. 2012) (citation omitted). "When a plaintiff files in state court a civil action over which the federal district courts would have original jurisdiction based on diversity of citizenship, the defendant or defendants may remove the action to federal court provided that no defendant 'is a citizen of the State in which such action is brought.'" *Caterpillar Inc.* v. *Lewis*, 519 U.S. 61, 68 (1996) (quoting 28 U.S.C. § 1441(b)) (citing 28 U.S.C. § 1441(a)).

After a defendant files a notice of removal, a plaintiff may object within 30 days based on any defect in the removal procedure by asking the district court to remand the case to state court. 28 U.S.C. § 1447(c). The 30-day limit to challenge defects in the removal procedure itself does not apply to jurisdictional challenges. *Id.*; *see also Caterpillar*, 519 U.S. at 69. "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." 28 U.S.C. § 1447(c). Our precedent makes clear defects in the removal procedure do not "involve the subject matter jurisdiction of the court and may be waived." *Huffman* v. *Saul Holdings Ltd. P'ship*, 194 F.3d 1072, 1077 (10th Cir. 1999). As such, "the validity of the removal procedure followed may not be raised for the first time on appeal . . . ." *Grubbs* v. *Gen. Elec. Credit Corp.*, 405 U.S. 699, 700 (1972).

Here, Ms. Brown did not oppose removal of the case from state to federal court on any ground. She never challenged the notice of removal filed by Depositors nor did she move to remand the case to state court. Ms. Brown also

did not contend in her opposition to the motion to dismiss that removal was improper. Under these circumstances, we conclude Ms. Brown has waived any appellate argument challenging the validity of the removal procedure. *See Huffman*, 194 F.3d at 1077.

Even if Ms. Brown had identified a defect in the removal procedure, that alone would not require reversal. "[A] defect in removal procedure does not warrant a remand to state court if subject matter jurisdiction existed at the time the district court entered judgment." *Id.* at 1080; *see also Grubbs*, 405 U.S. at 702. Instead, "the issue in subsequent proceedings on appeal is . . . whether the federal district court would have had original jurisdiction of the case had it been filed in that court." *Grubbs*, 405 U.S. at 702. "[B]ecause parties cannot waive subject-matter jurisdiction," *City of Albuquerque* v. *Soto Enters., Inc.*, 864 F.3d 1089, 1093 (10th Cir. 2017), we now consider whether "the requirements of federal subject-matter jurisdiction [were] met at the time the judgment [was] entered," *Caterpillar*, 519 U.S. at 73.

2. The district court had subject matter jurisdiction when it entered final judgment.

"The determination of the district court's subject matter jurisdiction is a question of law which we review de novo." *Plaza Speedway Inc.* v. *United States*, 311 F.3d 1262, 1266 (10th Cir. 2002) (citation omitted). Here, we must examine whether federal diversity jurisdiction existed when the district court

dismissed Ms. Brown's case with prejudice. As we explain, there is no jurisdictional problem.

Federal courts have diversity jurisdiction over civil actions where the amount in controversy exceeds $75,000 and the parties are citizens of different states. 28 U.S.C. § 1332(a). For a corporation to assert diversity jurisdiction, it must specify both its state of incorporation and principal place of business, and the citizenship of the plaintiff. *See Hendrix* v. *New Amsterdam Cas. Co.*, 390 F.2d 299, 300-01 (10th Cir. 1968). "[A] person is a citizen of a state if the person is domiciled in that state." *Middleton* v. *Stephenson*, 749 F.3d 1197, 1200 (10th Cir. 2014). A corporation is a citizen of the state where it is incorporated and the state of its principal place of business. *See Wachovia Bank* v. *Schmidt*, 546 U.S. 303, 306 (2006).

Removal typically proceeds on jurisdictional allegations, not proof of jurisdictional facts. The defendant must provide in its notice of removal "a short and plain statement of the grounds for removal." 28 U.S.C. § 1446(a); *see also Dart Cherokee Basin Operating Co.* v. *Owens*, 574 U.S. 81, 87 (2014). As for the amount in controversy, "a defendant's notice of removal need include only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold." *Dart*, 574 U.S. at 88-89. "[C]ourts should apply the same liberal rules to removal allegations that are applied to other matters of pleading." *Id.* at 87 (internal quotation marks and brackets omitted).

To assess jurisdiction at the time of removal, a district court may rely on the allegations in the complaint and the information provided in the notice of removal. *See McPhail* v. *Deere & Co.*, 529 F.3d 947, 955-56 (10th Cir. 2008); *see also* Wright & Miller, 14C Fed. Prac. & Proc. Juris. § 3723 (Rev. 4th ed.) ("The usual rule is that removability is determined from the record before the court at the time the notice of removal is filed in federal court."). "[O]nly when the plaintiff contests, or the court questions, the defendant's allegation[s]" is evidence establishing jurisdiction required. *Dart*, 574 U.S. at 89; *see also McPhail*, 529 F.3d at 955 ("[A] proponent of federal jurisdiction must, if material factual allegations are contested, prove those jurisdictional facts by a preponderance of the evidence" (citation omitted)). If challenged, the "party invoking diversity jurisdiction bears the burden of proving its existence by a preponderance of the evidence." *Middleton*, 749 F.3d at 1200.

Here, the notice of removal filed by Depositors stated the amount in controversy exceeded the $75,000 minimum. The notice of removal also stated Depositors was incorporated and had its principal place of business in Iowa, and that Ms. Brown is a citizen of Utah. These allegations satisfy the requirements of diversity jurisdiction, as Ms. Brown appears to concede. In the district court, Ms. Brown never challenged the validity of the jurisdictional facts, so Depositors had no burden to present evidence on the issue. Under

these circumstances, the district court could rely on the uncontested notice of removal to assess subject matter jurisdiction.

On appeal, Ms. Brown attempts to challenge the district court's subject matter jurisdiction by insisting Depositors was not the proper defendant. *See* Aplt. Br. at 19-20. As we explained, Ms. Brown waived any challenge to defects in the removal procedure. In any event, Ms. Brown's contention that Nationwide was the proper defendant is not supported by the record. The insurance policy document lists Depositors as Ms. Brown's carrier. Likewise, the arbitration award is captioned "Alexis Corporon Brown v. *Depositors Insurance* (UIM)." *See* App. at 18 (emphasis added). Ms. Brown argues the district court improperly relied on evidence outside the complaint, but both the policy and the arbitration award were central to Ms. Brown's claims, referenced in the complaint, and their authenticity was not disputed. *See Alvarado* v. *KOB-TV, L.L.C.*, 493 F.3d 1210, 1215 (10th Cir. 2007) ("[O]n a Rule 12(b)(6) motion to dismiss, 'the district court may consider documents referred to in the complaint if the documents are central to the plaintiff's claim and the parties do not dispute the documents' authenticity.'" (citation omitted)). Based on these documents, Depositors is the correct defendant, and Depositors and Ms. Brown are diverse parties. We thus conclude the district court had subject matter jurisdiction under 28 U.S.C. § 1332 when it entered judgment.

B. The district court did not err in dismissing Ms. Brown's case for failing to timely serve her complaint as required by Utah law.

We review de novo a district court's dismissal of a complaint based on improper service of process. *Jenkins* v. *City of Topeka*, 136 F.3d 1274, 1275 (10th Cir. 1998). We also review de novo issues of statutory interpretation. *Stickley* v. *State Farm Mut. Auto. Ins. Co.*, 505 F.3d 1070, 1076 (10th Cir. 2007). After a case has been removed, the Federal Rules of Civil Procedure apply. Fed. R. Civ. P. 81(c)(1). But "federal courts in removed cases look to the law of the forum state . . . to determine whether service of process was perfected *prior to* removal." *Wallace* v. *Microsoft Corp.*, 596 F.3d 703, 706 (10th Cir. 2010) (emphasis added) (citation omitted).

The district court concluded Ms. Brown failed to comply with the UIM statute by "not serv[ing] the nonmoving party within the twenty-day statutory period." App. at 348. According to Ms. Brown, the district court erred in concluding she needed to serve the complaint according to the methods of service outlined in Rule 4 of the Utah Rules of Civil Procedure. She maintains Rule 5 of the Utah Rules of Civil Procedure applies, and under Rule 5, she satisfied the requirements of the UIM statute by emailing the complaint to Mr. Payne, arbitration counsel for Depositors, 11 days after the arbitration award issued. We disagree with Ms. Brown and discern no error.

1. Applicable Law

"When interpreting a state statute in a diversity case, this court must apply state rules of statutory construction." *United Rentals Nw., Inc.* v. *Yearout Mech., Inc.*, 573 F.3d 997, 1001 (10th Cir. 2009). Under Utah law, our "primary goal 'is to give effect to the legislature's intent in light of the purpose that the statute was meant to achieve.'" *Garfield Cnty.* v. *United States*, 424 P.3d 46, 56 (Utah 2017) (citation omitted). Utah law instructs we "first look[] to the plain language." *State* v. *Barrett*, 127 P.3d 682, 689 (Utah 2005). "We presume that the legislature used each word advisedly and read each term according to its ordinary and accepted meaning." *Downs* v. *Thompson*, 452 P.3d 1101, 1105 (Utah 2019). "Where a statute's language is unambiguous and provides a workable result, we need not resort to other interpretive tools . . . ." *Garfield Cnty.*, 424 P.3d at 56 (citation omitted).

The UIM statute states the procedures for asserting a claim against a covered person's underinsured motorist carrier. *See* § 305.3(8)-(9). The statute allows a claimant to submit their claim to arbitration or to resolve it through litigation. *See* § 305.3(8)(a). If the claimant elects arbitration, the award is final unless

> (ii) either party, within 20 days after service of the arbitration award:
>
> > (A) files a complaint requesting a trial de novo in the district court; and

> (B) serves the nonmoving party with a copy of the complaint requesting a trial de novo under Subsection (8)(p)(ii)(A).

§ 305.3(8)(p).

The UIM statute does not state the procedure governing service of the complaint requesting a trial de novo in the district court. Under Utah law, however, the "rules of procedure operate as a general backdrop for judicial proceedings, occupying any gaps in special procedures prescribed by statute." *Maxfield* v. *Gary Herbert*, 284 P.3d 647, 652 (Utah 2012). Two Utah rules are at issue here: Rule 4 and Rule 5. Rule 4 is titled "Process" and explains the timing and procedure for serving a summons and complaint. *See* Utah R. Civ. P. 4. Rule 5 is titled "Service and Filing of Pleadings and Other Papers" and dictates the methods of service for papers such as "a judgment" or "a pleading after the original complaint." Utah R. Civ. P. 5.

2. Analysis

The district court concluded "the UIM statute specifically requires two things to be completed within twenty days of the arbitration." App. at 348. A complaint requesting a trial de novo must be filed with the court and a copy of that complaint must be served on the nonmoving party. The court determined Ms. Brown's "emailed [] copy of the original complaint to the attorney who defended the arbitration within the twenty-day period" was improper because the statute "require[d] [Ms. Brown] to serve the *nonmoving party*." *Id.* The

court also rejected Ms. Brown's argument "that emailing the complaint to arbitration counsel was effective under Rule 5." *Id.* Rule 5 "applies after an action has been commenced," the district court reasoned, but "it does not govern the initial service of a plaintiff's complaint, which falls under Rule 4." *Id.* The district court concluded Ms. Brown "did not comply with the service requirements for either Rule 4 or the underlying statute." *Id.*

Ms. Brown argues the district court misinterpreted Utah law. First, she contends the court erred by concluding Rule 4 applies to service of a complaint under Section 305.3(8)(p)(ii)(B). Second, she asserts the language of Section 305.3(8)(p)(ii)(B) clearly shows Rule 5 methods of service are sufficient for serving a complaint under the statute.[7] Neither contention is availing.

As for her Rule 4 argument, Ms. Brown claims "[i]f the Utah legislature had intended service under § 305.3(8)(p) to be analogous to personal service of process under Rule 4, it would have used language like 'service of process' to

[7] Ms. Brown also makes a third argument based on the public policy goals of the statute. Because we find the plain language of the statute to be unambiguous, we do not address this argument. *See State* v. *Barrett*, 127 P.3d 682, 690 (Utah 2005) ("If we find the provision ambiguous we then seek guidance from the legislative history and relevant policy considerations." (quoting *State* v. *Ostler*, 31 P.3d 528, 529 (Utah 2001))). At oral argument, counsel for Ms. Brown agreed "if the language is unambiguous, I don't believe that the rules of statutory construction would provide this court any basis to delve into the legislative intent." Oral. Arg. at 9:00-9:11.

so indicate." Aplt. Br. at 26. Instead, "the statute does not say anything about 'personal' service, or service of 'process.'" *Id.* at 25-26. We are not persuaded.

The plain language of Section 305.3(8)(p)(ii) states the party seeking to challenge the arbitration award must "file[] a complaint requesting a trial de novo in the district court; and serve[] the nonmoving party with a copy of the complaint." The Utah Supreme Court has explained "[w]hen a party initiates an action, it must serve a defendant under Utah Rule of Civil Procedure 4." *Wittingham, LLC* v. *TNE Ltd. P'ship*, 469 P.3d 1035, 1048 (Utah 2020). But "[a]fter an initial complaint is filed and properly served under rule 4, most subsequent pleadings and motions can be served under the less stringent requirements of rule 5." *Id.*; *see also* Utah R. Civ. P. 5. Thus, Rule 4 governs the service of "documents that commence an action." *State* v. *Bridgewaters*, 466 P.3d 204, 210 (Utah 2020).

At oral argument, Ms. Brown's counsel agreed a request for a trial de novo under the UIM statute "is commencement of an action" for purposes of the Utah Rules of Civil Procedure. Oral Arg. at 2:47-3:07. In her appellate briefing, however, Ms. Brown argued "Section 305.3(8)(p) does not commence suit." Aplt. Br. at 27. Instead, "[i]t serves a different procedural purpose: giving notice of a moving party's decision to challenge a UIM arbitration award, akin to a notice of appeal." *Id.* According to Ms. Brown, the arbitration award is final absent the invocation of the trial de novo procedure, so the requisite

complaint, as the first filing in district court, acts like a notice of appeal. We reject this interpretation.

Section 305.3(8)(p)(ii) states the filing is a "complaint," which is undisputedly the initial step required to commence the trial de novo procedure set out in the UIM statute. A complaint, which begins an action in the district court, cannot be understood as a notice of appeal, which begins an action in the appellate court.[8] The reference to "complaint" in the UIM statute plainly means "an initial complaint" subject to the methods of service in Rule 4. *See Wittingham*, 469 P.3d at 1048.

Because Ms. Brown has consistently argued Rule 4 does not apply to the UIM statute, she has never claimed, in the alternative, that she satisfied its requirements. Nor could she on this record. Rule 4 outlines two proper methods of service: (1) personal service or (2) service by mail or commercial courier service. Utah R. Civ. P. 4(d)(1)-(2). There is no dispute Ms. Brown did not personally serve the complaint. Although she attempted to satisfy service through a commercial courier service, Ms. Brown served CT Corporation, which was no longer a registered agent for Depositors in Utah in 2021. Therefore, Ms. Brown never actually served the complaint on an entity authorized to accept service for Depositors. *See* Utah R. Civ. P. 4(d)(2)(B) ("The

[8] Rule 3 of the Utah Rules of Appellate Procedure governs the filing of a notice of appeal. *See* Utah R. App. P. 3(e).

summons and complaint may be served . . . by mail or commercial courier service . . . provided defendant's agent authorized by appointment or by law to receive service of process signs a document indicating receipt.").

Notwithstanding the application of Rule 4 and Ms. Brown's failure to satisfy its requirements, she insists she should prevail under Rule 5. According to Ms. Brown, Rule 5 methods of service may be used to serve a complaint for a trial de novo under the UIM statute. Ms. Brown points to the language of "service of the arbitration award" in Section 305.3(8)(p)(ii). Because the arbitration award is subject to Rule 5 methods of service, Ms. Brown reasons, Rule 5 also should apply to the language "serves the nonmoving party with a copy of the complaint" found in Section 305.3(8)(p)(ii)(B). Aplt. Br. at 29. We disagree.

As Depositors correctly points out, "[t]he key to determining *how* to serve is by considering *what* is served." Aplee. Br. at 37. The arbitration award is akin to a judgment. *See MACTEC, Inc.* v. *Gorelick*, 427 F.3d 821, 831 (10th Cir. 2005) ("[A] valid and final award by arbitration generally has the same effect under the rules of res judicata as a judgment of a court."); Restatement (Second) of Judgments § 84 (1982) ("When arbitration affords opportunity for presentation of evidence and argument substantially similar in form and scope to judicial proceedings, the award should have the same effect on issues necessarily determined as a judgment has."). Recall, Rule 5 applies to

pleadings filed "after the original complaint," and to "a judgment." Utah R. Civ. P. 5(a)(1). This means the arbitration award can be served under Utah Rule of Civil Procedure 5. *See id.* But that does not compel the conclusion, argued by Ms. Brown, that Rule 5 should also govern service of "the complaint requesting a trial de novo." We thus discern no error in the district court's conclusion that service of the complaint under Section 305.3(8)(p)(ii)(B) cannot be satisfied by the procedure in Rule 5.

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Rule 4 of the Utah Rules of Civil Procedure, not Rule 5, governs service of a complaint requesting a trial de novo under Section 305.3(8)(p)(ii). Because Ms. Brown did not satisfy Rule 4, we affirm the district court's dismissal of her complaint.

C. The district court did not err in dismissing Ms. Brown's bad-faith claim because she abandoned it.

For the first time on appeal, Ms. Brown contends the district court erroneously dismissed her bad-faith claim for improper service of process, despite the Utah statute expressly exempting such a claim from the 20-day service requirement in Section 305.3(8)(p). *See* Aplt. Br. at 21-22. The district court did not address Ms. Brown's bad-faith claim in its dismissal order. Depositors urges affirmance, contending, under the specific facts of this

case, "[t]he district court considered the claim abandoned." Aplee. Br. at 51. We agree with Depositors.

Under Section 305.3(8)(m)(iii), "an allegation or claim asserting consequential damages or bad faith liability" is among the issues excluded from arbitration. The statute also makes clear an arbitration award is "the final resolution of all claims not excluded by Subsection (8)(m)" unless a party challenges the award within 20 days under Section 305.3(8)(p)(ii). On appeal, Ms. Brown contends the statute "explicitly excludes bad faith claims from its 20-day service requirement," so the district court erred in dismissing the claim for improper service. Aplt. Br. at 22. Ms. Brown is correct on the law: the UIM statute explicitly exempts bad-faith claims from arbitration. *See* § 305.3(8)(m)(iii). It stands to reason, therefore, that the 20-day service requirement in the UIM statute would not apply to Ms. Brown's bad-faith claim. But Ms. Brown did not make that argument—or any argument concerning her bad-faith claim—before the district court.

To be sure, as Ms. Brown correctly points out, a district court may not dismiss a complaint "merely because [a party] failed to file a response" altogether. Rep. Br. at 16 (alteration in original) (quoting *Issa* v. *Comp USA*, 354 F.3d 1174, 1177 (10th Cir. 2003)). But that principle does not advance Ms. Brown's cause in this case. Here, Depositors moved to dismiss, arguing both of Ms. Brown's claims—the breach of contract and the bad-faith claim—should

be dismissed "because Brown's deficient process and service failed to properly assert jurisdiction over Depositors" and the complaint failed to state a claim upon which relief could be granted. App. at 163, 171. Ms. Brown opposed the motion. She challenged the dismissal of her breach of contract claim, arguing Depositors "failed to meet its burden for dismissal under Rule 12(b)(6)" and she "complied with the requirements under the relevant portion of the underinsured motorist statute." *Id.* at 310. However, Ms. Brown did not address the bad-faith claim at all. In reply, Depositors pointed out Ms. Brown's silence on the bad-faith claim, contending she had "implicitly conced[ed]" the claim by not opposing dismissal. App. at 330.

Given Ms. Brown's litigation conduct in district court, we conclude it is appropriate to treat the bad-faith claim as abandoned.[9] *See, e.g.*, *C1.G ex rel. C.G.* v. *Siegfried*, 38 F.4th 1270, 1282 (10th Cir. 2022) (affirming district court's conclusion that plaintiff abandoned facial constitutional claim "by not addressing it in his response to [d]efendants' motion to dismiss"); *see also Lee* v. *Ne. Ill. Reg'l Commuter R.R. Corp.*, 912 F.3d 1049, 1053-54 (7th Cir. 2019) (explaining that a complaint "can be subject to dismissal if a plaintiff does not

[9] We leave for another day whether the failure to address an argument in response to a motion to dismiss categorically constitutes abandonment or requires a court to deem claims abandoned. Our circuit has not yet passed directly on this question, and we need not do so here because, as discussed, the factual circumstances in this case guide our disposition.

provide argument in support of the legal adequacy of the complaint," such as "when a party fails to develop arguments related to a discrete issue or when a litigant effectively abandons the litigation by not responding to alleged deficiencies in a motion to dismiss" (citation omitted)); *Tex. Cap. Bank N.A.* v. *Dallas Roadster, Ltd.* (*In re Dallas Roadster, Ltd.*), 846 F.3d 112, 126 (5th Cir. 2017) (concluding plaintiff abandoned one of two claims argued on appeal because his "oppositions to the motions to dismiss and for summary judgment contained arguments only about the" other claim). The intentional relinquishment occurred because Ms. Brown responded to the motion to dismiss but ignored the bad-faith claim and the arguments Depositors made against it, and instead, chose to focus only on her breach of contract claim. *See Richison* v. *Ernest Grp., Inc.*, 634 F.3d 1123, 1127-28 (10th Cir. 2011) (distinguishing claims "abandoned in the district court," which "we usually deem . . . waived and refuse to consider," from claims that "simply [weren't] raised before the district court," which we typically treat as "forfeited" and review only for plain error). Under these circumstances, and in the absence of any principled contrary argument from Ms. Brown, we must affirm.[10]

[10] In a footnote, Ms. Brown also seems to suggest we should review the dismissal of her bad-faith claim for plain error. "[W]e have routinely declined to consider arguments that are only raised perfunctorily in footnotes . . . ." *United States* v. *Walker*, 918 F.3d 1134, 1153 (10th Cir. 2019). And because we affirm the dismissal of the bad-faith claim based on abandonment, we need not reach her forfeiture argument.

D. The district court did not err in concluding amendment would be futile.

Ms. Brown never moved to amend her complaint. The district court, nevertheless, determined "[a]ny attempt to amend the complaint would be futile since [Ms. Brown] failed to comply with the statutory deadline." App. at 349. On appeal, Ms. Brown contends the district court erred in deciding leave to amend would be futile. Invoking Federal Rule of Civil Procedure 15(c) on appeal, Ms. Brown argues "she should be allowed to proceed against Depositors—as the real party in interest—with an amendment that 'relates back' to the original complaint." Aplt. Br. at 35-36. We disagree.

Generally, "[w]hen a party files a proper motion for leave to amend, rule 15(a) [] provides 'leave shall be freely given when justice so requires.'" *Calderon* v. *Kan. Dep't of Soc. & Rehab. Servs.*, 181 F.3d 1180, 1185 (10th Cir. 1999) (quoting Fed. R. Civ. P. 15(a)). But "a court need not grant leave to amend when a party fails to file a formal motion." *Id.* at 1186. Although "failure to file a formal motion is not always fatal," any attempt to request leave to amend "must give adequate notice to the district court and to the opposing party of the basis of the proposed amendment." *Id.* at 1186-87. Further, "[i]f a party seeks to amend a pleading following the court's grant of a motion to dismiss, the party must first move to reopen the case under Fed. R. Civ. P. 59(e) or 60(b)

and then file a motion under Fed. R. Civ. P. 15 for leave to amend pursuant to the standards set out in Fed. R. Civ. P. 7." *Id.* at 1185.

Here, Ms. Brown did not move to amend her complaint or otherwise seek leave to amend in any district court filing. Nor did she move to amend or vacate the judgment under Rule 59(e) or 60(b). *See id.* at 1185. If Ms. Brown desired an opportunity to amend her complaint, she needed to ask the district court, not wait to make her Rule 15 argument on appeal. *See Brannon* v. *Boatmen's First Nat. Bank of Okla.*, 153 F.3d 1144, 1150 (10th Cir. 1998) ("Plaintiffs ask us to conclude that the district court abused its discretion notwithstanding their own apparent failure to invoke that discretion in the first place. We will not satisfy this request.").

We also agree amendment would be futile. "Generally, we review a denial of leave to amend for abuse of discretion." *Chilcoat* v. *San Juan Cnty.*, 41 F.4th 1196, 1218 (10th Cir. 2022). However, "[w]hen a district court denies amendment based on futility, our review for abuse of discretion includes de novo review of the legal basis for the finding of futility." *Id.* (citation omitted). "A proposed amendment is futile if the complaint, as amended, would be subject to dismissal." *Bradley* v. *Val-Mejias*, 379 F.3d 892, 901 (10th Cir. 2004).

The UIM statute says an arbitration award "shall be the final resolution of all claims" unless a party files a complaint and serves the nonmoving party with a copy "within 20 days after service of the arbitration award."

§ 305.3(8)(p). Here, Ms. Brown failed to serve her complaint within the statutorily mandated 20 days. No amendment could cure this problem. *See, e.g.*, *Full Life Hospice, LLC* v. *Sebelius*, 709 F.3d 1012, 1019 (10th Cir. 2013) ("[G]ranting the amendment would have been futile because the amended complaint would have been subject to dismissal as time-barred under the 180-day rule of 42 U.S.C. § 1395oo(f)(1)."). Because Ms. Brown did not comply with the statutory deadline for service, any amendment would be futile, as the district court correctly held.

III. CONCLUSION

We **AFFIRM** the district court's dismissal of Ms. Brown's complaint. Ms. Brown's motion to certify a question to the Utah Supreme Court is denied[11] and her motion for summary disposition is denied as moot.

ENTERED FOR THE COURT

Veronica S. Rossman
Circuit Judge

[11] We normally do not certify questions "when the requesting party seeks certification only after having received an adverse decision from the district court." *United States* v. *Burkley*, 513 F.3d 1183, 1187 (10th Cir. 2008) (citation omitted). Even when properly requested, we will certify "in circumstances where the question before us (1) may be determinative of the case at hand and (2) is sufficiently novel that we feel uncomfortable attempting to decide it without further guidance." *Pino* v. *United States*, 507 F.3d 1233, 1236 (10th Cir. 2007). Even assuming Ms. Brown's certification request is proper, neither criterion for certification is satisfied. We therefore deny the request.