More than Pawns

Fighting Removal Spoiler Claims Against Adjusters, Attorneys, and Agents in Bad-Faith Lawsuits

By Matthew J. Lavisky and Toni L. Frain

The trend of joining non-diverse individual defendants in lawsuit against insurers is troubling. However, several legal principles provide ways to remove such a case to a federal court.

A Washington appellate court recently held that an insured may bring a lawsuit for bad faith against an individual insurance adjuster. *Keodalah v. Allstate Ins. Co.*, 413 P.3d 1059 (Wash. Ct. App. 2018). This is part of a national trend of joining individuals as defendants in lawsuits for bad faith against insurers. The motivation for this trend is to prevent insurers from removing case to federal courts by finding a non-diverse defendant who plausibly can be named as a defendant.

This article discusses cases permitting and prohibiting lawsuits against adjusters. It also discusses other professionals who may find themselves a defendant in a lawsuit against an insurer. Finally, this article explores strategies to remove cases to federal courts, notwithstanding the joinder of a non-diverse defendant.

Lawsuits Against Individual Insurance Adjusters

In *Keodalah*, a Washington appellate court held that an individual adjuster could be sued for bad faith. 413 P.3d at 30. This decision was based primarily on a construction of a Washington statute. The

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court concluded that a Washington statute imposed a duty of good faith not just on insurers but also on corporate and individual adjusters. *Id*. In doing so, the court disagreed with a federal district court in Washington, which held that as a matter of statutory construction, an individual adjuster could not be sued for bad faith. *Garoutte v. Am. Family Mut. Ins. Co.*, No. C12-1787MJP, 2013 WL 231104, at *3 (W.D. Wash. Jan. 22, 2013).

The *Keodalah* decision is part of larger a push by plaintiff attorneys to develop strategies to include individual insurance adjusters in bad-faith lawsuits.

The *Keodalah* decision is part of larger a push by plaintiff attorneys to develop strategies to include individual insurance adjusters in bad-faith lawsuits. For instance, in *Bock v. Hansen*, 170 Cal. Rptr. 3d 293, 304 (Cal. Ct. App. 2014), a California appellate court held that an insurance adjuster could, under certain circumstances, be sued for negligent misrepresentation. The court came to this conclusion even though California does not recognize a cause of action for bad faith against an insurance adjuster. *Sanchez v. Lindsey Morden Claims Services, Inc.*, 84 Cal. Rptr. 2d 799, 803 (Cal. Ct. App. 1999); *Mercado v. Allstate Ins. Co.*, 340 F.3d 824, 826 (9th Cir. 2003).

The opinion in *Keodalah* represents the minority view. The majority view is that an insurance adjuster owes a duty only to the insurance company that hired or employs him or her. 3 Couch on Ins. §45:25; *Lodholtz v. York Risk Services Group, Inc.*, 778 F.3d 635, 642 n.11 (7th Cir. 2015). There are three general reasons for this view. They are based on principles of agency, contract, and statutory construction.

In the case of an independent adjuster, courts reason that the duties of the adjuster are defined by the terms of the contract with the insurance company. If the independent adjuster acts improperly, he or she may be liable to the insurer that employed him or her for resulting losses. However, the independent adjuster is not liable to the insured for bad faith or negligence. *King v. Nat'l Sec. Fire & Cas. Co.*, 656 So. 2d 1338, 1339 (Fla. Dist. Ct. App. 1995). The court in *Meineke v. GAB Bus. Services, Inc.*, 991 P.2d 267, 271 (Ariz. Ct. App. 1999), explained the conflict that would arise by imposing a duty to the insured on an independent adjuster retained by an insurance company.

> The law of agency requires a duty of absolute loyalty of the adjuster to its employer, the insurer. The independent adjuster's obligation is measured by the contract between the adjuster and the insurer. The adjuster that contracts to perform a $200 investigation is not obligated to expend the same effort that might be reasonable for a fee of $2000, nor is it obligated to continue when the insurer advises it to stop. Creating a separate duty from the adjuster to the insured would thrust the adjuster into what could be an irreconcilable conflict between such duty and the adjuster's contractual duty to follow the instructions of its client, the insurer.

(internal citations omitted). *See also Sanchez*, 84 Cal. Rptr. 2d at 803 (relying on principles of agency to hold that independent adjuster does not owe duty to insured).

Courts also have refused to extend bad-faith liability to adjusters based on principles of contract law. A cause of action for bad faith generally requires a contractual relationship between the plaintiff and the defendant. *United Fire Ins. Co. v. McClelland*, 105 Nev. 504, 511, 780 P.2d 193, 197 (Nev. 1989); *Gillette v. Estate of Gillette*, 837 N.E.2d 1283, 1287 (Ohio Ct. App. 2005); *Sandalwood Estates Homeowner's Ass'n, Inc. v. Empire Indem. Ins. Co.*, 665 F. Supp. 2d 1355, 1360 (S.D. Fla. 2009). An insurance company adjuster is not a party to the insurance contract. Thus, as a matter of contract law, courts have refused to extend liability for bad faith to insurance adjusters. *Harris v. Geico Gen. Ins. Co.*, No. 11-80552-CIV, 2011 WL 13115559, at *2 (S.D. Fla. Aug. 9, 2011); *Egan v. Mut. of Omaha Ins. Co.*, 620 P.2d 141, 149 (Cal. 1979); *Delamar v. Mogan*, 966 F. Supp. 2d 755, 759 (W.D. Ky. 2013); *Cochran v. Hartford Fire Ins. Co.*, No. 3:14-cv-00022-RLY-WGH, 2015 WL 13636677, at *1 (S.D. Ind. Jan. 26, 2015); *Brousseau v. Laccetti*, No. 09-403 (JAP), 2009 WL 4015647, at *2 (D. Del. Nov. 16, 2009); *Dumas v. ACCC Ins. Co.*, 349 Fed. Appx. 489, 492 (11th Cir. 2009).

In those states with statutory causes of action for bad faith, courts have refused to extend bad-faith liability to adjusters as a matter of statutory interpretation. These cases generally have looked at the text of the relevant statute and determined that it applies only to insurance companies. *See Cipriani v. Fed. Ins. Co. Div. of Chubb Group of Ins. Companies*, No. Civ.A. 99-CV-1014, 1999 WL 554601, at *2 (E.D. Pa. July 20, 1999); *Fulkerson v. State Farm Mut. Auto. Ins. Co.*, No. 3:09CV-392-S, 2010 WL 2011566, at *1 (W.D. Ky. May 20, 2010).

The decision of the Washington appellate court in *Keodalah* is unlikely to be followed in other jurisdictions. The Washington opinion was based on the wording of the Washington statute; thus, it has limited applicability outside of Washington. Moreover, the weight of authority across the nation, and the entrenched law of many jurisdictions, do not allow for such actions. Thus, it is unlikely that many jurisdictions will follow Washington's lead.

What Is Driving This Strategy?

Insurance adjusters in most instances will not make unsympathetic defendants. They are normal people with normal jobs. They have families and work hard to provide for them. Most adjusters are not exceedingly wealthy. They usually make good witnesses if, for no other reason, they are often deposed. A faceless insurance company makes a much less sympathetic defendant. So why the drive to join insurance adjusters as defendants?

The true motive is exposed by the very first case to cite *Keodalah*. In *Tidwell v. Gov't Employees Ins. Co.*, No. C18-318RSL, 2018 WL 2441774 (W.D. Wash. May 31, 2018), the plaintiff moved to amend the complaint based on *Keodalah* to add an adjuster as a defendant. The insurance adjuster was a citizen of Washington, as was the plaintiff. Thus, the plaintiff also moved to remand the case to state court for

lack of diversity jurisdiction. Citing *Keodalah*, the court allowed the amendment and remanded the case to state court.

Destroying diversity jurisdiction motivates most efforts by a plaintiff to join a non-diverse insurance adjuster as a defendant. The *Tidwell* case proves it. Thus, while *Keodalah* is not likely to be followed in many other jurisdictions, its effect may extend outside of Washington. The concern is that *Keodalah* will embolden plaintiffs outside of Washington to join adjusters as defendants in insurance litigation, at least in those jurisdictions where the law is not sufficiently clear that such actions will not stand. Whether a lawsuit actually has merit is not the point. Instead, the goal of a plaintiff is to advance a sufficiently colorable claim to avoid a claim of fraudulent joinder. As discussed more below, in this regard, ambiguity in the law distinctively favors the plaintiff.

Creative Efforts to Avoid the Rule Precluding Lawsuits Against Adjusters

Even in jurisdictions with clear precedent precluding lawsuits for bad faith against adjusters, insureds have looked for creative ways to sue adjusters. In one case, for instance, the insured sued the insurance adjuster for intentional infliction of emotional distress in a jurisdiction that does not recognize a cause of action for bad faith against an adjuster. *Rymer v. Travelers Indem. Co.*, No. 5:16-cv-534-Orl-37PRL, 2016 WL 7010950 (M.D. Fla. Dec. 1, 2016). In another case, the plaintiff sued the insurer for bad faith and the insurance adjuster for fraud and negligent misrepresentation. *R.H. ex rel. Gunter v. Buffin*, No. 14-150-ART, 2014 WL 7272757 (E.D. Ky. Dec. 18, 2014). In another case, the complaint alleged that the adjuster forced the insured to use a specific contractor and received compensation from the contractor for the work done on behalf of the insured. *Plazaview, LLC v. Travelers Indem. Co.*, No. 4:15-CV-00800-SRB, 2015 WL 9875294 (W.D. Mo. Jan. 6, 2015). Each of these opinions decided a motion to remand. The defendants argued that the adjuster had been fraudulently joined, and thus, the motion to remand should be denied. The court in each case found the law to be sufficiently ambiguous so that the court could not say that the plaintiff had no possibility of stating a valid claim against the adjuster. Thus, the cases were remanded to state court.

A contrary ruling is found in *Ence v. AAA Nevada Ins. Co.*, No. 2:11-CV-00713-KJD, 2012 WL 1292472 (D. Nev. Apr. 16, 2012). There, the court denied a motion for leave to amend to add an adjuster as a defendant to assert a claim for negligent misrepresentation. The court held that Nevada does not recognize a cause of action against an adjuster for negligent misrepresentation and thus the amendment would be futile. A similar holding is found in *Whitney v. Esurance Ins. Co.*, No. 13-61329-CIV, 2013 WL 4028151 (S.D. Fla. Aug. 7, 2013). In that case the court dismissed claims for negligent misrepresentation against an adjuster and denied a motion to remand. The court found the adjuster had been fraudulently joined because Florida does not recognize negligence claims against adjusters. In another case, *Tipton v. Nationwide Mut. Fire Ins. Co.*, 381 F. Supp. 2d 567 (S.D. Miss. 2003), the plaintiff joined a conspiracy claim against an adjuster with a bad-faith claim against an insurer. The court held that the adjuster had been fraudulently joined because the adjuster was an agent of the insurer, and there must be two persons or entities to have a conspiracy. A corporation or an agent of that corporation cannot conspire with itself.

These cases had mixed results. A clear legal principle cannot be divined from them. One thing is clear, however. Plaintiff attorneys will look for creative ways to join adjusters in lawsuits, even in jurisdictions that do not recognize causes of actions against adjusters.

Lawsuits Against Other Professionals

Adjusters are not the only pawns in this game. Attorneys and insurance agents are targets as well.

Some jurisdictions hold a liability insurer liable for certain acts of its retained defense counsel. *Majorowicz v. Allied Mut. Ins. Co.*, 569 N.W.2d 472, 477 (Wis. Ct. App. 1997). In many other jurisdictions, however, a liability insurer is not liable for the acts or omissions of the attorney retained by the insurer to represent an insured as long as the attorney is competent. *Kapral v. GEICO Indem. Co.*, 723 Fed. Appx. 768, 770 (11th Cir. 2018). This rule does not, however, prevent an insured from suing a retained attorney for malpractice. *Id.* at 772.

It is not the norm, but at times an insured in a bad-faith lawsuit will add claims against a non-diverse attorney retained by an insurer to represent the insured. *E.g., Richka Enterprises, Inc. v. Am. Family Mut. Ins. Co.*, 200 F. Supp. 2d 1049 (E.D. Mo. 2001); *Harvey v. Geico Gen. Ins. Co.*, No. 14-80078-CIV, 2014 WL 3828434 (S.D. Fla. Aug. 4, 2014). The purpose, in most instances, is to destroy diversity jurisdiction.

Destroying diversity jurisdiction motivates most efforts by a plaintiff to join a non-diverse insurance adjuster as a defendant. The *Tidwell* case proves it.

Another tactic is to join insurance agent negligence claims with claims for bad faith. For example, in *Anderson v. State Farm Mut. Auto. Ins. Co.*, No. 4:08cv345-RH/WCS, 2008 WL 11366408 (N.D. Fla. Nov. 10, 2008), the plaintiff sued his liability insurer for bad faith for allegedly failing to settle a claim. The insured also sued a non-diverse insurance agent for allegedly failing to advise the insured to purchase higher liability coverage. Likewise, in *Boehmer v. State Farm Fire & Cas. Co.*, No. 09-CV-318-JHP, 2010 WL 1499227 (E.D. Okla. Apr. 12, 2010), the plaintiff moved for leave to amend the complaint to add a claim for negligence against a non-diverse insurance agent.

Strategies to Stay in Federal Court

Diversity jurisdiction requires complete diversity. This "requires that all persons on one side of the controversy be citizens of different states than all persons on the other side." *Harvey v. Grey Wolf Drilling Co.*, 542 F.3d 1077, 1079 (5th Cir. 2008). Nonetheless, when a plaintiff includes a non-diverse defendant—such as an adjuster, attorney,

or insurance agent—in a lawsuit against an insurer for bad faith, removal to federal court still may be possible. To accomplish this, however, an insurer will need to establish fraudulent joinder or misjoinder, both of which are discussed below.

Also, a plaintiff who finds him- or herself in federal court may attempt to join a non-diverse defendant after removal. In most cases, an insurer will be able to block a post-removal amendment. Another strategy is for an insurer to sever the claims against it from the claims against a non-diverse defendant. Finally, in some cases the claims against a non-diverse defendant are meritless, and they are dismissed in state court, either voluntarily by the plaintiff or involuntarily by the court. The dismissal of the claims against a non-diverse defendant provides another opportunity to remove.

The fraudulent joinder doctrine may successfully be asserted when a plaintiff joins an adjuster as a defendant in those jurisdictions that do not recognize claims against an adjuster.

Fraudulent Joinder

Federal courts recognize the fraudulent joinder doctrine.

> When a plaintiff names a non-diverse defendant solely in order to defeat federal diversity jurisdiction, the district court must ignore the presence of the non-diverse defendant and deny any motion to remand the matter back to state court. The plaintiff is said to have effectuated a "fraudulent joinder," and a federal court may appropriately assert its removal diversity jurisdiction over the case. A defendant seeking to prove that a co-defendant was fraudulently joined must demonstrate either that: "(1) there is no possibility the plaintiff can establish a cause of action against the resident defendant; or (2) the plaintiff has fraudulently pled jurisdictional facts to bring the resident defendant into state court."

Henderson v. Washington Nat. Ins. Co., 454 F.3d 1278, 1281 (11th Cir. 2006) (internal citations omitted).

The fraudulent joinder doctrine may successfully be asserted when a plaintiff joins an adjuster as a defendant in those jurisdictions that do not recognize claims against an adjuster. For instance, in *Whitney*, the plaintiff sued the insurer for bad faith but also sued the adjuster for alleged misrepresentations. 2013 WL 4028151. The insurer removed the case to federal court and alleged that the adjuster had been fraudulently joined. The court agreed with the insurer and denied the motion to remand. The court found that under Florida law the plaintiff could not establish claims against the adjuster. Accordingly, the court concluded the adjuster had been fraudulently joined.

The *Tipton* case involved a first-party property claim. 381 F. Supp. 2d at 567. The insured sued the insurer for bad faith. The complaint also named an adjuster. On a motion to remand, the court held that the adjuster had been fraudulently joined because the law of Mississippi was clear that the adjuster could not be directly liable to the insured. A similar ruling under Louisiana law is found in *Toups v. State Farm & Cas. Co.*, No. 07-1068, 2007 WL 1030452 (E.D. La. Mar. 29, 007).

The critical point in cases involving fraudulent joinder is legal clarity. Unfortunately, in some jurisdictions the law is not sufficiently clear. In those jurisdictions, federal courts are less likely to find that an adjuster has been fraudulently joined.

For instance, in *Collins v. Montpelier U.S. Ins. Co.,* No. 11-166-ART, 2011 WL 6150583 (E.D. Ky. Dec. 12, 2011), the court reviewed the law of Kentucky and found that it was insufficiently clear that an adjuster could not be sued for bad faith. The court refused to find that the adjuster had been fraudulently joined based on the uncertainty in the law. A similar ruling is found under Arizona law in *IDS Prop. Cas. Ins. Co. v. Gambrell*, 913 F. Supp. 2d 748 (D. Ariz. 2012). There, the court remanded the case and rejected a fraudulent joinder argument, stating that "ambiguity in the law must favor the plaintiff." *Id*. at 754.

Another example is found in *Good Shepherd Assisted Living Corp. v. Great Am. Ins. Co. of New York*, No. 4:14-CV-3241, 2015 WL 2449161 (D. Neb. May 21, 2015). In that case, the plaintiff sued its insurer for breach of contract and bad faith relating to a first-party property insurance claim. The plaintiff also brought a claim for bad faith against a non-diverse insurance adjuster. The insurer removed the case to federal court, and the plaintiff moved to remand. The insurer argued that the adjuster had been fraudulently joined. The court granted the motion to remand. The court found no clear law in Nebraska that precluded a cause of action against the adjuster. Because Nebraska "might" recognize a cause of action against an adjuster, the court concluded that the adjuster had not been fraudulently joined.

A defendant invoking federal jurisdiction based on fraudulent joinder has a heavy burden. *Grancare, LLC v. Thrower by & through Mills*, 889 F.3d 543, 548 (9th Cir. 2018). Accordingly, as the cases above show, uncertainty in the law favors the plaintiff. However, particularly in those jurisdictions where the law is clear, the fraudulent joinder doctrine may allow a case to be removed to federal court even when a plaintiff has joined a non-diverse defendant.

Misjoinder

Fraudulent joinder generally requires a showing that there is no possibility that a plaintiff can establish a claim against a non-diverse defendant. However, there is a related doctrine that applies even when a plaintiff has valid claims against a non-diverse defendant. This doctrine is known as fraudulent misjoinder. It was first articulated in *Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1360 (11th Cir.1996), *abrogated on other grounds by Cohen v. Office Depot, Inc.*, 204 F.3d 1069, 1072 (11th Cir. 2000).

Fraudulent joinder addresses the viability of the claims; fraudulent misjoinder addresses the joinder. *Geffen v. Gen. Elec. Co.*, 575 F. Supp. 2d 865, 869 (N.D. Ohio 2008). As it was articulated elsewhere, "'[f]raudulent misjoinder' occurs when a

plaintiff purposefully attempts 'to defeat removal by joining together claims against two or more defendants where the presence of one would defeat removal and where in reality there is no sufficient factual nexus among the claims to satisfy the permissive joinder standard.'" *Fed. Ins. Co. v. Tyco Int'l Ltd.*, 422 F. Supp. 2d 357, 378 (S.D.N.Y. 2006) (citing *Conk v. Richards & O'Neil, LLP*, 77 F. Supp. 2d 956, 971 (S.D. Ind. 1999)).

The *Anderson* case presents a great example of fraudulent misjoinder involving a bad faith claim. 2008 WL 11366408. There, Anderson was insured by State Farm under a policy that provided bodily injury liability limits of $25,000 per person. Anderson was involved in a motor vehicle accident, and the jury returned a verdict against him for more than $3,000,000. Anderson sued State Farm for bad faith, alleging that it failed to settle the claim against him. Anderson also sued the non-diverse agent, alleging that the agent should have advised him to purchase higher liability limits. State Farm removed the case, and Anderson moved to remand.

The court denied the motion to remand, based on fraudulent misjoinder. The court reviewed Federal Rule of Civil Procedure 20(a)(2), which provides:

> Persons—as well as a vessel, cargo, or other property subject to admiralty process in rem—may be joined in one action as defendants if:
>
> (A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and
>
> (B) any question of law or fact common to all defendants will arise in the action.

The court found that the claims against State Farm and the agent did not share common questions of law or fact.

> The claims against State Farm, on the one hand, and against the [agent], on the other hand, may arise from the same transaction or occurrence—the wreck. But no question of law or fact common to all defendants will arise in this action.
>
> The claim against State Farm will turn on what it did after the wreck and what in good faith it should have done in light of the policy that was in fact in effect. Whether Mr. Anderson should have obtained more coverage in advance will not be relevant.
>
> The claim against the [agent], in contrast—if allowed to go forward at all—will turn on what advice [the agent] should have provided in advance, at a time when nobody knew whether Mr. Anderson would or would not have a wreck. Indeed, the jury trying the claim against the [agent]—if the claim goes to trial—will not even need to know that there *was* a wreck, or what verdict resulted. The issue will simply be whether [the agent] should have advised Mr. Anderson to obtain more coverage, and how much coverage Mr. Anderson would have obtained if properly advised. Hindsight evidence of the wreck and resulting verdict could properly be excluded.

2008 WL 11366408, at *2. Accordingly, the court severed the claim of the non-diverse defendant, remanded that claim, and retained jurisdiction over the claim against the insurer.

The case of *Tri-Miss Services, Inc. v. Fairley*, No. 2:12-CV-152-KS-MTP, 2012 WL 5611058 (S.D. Miss. Nov. 15, 2012), involved a first-party claim for theft. The insured sued the insurers for breach of contract and bad faith (among other claims). The insured joined in the lawsuit former employees that the insured alleged stole the property. The insurers removed, and the insured moved to remand.

The court denied the motion to remand, based on the fraudulent misjoinder doctrine. The court found that the claims against the various defendants were substantially different and did not involve common issues of fact or law. The court also noted that the allegedly wrongful acts of the insurers and of the former employees occurred months apart—the alleged theft occurred months before the insurer allegedly wrongfully denied the claim.

The fraudulent misjoinder doctrine may permit an insurer to remove a bad-faith case when the bad-faith case is joined with a claim against a non-diverse defendant. For instance, in cases where the insured joins his or her defense counsel as a defendant, fraudulent misjoinder may apply. Third-party bad faith generally is determined based on actions by the insurer during the time in which it could have settled the claim against its insured within the limits. *Ellison v. GEICO Gen. Ins. Co.*, No. 11-80812-CIV, 2012 WL 12865220, at *2 (S.D. Fla. Feb. 17, 2012); *Mesa v. Clarendon Nat. Ins. Co.*, 799 F.3d 1353, 1360 (11th Cir. 2015). In the usual case, the insurer's opportunity to settle has passed by the time a lawsuit is filed. Thus, the relevant time period to assess whether the insurer has acted in bad faith is before the date that the lawsuit was filed. On the other hand, the claim against the defense counsel generally is based on actions taken after the lawsuit is filed, such as failing to timely take discovery, secure the appropriate experts, file the appropriate motion, or raise the appropriate defenses. In this case, a fraudulent misjoinder argument may be meritorious because there are no common questions of law and fact between the claims against the insurer and the attorney, and as in *Tri-Miss Services*, the relevant time periods are different.

The critical point in cases involving fraudulent joinder is legal clarity. Unfortunately, in some jurisdictions the law is not sufficiently clear.

Likewise, in a case that joins an agent, a fraudulent misjoinder claim likely will be meritorious. The alleged agent malpractice will, in most instances, have occurred well before the policy was issued. On the other hand, the alleged bad faith will have occurred, in most instances, much later.

Post-Removal Joinder of Parties

Plaintiffs who find themselves in federal court may look for a way out. One way is to amend the complaint to add a non-diverse defendant. Courts understandably are skeptical of a post-removal joinder of a non-diverse party.

One common misconception is that Federal Rule of Civil Procedure 15(a) applies

when a plaintiff tries to join a non-diverse defendant. However, a post-removal amendment to a complaint that adds a non-diverse defendant is governed by 28 U.S.C. §1447(e), not Federal Rule 15(a). *Mayes v. Rapoport*, 198 F.3d 457, 462 n.11 (4th Cir. 1999); *Bevels v. Am. States Ins. Co.*, 100 F. Supp. 2d 1309, 1312 (M.D. Ala. 2000). Leave is required to amend a complaint to join a non-diverse defendant, even when a plaintiff otherwise is entitled to amend as a matter of right. *Ascension Enterprises, Inc. v. Allied Signal, Inc.*, 969 F. Supp. 359, 360 (M.D. La. 1997); *Whitworth v. TNT Bestway Transp. Inc.*, 914 F. Supp. 1434, 1435 (E.D. Tex. 1996).

If a plaintiff moves to amend immediately after removal, but before discovery, courts consider this evidence that the purpose of the amendment is to defeat federal jurisdiction.

When a plaintiff attempts to join a non-diverse defendant, a federal court has only two options: deny joinder or permit the amendment and remand. *Ibis Villas at Miami Gardens Condo Ass'n, Inc. v. Aspen Specialty Ins. Co.*, 799 F. Supp. 2d 1333, 1334 (S.D. Fla. 2011). The following factors guide a court's decision:

> (1) the extent to which the purpose of the amendment is to defeat federal jurisdiction, (2) whether plaintiff has been dilatory in asking for amendment, (3) whether plaintiff will be significantly injured if amendment is not allowed, and (4) any other factors bearing on the equities.

Id. at 1334-35.

When making this determination, courts consider the timing of the amendment. If a plaintiff moves to amend immediately after removal, but before discovery, courts consider this evidence that the purpose of the amendment is to defeat federal jurisdiction. *Small v. Ford Motor Co.*, 923 F. Supp. 2d 1354, 1357 (S.D. Fla. 2013). Also, if a plaintiff moves to amend and remand simultaneously, courts also consider this an indication that the purpose of the amendment is to avoid a federal court. *McGee v. State Farm Mut. Auto. Ins. Co.*, 684 F. Supp. 2d 258, 264 (E.D.N.Y. 2009). Courts also consider whether a plaintiff had knowledge of the defendant that the plaintiff seeks to join before the plaintiff filed the lawsuit. *Smith v. White Consol. Indus., Inc.*, 229 F. Supp. 2d 1275, 1280 (N.D. Ala. 2002). Another factor that courts consider is whether a plaintiff has a valid explanation for deciding to wait until after removal to attempt to join a non-diverse defendant. *Ibis Villas at Miami Gardens*, 799 F. Supp. 2d at 1335.

Based on these rules, insurers are in a good position to fend off post-removal attempts to add claims against non-diverse agents, adjusters, or attorneys. In most cases, each factor discussed above will favor the insurer. An example is found in *Nsien v. Country Mut. Ins. Co.*, No. 16-CV-530-JED-TLW, 2017 WL 368504 (N.D. Okla. Jan. 25, 2017). There, the plaintiffs sued their insurer for breach of contract and bad faith. The insurer removed to a federal court. The plaintiffs moved for leave to add a non-diverse agent as a defendant. The court refused to allow the plaintiffs to join the non-diverse defendant, finding that the purpose was most likely to have the case remanded to state court.

Another example is found in *Bevels*. 100 F. Supp. 2d at 1309. In that case, the plaintiffs sued their insurer for breach of contract and bad faith. The insurer removed the case to federal court. The plaintiffs moved to amend the complaint to add a non-diverse adjuster as a defendant. The plaintiffs also sought remand. The court found that the claims against the adjuster were questionable. The court refused to allow the plaintiffs to add questionable claims against a non-diverse defendant that would result in the case being remanded to state court.

A similar holding is found in *Quintana v. State Farm Mut. Auto. Ins. Co.*, No. 14CV00105 WJ/GBW, 2014 WL 12638855 (D.N.M. Apr. 14, 2014). In that case, the plaintiff moved to amend to add a non-diverse insurance agent to a lawsuit against his insurer. The court concluded that the agent was not an indispensable party. The court also expressed concern about the motive for the amendment because the plaintiff was aware of the agent before he filed the lawsuit and only sought to join the agent as a party after the case was removed to federal court. Accordingly, the court denied the motion to amend the complaint to add the agent as a party.

As discussed above, when a plaintiff adds a questionable claim against a non-diverse defendant before removal, a removing defendant has a heavy burden to establish fraudulent joinder, and ambiguities in the law favor the plaintiff. In contrast, when a plaintiff attempts to add a non-diverse defendant after removal, the defendant enjoys a distinct advantage. In most instances, a defendant will be able to defeat a motion to add the non-diverse defendant.

State Court Severance

Given the heavy burden imposed on a defendant arguing fraudulent joinder, there undoubtedly will be many instances when—because of the facts of a case or previous rulings in that district—an insurer may consider it a near certainty that it will not prevail in a fraudulent joinder argument. In those cases, the insurer still may consider moving to sever the claims in state court, and if the insurer succeeds, removing the severed case. *Cent. of Georgia Ry. Co. v. Riegel Textile Corp.*, 426 F.2d 935, 938 (5th Cir. 1970); *Crockett v. R.J. Reynolds Tobacco Co.*, 436 F.3d 529, 533 (5th Cir. 2006).

Dismissal of Claims against Non-Diverse Defendants

A tenuous claim against a non-diverse defendant may, in some instances, prevent removal. In those cases, a plaintiff may be stuck with a claim that the plaintiff does not want to pursue against a defendant that the plaintiff does not want in the case. The claims against the non-diverse defendant ultimately may be disposed, either by the court or by the plaintiff. At that point, the remaining defendant may consider removing the claims against it.

Federal courts have adopted the "voluntary-involuntary rule" to determine whether the disposition of a claim against a non-diverse defendant will cause the remaining claim against the diverse defendant to become removable. *Poulos v. Naas Foods, Inc.*, 959 F.2d 69, 72 (7th Cir. 1992). Under this rule, "cases, not originally removable, may become so by the voluntary (but not the involuntary) dismissal of those defendants whose presence precluded removal." *Phillips v. Uinjax, Inc.*, 625 F.2d 54, 56 (5th Cir. 1980). Thus, if a plaintiff voluntary dismisses the claims against a non-diverse defendant, the case against the remaining diverse defendant will become removable. *Power v. Norfolk & W. Ry. Co.*, 778 F. Supp. 468, 470 (E.D. Mo. 1991). This is true even if the voluntary dismissal was the result of a settlement. *Id.* On the other hand, if a court involuntarily dismisses the claim against a non-diverse defendant, the remaining claim will not be amenable to removal. *Walter E. Campbell Co., Inc. v. Hartford Fin. Services Group, Inc.*, 48 F. Supp. 3d 53, 56 (D.D.C. 2014).

When a plaintiff has joined tenuous claims against non-diverse defendants, the plaintiff may eventually be forced to drop those claims—as a litigation strategy—on threat of sanctions, by accepting an offer of judgment, or by any other number of devices. When that happens, an insurer may be in a position to remove the case at that time.

Importantly, here, 28 U.S.C. §1446(c) precludes removal of a case based on diversity jurisdiction after more than one year from the commencement of the action. Thus, it is conceivable—perhaps even likely—that a plaintiff will wait until a case has been pending for one year before dismissing the claims against a non-diverse defendant. However, a recent amendment to §1446(c) established a "bad-faith" exception to the one-year limitation that applies when "the plaintiff has acted in bad faith in order to prevent a defendant from removing the action." It has been interpreted to apply to "plaintiffs who joined—and then, after one year, dismissed—defendants that they could keep in the suit, but that they did not want to keep in the suit, except as removal spoilers." *Aguayo v. AMCO Ins. Co.*, 59 F. Supp. 3d 1225, 1266 (D.N.M. 2014). In *Heller v. Am. States Ins. Co.*, No. CV 159771 DMG (JPRx), 2016 WL 1170891 (C.D. Cal. Mar. 25, 2016), the court applied this exception in a case against an insurer to which the plaintiff also joined as a defendant a non-diverse consultant hired by the insurer. The plaintiff did not serve the consultant or make any effort to take discovery to support a claim against her. More than one year after the plaintiff commenced the lawsuit, he dismissed the consultant from the lawsuit. The remaining defendant removed, and the plaintiff moved to remand. The court concluded that the bad-faith exception to the one-year limitation applied. When determining whether the bad-faith exception applies, courts put significant weight on whether a plaintiff has actively litigated the cases against a non-diverse defendant. *See Aguayo*, 59 F. Supp. 3d at 1262 (finding that the bad-faith exception did not apply where the plaintiff actively litigated the case against the non-diverse defendant). That factor favored the defendant in *Heller.*

Although significantly more difficult, a case may be removed to federal court after the involuntary dismissal of a non-diverse defendant, notwithstanding the voluntary-involuntary rule. *See* Christopher P. Nease & Christy Martin Liddle, *Voluntary vs. Involuntary: The Unwritten Rule of Removal*, For The Defense, Oct. 2007, at 49. This is based on the fraudulent joinder exception to the voluntary-involuntary rule. *Insinga v. LaBella*, 845 F.2d 249, 254 (11th Cir. 1988); *Riverdale Baptist Church v. Certainteed Corp.*, 349 F. Supp. 2d 943, 946 (D. Md. 2004); *Arthur v. E.I. du Pont*, 798 F. Supp. 367, 369 (S.D.W. Va. 1992).

> In order to sustain a fraudulent joinder, a state court must find either that there was no possibility that the plaintiff could prove a cause of action against the resident defendant or that the plaintiff fraudulently pled jurisdictional facts in order to subject that resident defendant to the jurisdiction of the state court.

Insinga, 845 F.2d at 254.

In *Katz v. Costa Armatori, S.p.A.*, 718 F. Supp. 1508 (S.D. Fla. 1989), the court fashioned a two-prong approach to determine whether the fraudulent joinder exception to the voluntary-involuntary rule applied. The first prong focuses on whether the complaint stated a cause of action under state law sufficient to survive a motion to dismiss. The second prong—applicable only if the complaint states a cause of action—is to review the state court record under the standard in Federal Rule of Civil Procedure 11.

Establishing the fraudulent joinder exception to the voluntary-involuntary rule is difficult. Still, when a complaint is dismissed or summary judgment is granted in favor of a non-diverse defendant, in those cases a remaining defendant may be able to remove based on the exception.

Federal courts have adopted the "voluntary-involuntary rule" to determine whether the disposition of a claim against a non-diverse defendant will cause the remaining claim against the diverse defendant to become removable.

Conclusion

The trend of joining non-diverse individual defendants in lawsuit against insurers is troubling. It is just another way to game the system. The decision of the Washington appellate court in *Keodalah* is unfortunate because more is at stake than whether the case will be litigated in federal or state court. Adjusters, agents, and attorneys should not become pawns in a litigation chess match. It must not be lost in this win-at-all-cost environment that these are people—not merely names in a case style—who are being subjected to the angst and embarrassment of being personally sued. The trend is not likely to end soon. However, several legal principles—discussed above—provide ways to remove the case to federal court, notwithstanding the joinder of a non-diverse defendant. FD