MEALEY'S™ LITIGATION REPORT
Insurance Bad Faith

The Vanishing Right To Federal Jurisdiction In Bad Faith Claims In Florida

by
Julius F. "Rick" Parker III

Butler Pappas Weihmuller Katz Craig LLP

A commentary article reprinted from the July 26, 2012 issue of Mealey's Litigation Report: Insurance Bad Faith

LexisNexis®

Commentary

The Vanishing Right To Federal Jurisdiction In Bad Faith Claims In Florida

By
Julius F. "Rick" Parker III

[Editor's Note: Julius F. "Rick" Parker III is a partner with the law firm of Butler Pappas Weihmuller Katz Craig LLP, which has offices in Tampa, Chicago, Charlotte, Mobile, Tallahassee, Philadelphia and Miami. He is an experienced litigator in the firm's Third-Party Coverage and Extra-Contractual Departments. This commentary expresses the author's opinion and does not reflect the opinions of Butler Pappas or Mealey's Publications. Copyright © 2012 by the author. Responses are welcome.]

On April 25, 2012, the United States District Court for the Southern District of Florida issued its opinion in *Moultrop v. GEICO General Ins. Co.*[1], remanding a bad faith claim to state court pursuant to the one-year "repose" provision of 28 U.S.C. § 1446(b).[2] The *Moultrop* decision is one more in a growing line of cases which refuse insurers access to a federal forum based on the repose provision,[3] under the anomalous reasoning that the right to removal expired before the cause of action for bad faith accrued. Unfortunately for the insurers, 28 U.S.C. section 1447(d) precludes appellate review of an order granting a motion to remand.[4] Therefore, unless the courts reverse the tide, it appears that, at least in Florida, insurers are quickly losing the right to litigate bad faith actions in federal court.

Moultrop was an uninsured/underinsured motorist ("UIM") case. The insureds sued GEICO to recover UIM benefits under a policy with a limit of liability of $50,000. Given the amount of the policy limits, GEICO had no right to remove the action initially, despite the existence of complete diversity. The plaintiffs tried the case to a jury resulting in a net verdict in the amount of $362,704.50. They then moved to amend their complaint to add a claim for bad faith in order to recover the amount of the verdict in excess of the policy limits. Once the amended complaint was filed, GEICO removed the action to the United States District Court for the Southern District of Florida pursuant to 28 U.S.C. section 1446(a).

The plaintiffs then moved to remand the case to state court citing 28 U.S.C. section 1446(b), which states:

> If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action (emphasis added).

The exception in the latter part of the statute is the "repose" provision referred to by the Court. GEICO argued that the bad faith claim was a "separate and independent" claim and therefore a new repose period began upon the filing of the bad faith complaint. The Southern District rejected that argument, choosing instead to base its decision on state law concerning when an action is "commenced" for purposes of removal.[5] The Court determined that date to be the date when the initial complaint for UIM benefits was filed. That date being more than one year prior to the date of removal, the Court found removal barred by the

repose provision and therefore remanded the case to state court.

Unfortunately, GEICO, like other insurers opposing remand, chose to base its argument on the fact that, under Florida law, a bad faith claim is a separate cause of action from a claim for UIM benefits. Thus, it argued, a bad faith claim is "separate and independent" of the claim for UIM benefits. Use of that language was unfortunate, as it appears to implicate the long-dead right to remove "separate and independent" claims along with removable claims based on diversity jurisdiction. In 1990, Congress amended the removal statute, 28 U.S.C. § 1441(c) to state:

> Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise nonremovable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or in its discretion may remand all matters in which State law predominates.

Prior to the amendment, the statute applied to diversity cases as well as federal question cases. As the language of the statute makes clear, it is meant to allow the removal of state law causes of action joined with federal question cases. In other words, in that instance, the defendant does not merely remove the federal question case, leaving the state law causes of action in state court. Rather, it allows removal of the entire case and vests discretion in the District Court as to whether to adjudicate those separate state law claims.

When arguing that a bad faith claim is "separate and independent" of a claim for UIM benefits, GEICO should have argued that a bad faith claim is a completely new cause of action, which could not possibly have been "commenced" before it accrued. That is the injustice which GEICO sought to avoid and which the Court countenanced. Unfortunately, those courts which have denied remand under similar facts have also characterized a bad faith cause of action as "separate and independent" of either a UIM claim or a claim against an insured tortfeasor.[6] The proper inquiry would be whether the filing of a new cause of action constitutes "commencement" of a new "action" within the meaning of the removal statutes. Logically, it must, as it is not possible to commence an action which does not yet exist.

It is certainly easier to make the case that the action against GEICO was commenced when it was originally sued, since GEICO was actually a party to the suit at that time. However, those courts which apply the repose provision of the removal statute have applied it to third-party bad faith claims as well.[7] In those cases, the insurer was never a party to the suit until after a final judgment was entered against their insureds. At that point, the plaintiffs can take advantage of Florida's "non-joinder statute,"[8] and add the insurer as a party, thereby eliminating the need to file a separate bad faith action against the insurer. Thus, in that instance, the insurer is barred from exercising its right to remove the action to federal court well before it is ever a party to a lawsuit.

Notwithstanding that obvious injustice, the *Moultrop* court, and those which it followed, chose to base its decision on the fact that Congress eliminated diversity jurisdiction from the ambit of 28 U.S.C. section 1441(c) with the 1990 amendment to the statute. Relying on that fact, those Courts simply assert that despite the fact that a bad faith action is "separate and independent" of a UIM or tort claim, the elimination of diversity jurisdiction from section 1441(c) means that causes of action which do not accrue until after the conclusion of primary litigation are nevertheless barred by the repose provision of section 1441(b). That glib assertion fails to address the fact that the only reason plaintiffs are able to defeat federal jurisdiction is by the fact that they are able to join bad faith actions with the underlying actions after final judgment.

Moreover, the Courts' focus on section 1441(c) is misplaced. Prior to the 1990 amendment, actions which were deemed to be entirely new actions under federal law were considered removable pursuant to section 1441(a). *See Butler v. Polk*.[9] *Butler* involved the removal of garnishment actions filed to collect on final judgments. The Fifth Circuit Court of Appeals held that the garnishment actions were entirely new actions for purposes of removal and therefore removable under section 1441(a). The issue section 1441(c) injected was whether the initial action could be removed along with the garnishment action. Since the amendment of section 1441(c), "separate and independent" causes of action are removable just as they always were.

The only difference is that now only the separate and independent action is removable, not the entire action.

Under *Butler*, that meant that the garnishee was permitted to remove an entire action once the third-party garnishment action was filed and the District Court had the discretion to adjudicate the separate state law claims or remand those to state court. The holding of *Butler* remains viable. The only difference is that now, claims which constitute entirely separate causes of action under federal law are separately removable. In the case of bad faith, that means that in the UIM context, the entire action is removable once the complaint is amended to assert a bad faith claim, whereas in the third-party context only the third-party complaint against the insurer is removable. As a practical matter, it should make no difference to the plaintiff, be it in the garnishment context or the bad faith context, as the underlying action is for all intents and purposes concluded at the time of removal. Therefore, there is nothing for the federal court to adjudicate with regard to the state law claim.

Fortunately, those Courts which have denied remand have avoided characterizing bad faith claims as "separate and independent" so as to implicate 28 U.S.C. section 1441(c).[10] In particular, the District Court for New Mexico applied logic and common sense to find that a bad faith action is an entirely new cause of action which commences a new repose period pursuant to section 1446(b). *See Rivera v. Fast Eddie's, Inc.*[11] In *Rivera*, the Court explained:

> This court finds that the current case is best characterized as a separate suit. No claims were asserted against Valley Forge until 2011, and indeed the primary factual underpinning of those claims appears to be Valley Forge's non-participation in the December 8, 2010, settlement conference. More importantly, Rivera can only assert claims against Valley Forge as a result of the assignment which formed part of the settlement agreement that effectively ended the underlying suit. These facts weigh heavily in the Court's decision to treat the Third-Party Complaint by Rivera against Valley Forge as a separate civil action for purposes of removal.
>
> Indeed, to hold that Valley Forge is barred from removal by the one-year time limit of § 1446(b) would have anomalous results: Valley Forge would be prevented from removing the case to federal court even though it was never joined as a party in the underlying suit and thus was unable to seek removal during the one-year time period. Moreover, the year-long countdown for removal would begin and end before any claims were asserted against Valley Forge and before the factual basis for those claims occurred.

The logic of the *Rivera* decision is unassailable and fully comports with decades of established law.[12] By contrast, the weak underpinning of the *Moultrop* decision and its predecessors fails to justify the denial of an insurer's right to a federal forum before the cause of action against the insurer even exists.

Conclusion

Unfortunately, *Moultrop* appears to be the trend in Florida. Given the fact that decisions remanding cases to state court are shielded from appellate review, the chances of insurers having their right to federal jurisdiction vindicated appear to be vanishing. The plaintiffs' bar must surely be thrilled with the current trend. Whether the case is a first-party bad faith case or a third-party bad faith case, all the plaintiff needs to do is wait 366 days to add a bad faith claim to an existing lawsuit and the insurer's right to removal will have been extinguished before it ever arose.

However, in the event a District Court applies the *Rivera* rationale and the insurer defeats the bad faith claim, the question of whether removal was proper will then be squarely before a federal appeals court. Perhaps at that point, this disturbing trend will be stopped and insurers will once again enjoy the right conferred upon them by Congress and the United States Constitution.

Endnotes

1. — F. Supp. 2d —, 2012 WL 1432316 (S.D. Fla. April 25, 2012).

2. That provision now appears at 28 U.S.C. § 1446(c)(1), and is substantively identical, with the exception that it

now allows the District Court to refuse remand in the event it finds that the plaintiff acted in bad faith in preventing removal.

3. *See, e.g.*, Potts v. Harvey, 2011 WL 4637132 (S.D. Fla. Oct. 6, 2011); Daggett v. Am. Security Ins. Co., 2008 WL 1776576 (M.D. Fla. Apr. 17, 2008); Suncoast Country Clubs, Inc. v. U.S. Fire Ins. Co., 2006 WL 2534197 (S.D. Fla. Aug. 31, 2006).

4. *See* In re Ocean Marine Mut. Protection & Indem. Ass'n, Ltd., 3 F.3d 353, 355 (11th Cir. 1993).

5. It would make no difference whether the Court applied state law or federal law to this question. Rule 1, Fed. R. Civ. P. states that "A civil action is commenced by filing a complaint with the court."

6. *See, e.g.*, Love v. Prop. & Cas. Ins. Co. of Hartford, 2010 WL 2836172 (M.D. Fla. July 16, 2010); Barnes v. Allstate Ins. Co., 2010 WL 5439754 (M.D. Fla. Dec. 28, 2010); Lahey v. State Farm Mut. Auto. Ins. Co., 2007 WL 2029334 (M.D. Fla. 2007).

7. *See, e.g.*, Potts v. Harvey, 2011 WL 4637132 (S.D. Fla. Oct. 6, 2011); Suncoast Country Clubs, Inc. v. U.S. Fire Ins. Co., 2006 WL 2534197 (S.D. Fla. Aug. 31, 2006).

8. Fla. Stat. § 627.4136 (2011).

9. 592 F.2d 1293 (5th Cir. 1979).

10. *See, e.g.*, Love v. Prop. & Cas. Ins. Co. of Hartford, 2010 WL 2836172 (M.D. Fla. July 16, 2010); Lahey v. State Farm Mut. Auto. Ins. Co., 2007 WL 2029334 (M.D. Fla. 2007); — F. Supp. 2d —, 2011 WL 6293229 (D. N.M. Dec. 16, 2011).

11. *See id.*

12. *See, e.g.*, Butler v. Polk, 592 F.2d 1293 (5th Cir. 1979) and its progeny. ■

MEALEY'S LITIGATION REPORT: INSURANCE BAD FAITH
edited by Mark Rogers
The Report is produced twice monthly by

1600 John F. Kennedy Blvd., Suite 1655, Philadelphia, PA 19103, USA
Telephone: (215)564-1788 1-800-MEALEYS (1-800-632-5397)
Email: mealeyinfo@lexisnexis.com
Web site: http://www.lexisnexis.com/mealeys
ISSN 1526-0267