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Federal Jurisdictional Issues Facing The Insurance Industry

by Patricia Trombetta

For several decades, extracontractual damages have been recoverable by insureds where the insurance carrier acts in bad faith under the theory every insurance contract infers a duty of good faith and fair dealing. This theory of recovery was a result of the perceived disadvantage a single insured had in fighting the insurance carrier on their claim. We see this claimed disadvantage every day in television ads by plaintiffs' firms asserting they can assist the claimant in recovering what is due to them in damages from the big bad insurance company. However, until more recently, bad faith claims were against the insurance carrier, not the individual adjuster, based upon the contractual insurance relationship, even though it was a single adjuster who committed the alleged act(s) of bad faith in adjusting the claim. There is a new trend of adding individual adjusters to lawsuits to destroy diversity in removing a case to Federal Court.

In recent years, federal courts have found at least a colorable claim against individual insurance adjusters on a variety of theories. Some have found the adjuster's actions violated the state insurance code, such as in the 2015 Northern District of Texas case of *Linron Properties v Wausau Underwriters Insurance Company*. Another viable method of holding the adjuster personally liable is seen in a case from the U.S. District Court for the Eastern District of Pennsylvania where the court found a colorable claim against an adjuster for willful misrepresentation and concealment of material facts under the State's Uniform Trade Practices and Consumer Protection law in *Kennedy v Allstate* in 2015. However, a different federal district court came to the opposite conclusion in the case of *Evans v GEICO Gen. Ins. Co.* in 2015 in the Eastern District of Virginia where the court found there was no direct contractual relationship between the adjuster and the insured allowing for a separate finding of bad faith against the handling adjuster.

In light of the fact there has been no consensus among the federal courts regarding individual liability for adjusters doing their job adjusting claims, but many finding a colorable claim, why the concern? It lies in the fact that, whenever possible, carriers remove cases for bad faith to federal court where there is a perceived lesser bias toward the industry, as well as stricter guidelines for litigating a case. However, if there is at least a colorable claim against an individual adjuster by a claimant and they both reside in the same state, which is often the case, that can destroy federal diversity and the case either remains in, or is remanded to, the state court.

The industry has fought the remand of cases to state courts on the theory of fraudulent joinder. The standard for fraudulent joinder in the federal courts is that "there is no reasonable basis in fact or colorable ground supporting the claim against the joined defendant, or no real intention in good faith to prosecute the action against the defendants or seek a joint judgment." *In re Briscoe*, 448 F.3d 201, 217 (3d Cir. 2006. But in June 2017 the U.S. District Court in South Carolina, lent a blow to the insurance industry in removing a case to federal court when an individual insurance adjuster was also named in the bad faith suit against the carrier, rejecting the fraudulent joinder argument. In the case of *Aung v GEICO* the court reasoned an employee can be held personally liable for torts committed in the scope of their employment even as their employer is also held liable under a *respondeat superior* theory. The Court found there was no recognized case in South Carolina exempting insurance adjusters from such tort liability and therefore found a colorable claim directly against the adjuster in tort, causing a remand of the case to state court. The same District Court came to a similar conclusion in 2011 in *Pohto v Allstate Insurance Co.* where it noted it was possible to find the individual adjuster liable on a theory of bad faith, negligence,

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or both under the law placing personal liability on employees acting in the scope of their employment.

This is an alarming extension of the duty of good faith going beyond being an inference in an insurance contract to inferring that duty individually to an employee of the insurance carrier who has no individual contract with the insured. What can an insurance carrier do, faced with the inclusion of the nondiverse adjuster in the Complaint, to allow either the removal of the case to federal court or to stave off the remand to state court? The carrier must focus on the allegations, or lack of allegations, of actionable claims against the adjuster to show there is no possibility of establishing a plausible cause of action against the adjuster. The Federal Courts Jurisdiction & Venue Clarification Act and the bad faith exception in it (28 U.S.C. 1446 (c)(1)) allow diversity removal more than one year after the filing of the Complaint, if the plaintiff acted in bad faith to prevent the removal of the action. This will allow the carrier time to accomplish the necessary discovery to prove the bad faith inclusion of the adjuster to undermine diversity—defeating the colorable argument—and then remove the case to federal court.

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