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Commentary

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Three years ago, I published an editorial in this esteemed journal regarding the vanishing right to federal jurisdiction for insurers in bad faith claims in Florida.[1] That article focused on a decision of the United States District Court for the Middle District of Florida in *Moultrop v. GEICO General Ins. Co.*[2] Since authoring that article, the law concerning removal of first-party bad faith cases has drifted even further from its judicial underpinnings. This article explains the recent trends and suggests how the law could and should be clarified in order to restore insurers' fundamental right to federal jurisdiction.

By way of review, *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. On the same day, the trial court entered final judgment in favor of the plaintiffs and granted the motion for leave to amend the complaint, subject to "abatement" pending exhaustion of GEICO's appellate remedies. 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. § 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.[3] 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.

The dilemma faced by insurers in cases like *Moultrop* is the fact that a decision granting a motion to remand is not reviewable.[4] Thus, the law has been somewhat of a patchwork. When the court denies a motion to remand, few plaintiffs raise that denial as error on appeal. In the more common instance where a court grants a motion to remand, the insurer has no remedy.

Therefore, until recently, there were no appellate level decisions concerning the issue. However, in 2013, the Eleventh Circuit Court of Appeals released its decision in *Bollinger v. State Farm Mut. Auto. Ins. Co.*[5] The District Court in *Bollinger* denied a motion to remand a "second amended complaint" filed in state court against State Farm after a previous uninsured/underinsured motorist ("UIM") case was tried to a verdict. The District Court held:

> State Farm[']s removal of this newly-filed action does not violate the one year limit on removal under 28 U.S.C. § 1446(b), because the action was commenced in 2012 following the dismissal of [Bollinger's] earlier suit on this exact same claim. State Farm removed this matter within 30 days of filing of a complaint that *first established this action was removable*. Finally, State Farm has established the requirements of diversity jurisdiction under 28 U.S.C. § 1332, as there is complete diversity of citizenship and the amount in controversy minimum requirement is clearly satisfied.[6]

The Eleventh Circuit affirmed the District Court's denial of Bollinger's motion to remand *in toto*.

But the decision in *Bollinger* was only published in the Federal Appendix, not the Federal Reporter. Pursuant to Eleventh Circuit internal rules, *Bollinger* is considered unpublished and therefore is not binding precedent.[7] In fact, in considering the question the following year, the Court did not even cite to *Bollinger*. In *King v. Gov't Employees Ins. Co.*,[8] the District Court refused to remand a UIM bad faith case under the repose provision of the Removal Statute. On appeal, the Eleventh Circuit noted that the District Courts of Florida were divided on the question, and that failure to timely remove an action is only a procedural defect, not a jurisdictional defect. As such, it refused to consider the propriety of the District Court's decision.[9]

Thus, litigants in UIM bad faith cases must continue to wage battle in the District Courts on a case-by-case basis. Unfortunately, the law continues to evolve in this area based upon faulty premises on each side. The majority of District Courts considering whether to remand a bad faith case filed as an amended complaint in an existing first-party coverage matter, which was filed more than one year after filing the original complaint, have granted motions to remand.[10] However, at least six District Courts have refused to remand cases under the same facts.[11] A close examination of the rationale underlying the majority and minority rules reveals why a complete overhaul of the law in this area is due.

Illustrative of the majority rule is *Darragh v. Nationwide Mut. Fire Ins. Co.*[12] In *Darragh*, the plaintiff filed a UIM claim against Nationwide and obtained a verdict in excess of the policy limits. The court entered a final judgment in the amount of the policy limits, but purported to retain jurisdiction to allow plaintiff to amend his complaint to add a claim for bad faith. Twenty days later, the plaintiff moved to amend his complaint. Three months later, the trial court granted the motion and deemed the amended complaint filed as of that date. Nationwide then removed the case to the Middle District and plaintiff moved to remand, citing the repose provision of the Removal Statute.

The Court recognized the bedrock principle of Florida law that a cause of action for bad faith is an entirely new and separate cause of action from the action on the policy.[13] So far, so good. From there, however, the court went astray, following the "logic" of *Moultrop* that an action is "commenced" under Florida law when the complaint is filed, not when it is amended. The Court even recognized another well-settled principle of Florida law, *i.e.*, that a complaint cannot be amended after entry of a final judgment.[14] From these premises, the Court then concluded that the action for bad faith was "commenced" when the UIM complaint was filed, years earlier. Therefore, it remanded the case pursuant to the repose provision.

In contrast to the *Darragh* line of cases is the line stemming from the Middle District's decision in *Lahey v. State Farm Mut. Auto. Ins. Co.*[15] In *Lahey*, the plaintiff obtained an excess verdict in a UIM case. The trial court entered a final judgment limited to the policy limits, which the insurer appealed. During the pendency of the appeal, the trial court allowed plaintiffs to amend their complaint to assert a bad faith claim.

The insurer then removed the case to the Middle District. The Court rejected the plaintiff's argument that the case was barred by the repose provision, grounding its decision on the well-recognized principle that a cause of action for bad faith is "separate and independent" from the claim for UIM benefits. Thus, the Court considered the bad faith case as having been "commenced" when the amended complaint was filed.

The critical fact that seems to have been glossed over by all of the courts considering this question is the fact that once a final judgment has been entered by a Florida trial court, the court loses jurisdiction to do anything further. *See Liberty Ins. Corp. v. Milne*;[16] *DiPaolo v. Rollins Leasing Corp.*[17] In short, Florida's trial courts have been exercising non-existent jurisdiction over bad faith claims for nearly a decade without any party raising that lack of jurisdiction as a bar.

This presents a true conundrum for insurers. When a trial court purports to exercise jurisdiction to allow a plaintiff to amend his/her complaint after a final judgment for UIM benefits, the insurer has two choices: 1) it can move to dismiss the bad faith claim as being filed in a court which lacks jurisdiction; or 2) it can remove the case to federal court and ignore the jurisdictional defect. If it exercises the first option, it has lost its right to litigate an entirely new cause of action in federal court in hopes that the trial court does the right thing and dismisses the complaint; or if it refuses, take its chances with the state appellate court. Either way, the insurer has lost its right to a federal forum, unless the trial court and/or appellate court gets it right and requires the plaintiff to initiate an entirely new lawsuit. In that instance, the insurer would clearly have the right to remove the case, so long as it did so within thirty days of the filing (or service) of the new complaint.

If it exercises the second option, the insurer takes a gamble that the federal court will side with the minority rule and keep the case in federal court. But that also begs the question of whether the federal court has subject matter jurisdiction over a removed case over which the state court lacked jurisdiction in the first place. The insurer is certainly free to argue the latter point in federal court. But a win on that point places the parties in the same position as a win in state court. Either way, the plaintiff has to file a new lawsuit, which is immediately and unquestionably removable.

It appears that plaintiffs' attorneys in Florida are wise to this conundrum, as in recent years, a new trend has emerged. Plaintiffs began filing UIM suits with premature bad faith counts included in the complaint. When the insurers predictably moved to dismiss the unripe bad faith claim, plaintiffs argued that the appropriate remedy was to "abate" the bad faith claim pending resolution of the UIM claim, rather than dismissing the admittedly non-existent bad faith claim. *See Safeco Ins. Co. of Ill. v. Beare*.[18] This ploy is clearly designed to ensure the bad faith claim is subject to the repose provision of the Removal Statute in all cases.

Surprisingly, Florida's appellate courts have sanctioned this ruse.[19] The Court in *Beare* held, on the one hand, that it had *certiorari* jurisdiction to consider the trial court's refusal to dismiss an unripe bad faith claim joined with a UIM claim, because the loss of ability to remove to federal court is irreparable injury. On the other hand, it held that the appropriate remedy was "abatement," rather than dismissal. The underpinnings of that specious holding are decidedly shaky.

Unfortunately, the Fourth District's use of the word "abate" in *Beare*, as well as the same use of the term by other appellate courts in Florida has engendered confusion regarding what is the proper approach to dealing with a plaintiff's attempt to join premature bad faith counts with claims for UIM benefits. That confusion began with the Supreme Court's decision in *Allstate Indem. Co. v. Ruiz*.[20] However, even a cursory examination of the *Ruiz* decision demonstrates that any supposed rule of law concerning the proper treatment of a prematurely-filed bad faith action is pure *obiter dicta*.

Ruiz was a case about discovery. The precise question at issue was when the portions of an insurer's claim file become work product, and therefore not discoverable in a bad faith case. The Court, unremarkably, held that the entirety of the insurer's claim file up to and including the final resolution of the underlying UIM claim, is discoverable in a subsequent bad faith case. That material is obviously protected work product and not subject to discovery in the underlying claim for UIM benefits, as the only questions presented by the underlying case are "of the existence of liability on the part of the uninsured tortfeasor and the extent of the plaintiff's damages."[21] In resolving the discovery issue, the *Ruiz* Court simply applied the same rule which had long been in place with regard to third-party bad faith claims

to first-party claims. However, upon announcing that rule, the Court went a step further and stated, "However, we caution that where the coverage and bad faith actions are initiated simultaneously, the courts should employ existing tools, such as the abatement of actions and in-camera inspection, to ensure full and fair discovery in both causes of action."[22]

From that one statement, other appellate courts throughout Florida have purported to apply the "rule" that the decision whether to dismiss a bad faith action brought concurrently with an action for UIM benefits, or "abate" that cause of action is one to be made in the trial court's discretion.[23] The problem with *Beare* and the other decisions which make that empty distinction is that they fail to apprehend that "abatement" of a cause of action is identical to dismissal.[24] The Second District, in *Flaig v. Sullivan*, finally grasped that distinction, noting that, "An important difference between abating a suit and staying it is that the former terminates the action, necessitating a refilling of it, whereas the latter merely pauses proceedings in the stayed suit until the happening of a contingency."[25]

Ruiz was decided in 2005. The distinction between abatement and stay had long been a part of the law of Florida. Clearly, even if the Court had the power to decide what the proper remedy was for bringing a premature bad faith claim against an insurer (it did not), its own pronouncement indicated that the trial court could both "abate" the bad faith count, and use discovery tools such as *in camera* inspection to resolve discovery disputes in UIM cases and bad faith cases. Thus, *Ruiz* actually supports the rule that dismissal is the proper remedy for a premature bad faith claim. The same Court in *Blanchard* made it clear that a bad faith claim filed prior to obtaining a judgment against the insurer in an underlying claim for UIM benefits was subject to dismissal. The Court's unfortunate use of the word "abatement" and its concomitant misunderstanding by later appellate courts is what has engendered the confusion which now exists.

So the question remains — how to overcome the impediments to federal court jurisdiction in a first-party bad faith claim in Florida? The answer, unfortunately, lies with the state courts. This writer would suggest that practitioners representing insurers always move to dismiss premature bad faith claims. In the event the trial court follows the *Beare* line of cases and "abates" the action, the insurer can await the later attempt by plaintiff's counsel to "unabate" the bad faith claim after entry of a judgment in the UIM case. At that point, the insurer must cite to *Flaig* and its forebears for the proposition that an abated case is equivalent to a dismissed case, thus requiring the plaintiff to file a separate action for bad faith. In that event, the insurer has the unfettered right to remove the case to federal court. By taking that course of action, the split of authority as between the *Darragh* and *Lahey* rationales will become a relic, properly relegated to the dustbin of history.

The law in this area remains headed far from the bedrock principles by which it is governed. The trend must be reversed. While it is indeed ironic that the battle to preserve federal court jurisdiction must be waged in state court, it is nevertheless a battle which must be fought. The right to federal jurisdiction is too important to allow the trend to continue.

Endnotes

1. *See* Parker, J., *The Vanishing Right to Federal Jurisdiction in Bad Faith Claims in Florida*, Mealey's Litigation Report: Insurance Bad Faith, Vol. 26, # 6 (July 26, 2012).

2. 858 F. Supp. 2d 1342 (S.D. Fla. 2012).

3. 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."

4. *See* 28 U.S.C. § 1447(d).

5. 538 Fed. App'x 857 (11th Cir. 2013).

6. *Id.* at 862.

7. *See* R. 36-2, 11th Cir. Rules.

8. *See King v. Gov't Employees Ins. Co.*, 579 Fed. App'x 796 (11th Cir. 2014).

9. *King*, 579 Fed. App'x at 800.

10. *See, e.g., Darragh v. Nationwide Mut. Fire Ins. Co.*, 2014 WL 4791993 (M.D. Fla. Sept. 24, 2014);

Wallace v. GEICO Gen'l Ins. Co., 2014 WL 4540328 (M.D. Fla. Sept. 11, 2014); *Barroso v. Allstate Prop. & Cas. Ins. Co.*, 958 F. Supp. 2d 1344 (M.D. Fla. 2013); *Rader v. Safeco Ins. Co. of Ill.*, 2013 WL 10186944 (N.D. Fla. May 21, 2013); *Van Niekerk v. Allstate Ins. Co.*, 2013 WL 253693 (S.D. Fla. Jan. 23, 2013); *Rock v. State Farm Auto. Ins. Co.*, 2013 WL 230248 (M.D. Fla. Jan. 22, 2013); *Bolen v. Ill. Nat'l Ins. Co.*, 2012 WL 4856811 (M.D. Fla. Aug. 28, 2012); *Long v. FIA Card Svcs., N.A.*, 2012 WL 2370218 (M.D. Fla. Apr. 11, 2012); *Curran v. State Farm Mut. Auto. Ins. Co.*, 2009 WL 2003157 (M.D. Fla. July 2, 2009); *Daggett v. Am. Security Ins. Co.*, 2008 WL 1776576 (M.D. Fla. 2008).

11. *See, e.g., Rios v. 21st Cent. Ins. Co. of Cal., Inc.*, 2012 WL 12141972 (M.D. Fla. Sept. 14, 2012); *Batchelor v. GEICO Cas. Co.*, 2011 WL 12008037 (M.D. Fla. Aug. 15, 2011); *Barnes v. Allstate Ins. Co.*, 2010 WL 5439754 (M.D. Fla. Dec. 28, 2010); *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. July 11, 2007). The sixth decision came from the Middle District but is not published. *See Bollinger v. State Farm Mut. Auto. Ins. Co.*, 538 Fed. App'x 857 (11th Cir. 2013) (quoting District Court order denying remand).

12. 2014 WL 4791993 (M.D. Fla. Sept. 24, 2014).

13. *See Blanchard v. State Farm Mut. Auto. Ins. Co.*, 575 So. 2d 1289 (Fla. 1991).

14. *Darragh*, 2014 WL 4791993 at *4, citing *United Tel. Co. of Fla. v. Mayo*, 345 So. 2d 648 (Fla. 1977).

15. 2007 WL 2029334 (M.D. Fla. July 11, 2007).

16. 98 So. 3d 613 (Fla. 4th DCA 2012).

17. 700 So. 2d 31 (Fla. 5th DCA 1997).

18. 152 So. 3d 614 (Fla. 4th DCA 2014).

19. *See id.*

20. 899 So. 2d 1121 (Fla. 2005).

21. *Blanchard*, 575 So. 2d at 1291.

22. *Ruiz*, 899 So. 2d at 1130.

23. *See, e.g.*, *Vanguard Fire & Cas. Co. v. Golmon*, 955 So. 2d 591 (Fla. 1st DCA 2006).

24. *See Flaig v. Sullivan*, 141 So. 3d 1274 (Fla. 2d DCA July 18, 2014).

25. *Flaig*, 141 So. 3d at 1276, citing *Perry v. Fireman's Fund Ins. Co.*, 379 So. 2d 429, 430 (Fla. 2d DCA 1980). ■

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