

2013

Amendments to Federal Removal Statutes: Curtailing Adjudication of Diversity Cases or Bad Faith Causes of Action?

Brooke M. Gaffney

Follow this and additional works at: <http://lawpublications.barry.edu/barryrev>

 Part of the [Civil Law Commons](#), [Insurance Law Commons](#), [Jurisdiction Commons](#), and the [Jurisprudence Commons](#)

Recommended Citation

Brooke M. Gaffney (2013) "Amendments to Federal Removal Statutes: Curtailing Adjudication of Diversity Cases or Bad Faith Causes of Action?," *Barry Law Review*: Vol. 19: Iss. 1, Article 6.

Available at: <http://lawpublications.barry.edu/barryrev/vol19/iss1/6>

This Article is brought to you for free and open access by Digital Commons @ Barry Law. It has been accepted for inclusion in Barry Law Review by an authorized administrator of Digital Commons @ Barry Law.

AMENDMENTS TO FEDERAL REMOVAL STATUTES: CURTAILING ADJUDICATION OF DIVERSITY CASES OR BAD FAITH CAUSES OF ACTION?

Brooke M. Gaffney*

I. OVERVIEW

The purpose of this comment is to explore a problem facing Florida insurers; a problem that may prevent Florida insurers from exercising their right to litigate bad faith causes of action in federal court.¹ This article demonstrates how the federal removal statutes, and amendments thereto, have potentially precluded insurers from removing some bad faith actions from state to federal court under diversity jurisdiction.² This article details the divergence in opinion among Florida's Southern and Middle District Courts in interpreting the federal removal statutes³ and concludes with a prediction of how the split may be resolved by the Eleventh Circuit Court of Appeals.⁴

II. INTRODUCTION TO A BAD FAITH PROBLEM

Here is a hypothetical: Sidney Sly, a Florida resident, who is insured by insurance company Alpha, a Delaware corporation, files a claim with Alpha to recover damages sustained to her automobile while it was parked on the street outside her home. Sly's insurance policy with Alpha includes property damage coverage for a maximum of \$25,000. A representative of Alpha investigates Sly's claim, and determines that the damages are not a result of the hit and run incident Sly reported, and refuses to pay her property damage claim. Sly hires an attorney, Carl Clever, who files a lawsuit against Alpha in a Florida state court on January 1, 2012, alleging breach of contract and statutory bad faith by Alpha in refusing to pay Sly's claim. Clever demands the limits of Sly's \$25,000 property damage policy.

Alpha's attorney, Sam Sharp, believes that a federal court will be a more favorable venue to adjudicate Sly's claims and, therefore, removes the case to federal court on January 25, 2012, pursuant to 28 U.S.C. § 1332(a),⁵ 28 U.S.C. §

* Brooke M. Gaffney, Barry University School of Law, J.D. Candidate May 2014.

1. See *infra* Part II.

2. See *infra* Part III.

3. See *infra* Part V.

4. See *infra* Part VI.

5. 28 U.S.C. § 1332(a) (2011) (establishing that federal district courts have original jurisdiction in all civil actions where the matter in controversy exceeds \$75,000 and citizens and subject of different states).

1441(a),⁶ and 28 U.S.C. § 1446(b).⁷ Sharp knows that Sly's bad faith claim is premature, and seeks to abate the claim until the breach of contract claim is adjudicated.⁸ Clever strategically seeks to amend Sly's Complaint on April 1, 2012 to remove the bad faith claim. The amended complaint only includes a breach of contract claim and demand for \$25,000 in damages—the limits of Sly's property damage coverage with Alpha.

While at first blush this appears to be a win for Sharp and Alpha, as they are now able to avoid disclosing privileged and perhaps proprietary information through the discovery process⁹—there is a problem. The breach of contract claim, standing alone, without the bad faith claim, does not meet the federal court's \$75,000 jurisdictional requirements. Clever timely moves to remand the case back to state court, which he believes is a more favorable venue for Sly, pursuant to 28 U.S.C. § 1447(c).¹⁰ Sharp files a motion in opposition to the remand motion and brings to the federal court's attention the difference in opinions among the federal district courts. Should the federal court remand the case back to state court at Clever's insistence? Or, should the federal court retain jurisdiction over the case as Sharp advocates?

Before this hypothetical is addressed further, a brief overview of bad faith is in order.

6. 28 U.S.C. § 1441(a) (2011) provides that:

[A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

Id.

7. 28 U.S.C. § 1446(b)(1) (2011) provides that:

The notice of removal of a civil action or proceeding shall be filed within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within 30 days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

Id.

8. *Lexington Ins. Co. v. Royal Ins. Co.*, 886 F. Supp. 837, 842 (N.D. Fla. 1995) (finding that the proper action to take is abatement when a bad faith claim is premature).

9. *See* NORM LACOE, *LA COE'S PLEADINGS UNDER THE FLORIDA RULES OF CIVIL PROCEDURE WITH FORMS 374* (2012 ed. 2012) (discussing Rule 1.280(246)). "Insurer's work product discovery permitted in actions for failure to defend in good faith." *Id.* *See also* *Allstate Indem. Co. v. Ruiz*, 899 So. 2d 1121, 1129–30 (Fla. 2005).

10. 28 U.S.C. § 1447(c) (2011) provides that:

A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal.

Id.

III. INSURER BAD FAITH ACTIONS: CURRENT STATE OF FLORIDA LAW AND WHY BAD FAITH ACTIONS ARE A PROBLEM FOR FLORIDA INSURANCE COMPANIES AND FLORIDA INSURANCE CONSUMERS

An insurer's duty to act fairly and in good faith when settling a claim made by its insured, or when settling a claim by a third party against its insured, is an implied obligation imposed by law.¹¹ An insurer must act fairly and in good faith in discharging its contractual responsibilities.¹² Florida's "bad faith" laws aim to protect Florida's insurance consumers from unfair practices by insurers and enable injured parties to recover damages from insurance companies that fail to settle claims in good faith.¹³

A "first party" bad faith cause of action is filed by an insured against his insurance company for failure to settle a claim by the insured.¹⁴ A "third party" bad faith cause of action is filed by the insured against his insurance company for failure to settle a claim of a third party against the insured;¹⁵ such claims potentially expose the insured to damages that are above the limits of his insurance policy.¹⁶ While Florida common law has long recognized only third party causes of action for bad faith,¹⁷ Florida Statute section 624.155 embraces both first and third party causes of action for bad faith in providing that "[a]ny person may bring a civil action against an insurer when such person is damaged."¹⁸

There are some prerequisites that need to be met whether one brings a common law bad faith claim or a statutory bad faith claim.¹⁹ First, if the plaintiff brings a first or third party bad faith claim under section 624.155, the insured must first file a Civil Remedy Notice with the Florida Department of Financial Services.²⁰ The notice gives the insurer sixty days to cure the alleged violation.²¹ While the statute provides that "[n]o action shall lie if, within sixty days after filing notice, the damages are paid or the circumstances giving rise to the violation are corrected,"²² the Florida Supreme Court has established that payment of a claim after the filing of a Civil Remedy Notice does not preclude a common law cause of action against the insurer for third party bad faith,²³ nor does payment preclude a later finding of bad faith.²⁴

11. *Opperman v. Nationwide Mut. Fire Ins. Co.*, 515 So. 2d 263, 266 (Fla. 5th DCA 1987) (citing *Gruenberg v. Aetna Ins. Co.*, 510 P.2d 1032, 1037 (Cal. 1973)).

12. *Id.*

13. S. COMM. ON THE JUDICIARY, INSURANCE BAD FAITH, INTERIM REP. 2012-132, at 1 (Fla. 2011).

14. *Id.* at 2 (citing *Opperman*, 515 So. 2d at 265).

15. *Id.* at 2 (citing *Blanchard v. State Farm Mut. Auto. Ins. Co.*, 575 So. 2d 1289 (Fla. 1991)).

16. *Opperman*, 515 So. 2d at 265.

17. *Id.*

18. FLA. STAT. § 624.155(1) (2013).

19. *Id.* § 624.155(3)(a); *Vest v. Travelers Ins. Co.*, 753 So. 2d 1270, 1275-76 (Fla. 2000).

20. FLORIDA DEPARTMENT OF FINANCIAL SERVICES, DEPARTMENT OF FINANCIAL SERVICES CIVIL REMEDY SYSTEM, available at <https://apps.fldfs.com/CIVILREMEDY/Default.aspx>. (last visited Oct. 1, 2013).

21. FLA. STAT. § 624.155(3)(d).

22. *Id.*

23. *Macola v. Gov't Emps. Ins. Co.*, 953 So. 2d 451, 452 (Fla. 2006).

24. *Berges v. Infinity Ins. Co.*, 896 So. 2d 665, 676 (Fla. 2004).

Second, for first party claims, a bad faith action is premature and subject to dismissal if the claim is brought before the underlying action for the insurance benefits has been resolved in favor of the insured.²⁵ For third party claims, generally, although an excess judgment against the insured is not always a prerequisite to bringing a bad faith cause of action against the insurer, the existence of a causal connection between the insurer's alleged bad faith actions and the claimed damages must be proven before a cause of action for bad faith can proceed.²⁶

Critics of the law governing bad faith have stated that it “has helped to curb abuse and unfair practices” on the part of insurers, but “as quickly as bad-faith law developed to come to the aid of the disadvantaged party in a contract or fiduciary relationship, it has evolved into a litigation quandary that often misses its basic purpose.”²⁷

The proponents of Florida's bad faith law reforms argue that the plaintiffs' attorneys essentially “set up” insurers for bad faith.²⁸ Their demands require the insurers to jump through numerous hoops under tight time constraints.²⁹ They often fail to supply the insurers with complete records to enable them to properly evaluate claims, or make such vague and ambiguous allegations of bad faith in demand letters or Civil Remedy Notices that the insurer is unable to timely remedy the alleged violation.³⁰

Adversaries to bad faith law reforms, however, “contend that the current law provides necessary protections to consumers and that insurers set themselves up for bad faith by not acting fairly toward their insureds.”³¹ Whether or not reform is in order, the current state of the law means a higher cost of doing business for Florida insurers because they are seeing an increase in the number of bad faith claims filed since 2006; and consumers are also seeing higher premiums.³² Specifically, insurers are spending more on attorney's fees and on reviewing extra-contractual claims.³³ They are also spending more, on average, to settle bad faith claims and bodily injury claims under threat of subsequent bad faith litigation.³⁴

25. *Blanchard v. State Farm Mut. Auto. Ins. Co.*, 575 So. 2d 1289, 1291 (Fla. 1991); *Vest*, 753 So. 2d at 1276.

26. *Perera v. U.S. Fid. & Guar. Co.*, 35 So. 3d 893, 899–901 (Fla. 2010).

27. S. INTERIM REP. 2012-132 (Fla. 2011), *supra* note 13, at 3 (quoting Victor E. Schwartz & Christopher E. Appel, *Common-Sense Construction of Unfair Claims Settlement Statutes: Restoring the Good Faith in Bad Faith*, 58 AM. U. L. REV. 1477, 1479 (2009)).

28. Janis Brustares Keyser, *Settlement for the Policy Limits: It's Tougher Than It Used To Be*, 23 TRIAL ADVOC. Q. 8 (2004).

29. *Id.* at 9–10.

30. S. INTERIM REP. 2012-132 (Fla. 2011), *supra* note 13, at 4.

31. *Id.* at 4–5.

32. *Id.* at 14, 16; *Berges v. Infinity Ins. Co.*, 896 So. 2d 665, 685 (Wells, J., dissenting).

33. S. INTERIM REP. 2012-132 (Fla. 2011), *supra* note 13, at 14.

34. *Id.* at 15.

A 2010 commissioned study on the economic effects of Florida's bad faith system supports the proponents' argument for the reform of Florida's bad faith law.³⁵ The Hamm Study was conducted at the request of the U.S. Chamber of Commerce's Institute for Legal Reform.³⁶

The Hamm Study contends that Florida's bad faith law creates a financial incentive for litigation even when the claim is weak by "rendering the policy or coverage limits moot, so that the insured may recover more than the amount of insurance for which he or she has paid." According to the study, this leads to increased insurance fraud because the heightened potential exposure deters insurers from conducting thorough investigations.³⁷

After hearing the call for reform, Florida's Senate Committee on the Judiciary held a workshop in February of 2011 to allow proponents and opponents of reforming Florida's bad faith laws to inform the Committee on their respective opinions and experience.³⁸ Thereafter, the Committee drafted Senate Bill 1592 (SB 1592), which proposed significant amendments to section 624.155.³⁹ Specifically, SB 1592 "creates specific statutory standards for a bad faith claim against an insurer that would 'apply equally and without limitation or exception to all common law remedies and causes of action for bad faith failure to settle,'" and also creates clearer lines defining insurer bad faith and other provisions to further level the playing field for insurers.⁴⁰ Although SB 1592 passed the Judiciary Committee by a vote of four-to-three, it was never heard in the Committee on Budget,⁴¹ and was indefinitely postponed and withdrawn from consideration on May 7, 2011.⁴² The companion bill, Bill 1187, passed in the Florida House, but died in the Civil

35. *Id.* at 16.

36. *Id.*

37. *Id.*

The Hamm Study comes to the conclusion that after adjusting for other factors that can influence premiums, allowing individuals to file third-party bad faith lawsuits is associated with a 30.2 percent increase in the median bodily injury insurance pure premium per vehicle. Although the study recognizes that [section 627.0651, *Florida Statutes*], bars insurance companies from including bad faith awards or settlements in their rate bases, it does not apply to settlements offered to reduce the risk of such actions before they are pursued.

Id. at 16–17. In comparing Florida's uninsured/underinsured motorist coverage pure premiums to other states without a defined first party bad faith cause of action, "[t]he Hamm Study concludes that Florida's average premium for this coverage is 188 percent higher than the average for the states without first-party bad faith." *Id.* at 17.

38. *Id.* at 3.

39. *Id.*

40. S. INTERIM REP. 2012-132 (Fla. 2011), *supra* note 13, at 3; Gwynne A. Young & Johanna W. Clark, *The Good Faith, Bad Faith, and Ugly Set-Up of Insurance Claims Settlement*, 9 FLA. B. J. 10–12, (2011); *see also* S.B. 1592, 2010 Reg. Sess. (Fla. 2011), *available at* <http://www.flsenate.gov/Session/Bill/2011/1592/BillText/c1/PDF>; H.B. 1187, 2010 Reg. Sess. (Fla. 2011), *available at* <http://www.flsenate.gov/Session/Bill/2011/1187/BillText/Filed/PDF>.

41. S. INTERIM REP. 2012-132 (Fla. 2011), *supra* note 13, at 3.

42. S.B. 1592, *supra* note 40.

Justice Subcommittee and was indefinitely postponed and withdrawn from consideration on May 7, 2011.⁴³

As it stands, Florida's bad faith law "undoubtedly provides social benefit by encouraging insurers to make fair settlements."⁴⁴ On the other hand, the law's one-sided provisions regarding the insurer's good faith obligations will continue to be exploited in some cases.⁴⁵ Thus, insurers will continue to charge more and the insured will continue to pay more for insurance premiums. It follows then that if Florida's legislature won't level the playing field, insurers and the attorneys who defend them must utilize every technical and tactical advantage available to them in adjudicating bad faith causes of action.

IV. THE TROUBLE CONTINUES: 28 U.S.C. § 1446 AND WHY 28 U.S.C. § 1446 IS A PROBLEM IN DIVERSITY CASES INVOLVING ALLEGATIONS OF BAD FAITH BY FLORIDA INSURERS

Let us return now to the question posed by Sly's hypothetical situation in Part I. Should the federal court remand Sly's case back to state court at Clever's insistence? Or, should the federal court retain jurisdiction over the case as Sharp advocates? Before we can explore this issue and the parties' respective arguments, we need to consider why Sharp removed Sly's case when he was well aware of the *Blanchard*⁴⁶ holding and the applicable provisions of the U.S. Code pertaining to removal and remand.⁴⁷

In 1983 and 1984, U.S. Senate hearings before the Subcommittee on Courts of the Committee of the Judiciary on the problem of civil case backlogs in the federal judicial system in district and appellate courts revealed that "[d]iversity cases require the expenditure of an inordinate amount of judicial resources where the federal interest is dubious at best."⁴⁸ "Diversity cases take more judicial time to handle and more frequently go to trial than federal question cases, at the expense of federal question cases."⁴⁹ Through these hearings, the Senate called Congress' attention to the problem and requested its help in the "abolition and curtailment of diversity jurisdiction."⁵⁰

In response to the court's call for help, in 1988, 28 U.S.C. § 1446(b) was amended by the passage of the Judicial Improvements and Access to Justice Act by

43. H.B. 1187, *supra* note 40.

44. Young & Clark, *supra* note 40, at 9.

45. *Id.*

46. *Blanchard v. State Farm Mut. Auto. Ins. Co.*, 575 So. 2d 1289, 1291 (Fla. 1991) (holding that a statutory bad faith claim does not *exist* until the underlying first party action on the policy has been resolved in favor of the insured).

47. 28 U.S.C. § 1441(a) (2011); 28 U.S.C. § 1446 (2011); 28 U.S.C. § 1447 (2011).

48. *Civil Case Backlogs in Federal District Courts: Hearing on The Problem of Civil Case Backlogs in the Federal Judicial System in District and Appellate Courts Before the S. Comm. on the Judiciary*, 98th Cong. 12 (1984) (statement of J. Elmo B. Hunter, Senior United States District Court Judge and Chairman of the Committee on Court Administration on the Judicial Conference).

49. *Id.*

50. *Id.* at 13

the 100th Congress.⁵¹ During the Senate proceedings and debates Wisconsin Representative, Robert Kastenmeier, remarked that when the Act was first introduced in the House, he read from a letter sent to him by Chief Justice William H. Rehnquist: “[t]his bill is probably the most significant measure affecting the operation and administration of the Federal Judiciary to be considered by the Congress in over a decade.”⁵² In agreeing with the Chief Justice, Representative Kastenmeier remarked that “the bill was much needed” in light of the “constantly burgeoning caseloads of the Federal Courts.”⁵³

As amended (and up until December 7, 2012), U.S.C. § 1446 provided that,

(b) The notice of removal of a civil action or proceeding shall be filed within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within 30 days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within 30 days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, or order 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.⁵⁴

In what Congress referred to as a “modest curtailment,”⁵⁵ the 1988 amendment effectively put “a one-year outer limit on the removal—measured from the action’s commencement—if the purported removal basis is the diversity of citizenship of the parties.”⁵⁶ What this means for Florida practitioners is that a removable action must be removed to federal court from a state court within one year of the filing of the original complaint, if federal jurisdiction is based on diversity.⁵⁷ This spells trouble for defendant insurers.⁵⁸ The amendment to 28 U.S.C. § 1446(b) allows a plaintiff with the motive of defeating removal to join a diversity destroying

51. 28 U.S.C. § 1446 cmt. (2011).

52. 134 CONG. REC. H10430, 10441 (daily ed. Oct. 19, 1988) (statement of Rep. Kastenmeier).

53. *Id.*

54. 28 U.S.C. § 1446(b) (2011)

55. 28 U.S.C. § 1446 cmt.; Yosef Rothstein, *Ask Not for Whom the Bell Tolls: How Federal Courts Have Ignored the Knock on the Forum Selection Door Since Congress Amended Section 1446(B)*, 33 COLUM. J. L. & SOC. PROBS. 181, 195 (2000).

56. 28 U.S.C. § 1446 cmt.

57. See FLA. R. CIV. P. 1.050 (providing that a civil action is deemed commenced when the complaint or petition is filed).

58. 28 U.S.C. § 1446 cmt.

defendant and then wait until after a year has passed to drop them,⁵⁹ or wait to disclose the true amount in controversy in diversity cases until after the one year limitation on removal expires.⁶⁰ The likelihood of experiencing these evils, however, has been reduced by the most recent amendment to 28 U.S.C. § 1446,⁶¹ discussed further in the last section.⁶²

Returning to the hypothetical in Part II of this article, depending on which federal district court in Florida Sly's action was removed to, pursuant to 28 U.S.C. § 1446(b), Sharp could lose entitlement to remove the case if he waits more than thirty days after the complaint is filed to remove the action.⁶³ Also, it would be unrealistic for Sharp to assume that Sly's breach of contract claim will be adjudicated within one year, thus allowing Sharp to timely remove the bad faith action in Sly's proposed Amended Complaint, assuming Sly prevails on the breach of contract claim. In the fiscal year of 2011–2012, approximately 4,000,000 complaints and petitions were filed in Florida's trial and appellate courts,⁶⁴ where there are only 4.5 judges per 100,000 people.⁶⁵ Further, Sharp cannot seek to remove only the bad faith cause of action because, again, it is premature if filed before the breach of contract claim is resolved.⁶⁶ But, there are other considerations playing in to Sharp's prompt removal to federal court.⁶⁷

Generally, plaintiffs prefer state court,⁶⁸ where judges may be biased in favor of resident plaintiffs because of political considerations.⁶⁹ Insurers, on the other hand, find federal court a more favorable setting for the disposition of coverage issues,⁷⁰ particularly when an insurer's bad faith is at issue.⁷¹ Another important consideration, and perhaps the most important one, is the standard for granting summary judgment in state courts versus federal courts. Plaintiffs bringing breach of contract and bad faith claims have a better opportunity to defeat summary

59. *Id.* "The amendment may sometimes give too much control to the state court plaintiff who wants to resist a removal to the federal court at all costs. It can invite tactical chicanery." *Id.*

60. Rothstein, *supra* note 55, at 188.

61. 28 U.S.C. § 1446(b)(1) (2011).

62. *See infra* Part VII.

63. *Daggett v. Am. Sec. Ins. Co.*, No. 2:08-CV-46-FTM-29DNF, 2008 WL 1776576, at *2 (M.D. Fla. Apr. 17, 2008) (remanding action removed when original complaint bringing declaratory judgment action was removable before bad faith action was added by amended complaint thus defendant's removal after amended complaint was untimely).

64. ANNUAL REPORT OF THE SUPREME COURT OF FLORIDA, at 11 (2012) *available at* http://www.flcourts.org/gen_public/pubs/bin/annual_report1112.pdf (last visited Oct. 27, 2013).

65. *Id.* at 7.

66. *See Curran v. State Farm Mut. Auto. Ins. Co.*, No. 6:09-cv-463-Orl-28DAB, 2009 WL 2003157, at *1 (M.D. Fla. July 2, 2009) (finding that removal of bad faith cause of action alleged in amended complaint was premature where verdict on UM coverage was still on appeal); *Jenkins v. Allstate Ins. Co.*, No. 5:08-cv-285-OC-10GRJ, 2008 WL 4934030, at *3 (M.D. Fla. Nov. 12, 2008) (finding that removal of bad faith cause of action alleged in amended complaint was premature where final judgment on UM coverage was on appeal).

67. STEPHEN S. ASHLEY, *BAD FAITH ACTIONS AND LIABILITY & DAMAGES* § 10:9 (2d ed. 2013).

68. *Id.*

69. Rothstein, *supra* note 55, at 182–83 (citing John R. Cashin, *Plaintiff's Nation*, BEST'S REVIEW-PROPERTY-CASUALTY INSURANCE EDITION, July 1, 1998).

70. WILLIAM E. WRIGHT, JR., *PROFESSIONAL LIABILITY IN LAW AND PRACTICE OF INSURANCE COVERAGE LITIGATION* § 49:23 (David Leitner, Reagan Simpson, & John Bjorkman eds., 2005).

71. DIANNE K. DAILEY & MADELEINE S. CAMPBELL, *THIRD-PARTY BAD FAITH IN LAW AND PRACTICE OF INSURANCE COVERAGE LITIGATION* § 29:8 (David Leitner, Reagan Simpson, & John Bjorkman eds., 2005).

judgment in state court, where the moving party must “overcome ‘all reasonable inferences’ that there is an issue of material fact to be tried.”⁷² By contrast, in federal court, an insurer must prove only that “a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue.”⁷³

This brings us to the crux of this comment and to Sharp’s ultimate dilemma in determining when to remove Sly’s action to federal court: the divergence in opinion in interpreting 28 U.S. § 1446(b) between Florida’s Middle and Southern District Courts⁷⁴ which to date remains unsettled by the Eleventh Circuit Court, although the conflict is now, perhaps, questionable.

V. THE DIVERGENCE IN OPINION INTERPRETING 28 U.S.C. § 1446(B) AMONG FLORIDA’S SOUTHERN AND MIDDLE DISTRICT COURTS

An analysis of decisions concerning 28 U.S. § 1446(b) and removal after one year reveal that, generally, the Southern District of Florida favors remand,⁷⁵ and the Middle District does not.⁷⁶ The Middle District will deny remand even when an action is removed more than one year after the action’s commencement.⁷⁷ Well, at least perhaps until very recently.

We begin the discussion with the Middle District. In 2006, the court in *Suncoast v. U.S. Fire Insurance Co.*⁷⁸ remanded a case originally brought by plaintiffs against the defendant’s insured in 1998.⁷⁹ In 2005, after the plaintiffs settled their claims with the defendant’s insureds, they amended their complaint to add the defendant insurance company.⁸⁰ The court held that the joinder of an

72. S. COMM. ON THE JUDICIARY, INSURANCE BAD FAITH, INTERIM REP. 2012–132, at 8 (Fla. 2011).

It has been suggested by practitioners that bad faith plaintiffs prefer the state court forum because of the lower likelihood of having the case disposed of on summary judgment, even in the event of a potentially weak case. Proponents for revision of Florida’s bad faith law have stated that since the decision in *Berges v. Infinity Insurance Co.*, . . . no state court has granted summary judgment in favor of an insurance company in a bad faith case based on an unreasonable condition or timeframe.

Id. (citing *Berges v. Infinity Ins. Co.*, 896 So. 2d 665 (Fla. 2004); Transcript of Hearing for HB 1187 Before the H. Civil Justice Subcomm., Senate Comm. on the Judiciary (2011)).

73. FED. R. CIV. P. 50(a)(1).

74. *See infra* Part V. This Comment does not address the Northern District of Florida due to the apparent lack of substantive opinions from the Northern District pertaining to the one-year limitation in 28 U.S.C. § 1446(b).

75. *See* *Moulthrop v. Geico Gen. Ins. Co.*, 858 F. Supp. 2d 1342 (S.D. Fla. 2012); *Lopez v. Robinson Aviation (RVA), Inc.*, No. 10-60241-CIV, 2010 WL 3584446 (S.D. Fla. Apr. 21, 2010); *Potts v. Harvey*, No. 11-80495-CIV-MARRA, 2011 WL 4637132 (S.D. Fla. Oct. 6, 2011); *Wohlgemuth v. Wohlgemuth*, No. 08-80138-CIV, 2008 WL 4610034 (S.D. Fla. Oct. 10, 2008).

76. *Barnes v. Allstate Ins. Co.*, No. 8:10-cv-2434-T-30MAP, 2010 WL 5439754, at *2–3 (M.D. Fla. Dec. 28, 2010).

77. *Id.*; *See* *Love v. Prop. & Cas. Ins. Co. of Hartford*, No. 8:10-CV-649-T-27EAI, 2010 WL 2836172, at *3 (M.D. Fla. July 16, 2010); *Lahey v. State Farm Mut. Auto. Ins. Co.*, No. 8:06-CV-1949-T27-TBM, 2008 WL 1766764, at *1 (M.D. Fla. Apr. 17, 2008); *Lahey v. State Farm Mut. Auto. Ins. Co.*, No. 8:06-CV-1949-T27TBM, 2007 WL 2029334, at *1, 4 (M.D. Fla. July 11, 2007).

78. *Suncoast Country Clubs, Inc. v. U.S. Fire Ins. Co.*, No. 8:06-CV-1238-T-23MSS, 2006 WL 2534197, at *1 (M.D. Fla. Aug. 31, 2006).

79. *Id.*

80. *Id.*

insurer for the purpose of a state court “‘direct action’ is bound by the one-year deadline under 28 U.S.C. § 1446,” and noted that “[t]he Eleventh Circuit has urged district courts to heed the ‘bright line limitations on federal removal jurisdiction’ as ‘an inevitable feature of a court system of limited jurisdiction that strictly construes the right to remove.’”⁸¹

Just a year later, the Middle District appeared to stray from *Suncoast* in its decision in *Lahey v. State Farm*.⁸² In *Lahey*, the plaintiffs filed an action against State Farm in state court in September 2001 alleging only a claim to uninsured/underinsured motorist (“UM”) benefits.⁸³ The jury awarded Lahey damages in excess of Lahey’s \$300,000 UM policy limits with State Farm.⁸⁴ The court then reduced the award to \$300,000.⁸⁵ While the judgment was on appeal, the state court authorized the Laheys to amend their complaint to include a statutory bad faith claim against State Farm.⁸⁶ On September 22, 2006, the Laheys filed their amended complaint and on October 20, 2006, nearly five years after commencement of the initial action, State Farm removed the bad faith claim to the Middle District Court.⁸⁷ The Laheys sought remand to state court relying on the one-year removal limit for diversity cases.⁸⁸

The Middle District denied the Laheys’ motion to remand the case back to state court and held that State Farm was not precluded from removing the case more than one year after the original UM claim was filed.⁸⁹ The Middle District relied on Florida Supreme Court precedent⁹⁰ and reasoned that the “[p]laintiffs’ bad faith claim [was] a cause of action ‘separate and independent of’ the underlying UM claim and was therefore separately removable pursuant to 28 U.S.C. § 1441(a).”⁹¹ Although confronted with conflicting opinions from the Southern and Middle

81. *Id.* (quoting *Russell Corp. v. Am. Home Assur. Co.*, 264 F.3d 1040, 1050 (11th Cir. 2001)).

82. *See Lahey*, 2007 WL 2029334 at *1.

83. *Id.* at *1.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Lahey*, 2007 WL 2029334 at *1.

89. *Id.* at *2.

90. *Id.*

Under Florida law, a statutory bad faith claim is ‘separate and independent’ of the claim arising from the contractual obligation to perform under the policy. A statutory bad faith claim does not *exist* until the underlying first party action on the policy has been resolved in favor of the insured Moreover, as we approved in *Blanchard*, a claim arising from bad faith is grounded upon the legal duty to act in good faith, and is thus separate and independent of the claim arising from the contractual obligation to perform.

Dadeland Depot, Inc. v. St. Paul Fire and Marine Ins. Co., 945 So. 2d 1216, 1235 (Fla. 2006) (internal citations omitted).

91. *Lahey v. State Farm Mut. Auto. Ins. Co.*, No. 8:06-CV-1949-T27-TBM, 2008 WL 1766764, at *1 (M.D. Fla. Apr. 17, 2008). The *Lahey* court does not recite any provisions of 28 U.S.C. § 1441(a) in the opinion but based on the phrase quoted in the court’s opinion, it can be surmised that the court’s reference to subsection (a) was an error and should have been a reference to subsection (c).

Districts,⁹² the Middle District Court denied the Laheys' motion for reconsideration in 2008.⁹³

Given its use of the phrase "separate and independent," it appears that the *Lahey* court's decision is based, in substantial part, on the original version of 28 U.S.C. § 1441 wherein subsection (c) (not subsection (a)) referenced "separate and independent."⁹⁴ Specifically, the original version of 28 U.S.C. § 1441(c) (effective prior to the 1990 amendment to section (c)) provided that:

Whenever a separate and independent claim or cause of action which would be removable if sued upon alone is joined with one or more otherwise non-removable 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.⁹⁵

Subsection (c) of 28 U.S.C. § 1441, however, was amended in 1990⁹⁶ and the text "which would be removable if sued upon alone," was replaced by "within the jurisdiction conferred by section 1331 of this title."⁹⁷ Thus, after the 1990 amendment and at the time *Lahey* was decided in 2007, separate and independent claims could only be removed if based on a federal question.⁹⁸ The version of 28 U.S.C. § 1441 that was effective in December 2011, makes no mention of "separate and independent" anywhere in the text of the statute and completely eliminates section (c) (quoted above) appearing in earlier versions.⁹⁹ So, while prior to the 1990 amendment it was the diversity cases that most often benefited from subsection (c), after the amendment, it appears the diversity case can no longer invoke removal under subsection (c).¹⁰⁰

Despite this 1990 amendment to 28 U.S.C. § 1441 and the clear language requiring separate and independent claims removed to involve federal questions, the Middle District refused to stray from *Lahey* in deciding *Love v. Hartford*¹⁰¹ and *Barnes v. Allstate*¹⁰² in 2010.¹⁰³ Noting that "there are divergent views on the

92. See *Suncoast Country Clubs, Inc. v. U.S. Fire Ins. Co.*, No. 8:06-CV-1238-T-23MSS, 2006 WL 2534197, at *1 (M.D. Fla. Aug. 31, 2006); see also *McCreery v. State Farm Mut. Auto. Ins. Co.*, No. 07-80489-CIV-Hurley/Hopkins (S.D. Fla. Sept. 1, 2007) (holding that addition of new state law claim would not allow defendant to get around the otherwise applicable one year bar); see also *Williams v. Heritage Operating, L.P.*, No. 8:07-cv-977-T-24MSS, 2007 WL 2729652, at *2 (M.D. Fla. Sept. 18, 2007) (holding that plaintiff's motion to amend started the thirty day clock for removal).

93. *Lahey*, 2008 WL 1766764 at *4.

94. 28 U.S.C. § 1441(c) (1990) (amended 2011).

95. *Id.*

96. *Id.*

97. *Id.*

98. See 28 U.S.C. § 1331.

99. 28 U.S.C. § 1441(c) (1990) (amended 2011).

100. 28 U.S.C. § 1446 cmt.

101. See *Love v. Prop. & Cas. Ins. Co. of Hartford*, No. 8:10-CV-649-T-27EAJ, 2010 WL 2836172, at *3 (M.D. Fla. July 16, 2010).

102. See *Barnes v. Allstate Ins. Co.*, No. 8:10-cv-2434-T-30MAP, 2010 WL 5439754, at *2-3 (M.D. Fla. Dec. 28, 2010).

issue,”¹⁰⁴ the *Love* court refused to remand a bad faith cause of action included in the plaintiff’s amended complaint, over two years after the initial complaint—demanding benefits to the insured’s \$200,000 in UM coverage—was filed.¹⁰⁵ Interestingly, the Middle District’s opinion in *Love* did not mention 28 U.S.C. § 1441.¹⁰⁶ Instead, the *Love* court focused on 28 U.S.C. § 1446(b) and determined that it “establishe[d] two distinct removal periods.”¹⁰⁷

The first applies where the federal jurisdiction can be determined from the initial pleading. The second applies where the initial pleading fails to disclose sufficient grounds to support federal jurisdiction. Both allow a [thirty] day window for removal. The first window opens when the initial pleading is served. The second window opens when the first document demonstrating that removal is proper is served.¹⁰⁸

While reliance on the Eleventh Circuit’s decision in *Pretka v. Kolter*¹⁰⁹ seems misplaced because it appears that the *Love* case was removable at the time the plaintiff filed his initial complaint that sought \$200,000 in UM benefits, and before amending its complaint to add the bad faith claim after a \$1,598,357.90 verdict was entered in plaintiff’s favor,¹¹⁰ the *Love* court appears to side-step this issue using the same reasoning it relied on in *Lahey*. Reiterating that a bad faith cause of action cannot accrue before the conclusion of the underlying litigation for contractual benefits, the *Love* court reasoned that because of this, a bad faith cause of action is removable as a separate cause of action upon service of the initial pleading setting forth the claim and thus the one year limit of 28 U.S.C. § 1446 was not implicated.¹¹¹

The Middle District utilized the same reasoning (making no reference to 28 U.S.C. § 1441) in its decision in *Barnes v. Allstate*¹¹²—a case with facts very similar to those in *Love*; although, it appears that the initial complaint did not assert a removable action.¹¹³ In finding that the defendant in *Barnes* timely removed the bad faith cause of action within thirty days of the state court’s affirmance of the

103. The revised version of 28 U.S.C. § 1441, incorporating the 1990 amendment, was not reflected in the language of § 1441 until the formal revision of § 1441 effective on December 7, 2011.

104. See *Love*, 2010 WL 2836172 at *3.

105. *Id.* at *1–3.

106. *Id.*

107. *Id.* at *2 (citing *Pretka v. Kolter City Plaza II, Inc.*, 608 F.3d 744, 759–60 (11th Cir. 2010) (holding that the second paragraph of § 1446 extends the time for filing notice of removal under the stated circumstance).

108. *Id.* at *2 (internal citations omitted).

109. *Pretka v. Kolter City Plaza II, Inc.*, 608 F.3d 744, 759–60 (11th Cir. 2010).

110. *Love v. Prop. & Cas. Ins. Co. of Hartford*, No. 8:10-CV-649-T-27EAJ, 2010 WL 2836172, at *2 (M.D. Fla. July 16, 2010).

111. *Id.* at *2–3.

112. See *Barnes v. Allstate Ins. Co.*, No. 8:10-cv-2434-T-30MAP, 2010 WL 5439754, at *2–3 (M.D. Fla. Dec. 28, 2010).

113. *Id.* at *3.

final judgment, the Middle District Court noted that “a party cannot waive a right that it does not yet have.”¹¹⁴

Now we turn to the Southern District of Florida. The court in *Wohlgemuth v. Wohlgemuth*,¹¹⁵ relied on an Alabama District Court decision,¹¹⁶ and construed 28 U.S.C. § 1446(b) narrowly.¹¹⁷ The court noted that “the thrust of the comments in [the legislative] history [of 28 U.S.C. § 1446(b)] support” the *Sasser* court’s interpretation that 28 U.S.C. § 1446(b) is not party specific and that where there are clashes about jurisdiction, uncertainties are resolved in favor of remand.¹¹⁸ In *Wohlgemuth*, in 2004 the plaintiffs filed an action over the competing claims for a \$1,000,000 annuity.¹¹⁹ In 2007, the plaintiffs filed a counterclaim against the intervening insurer and less than a year later, in 2008, the insurer removed the matter to the Southern District.¹²⁰ Relying on the plain language of 28 U.S.C. § 1446(b) the *Wohlgemuth* court remanded the case even though the third party defendants were not named as parties to the action until the third party complaint was filed.¹²¹

In the absence of more specific guidance from [sic] the Eleventh Circuit on this question this Court adopts the view of *Sasser* and its progeny, holding that the one year limitation in § 1446(b) applies from the date the underlying state court action was originally filed.¹²²

*Lopez v. Robinson*¹²³ came before the Southern District Court approximately two years later.¹²⁴ In *Lopez*, the plaintiff filed his complaint in state court on January 4, 2008, and then on October 1, 2009, filed an amended complaint adding Robinson as a defendant.¹²⁵ After dismissal of a diversity destroying defendant in

114. *Id.* at *3 (quoting *Cruz v. Lowe’s Home Ctrs., Inc.*, 2009 WL 2180489, at *3 (M.D. Fla. July 21, 2009)).

115. *See Wohlgemuth v. Wohlgemuth*, No. 08-80138-CIV, 2008 WL 4610034, at *2 (S.D. Fla. Oct. 10, 2008).

116. *Id.* at *2 (citing *Sasser v. Ford Motor Co.*, 126 F. Supp. 2d 1333, 1335–37 (M.D. Ala. 2001)).

117. *Id.* at *2.

118. *Id.*

119. *Id.* at *1.

120. *Id.*

121. *Wohlgemuth v. Wohlgemuth*, No. 08-80138-CIV, 2008 WL 4610034, at *3 (S.D. Fla. Oct. 10, 2008).

122. *Id.* The Eleventh Circuit had already answered this question in *Bailey v. Janssen Pharmaceutical, Inc.*, 536 F.3d 1202, 1209 (11th Cir. 2008) (endorsing the “last served defendant rule” wherein a newly served defendant has 30 days to remove an action even if the action was pending for longer than a year before that defendant was served).

[W]e are convinced that both common sense and considerations of equity favor the last-served defendant rule. The first-served rule has been criticized by other courts as being inequitable to later-served defendants who, through no fault of their own, might, by virtue of the first-served rule, lose their statutory right to seek removal.

Id. at 1206.

123. *See Lopez v. Robinson Aviation (RVA), Inc.*, No. 10-60241-CIV, 2010 WL 3584446, at *2 (S.D. Fla. Apr. 21, 2010).

124. *Id.* at *1.

125. *Id.*

January 2010, Robinson removed the case from state court on February 19, 2010.¹²⁶ The *Lopez* court granted the plaintiff's motion to remand pursuant to its decision in *Wohlgemuth* and the Alabama court's decision in *Sasser*.¹²⁷ The court reasoned that:

[I]f Congress intended to make "commencement of the action" under § 1446(b) party or claim specific, it could have easily done so by modifying the statute to read that "a case may not be removed by a party on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action against that party."¹²⁸

The *Lopez* court relied upon the plain language of 28 U.S.C. § 1446(b) and Florida Rule of Civil Procedure section 1.050.¹²⁹ The court acknowledged that "commencement of action" means when the original complaint is filed, but looked to the legislative history of 28 U.S.C. § 1446(b) for "additional clarification."¹³⁰ Noting that the one year limitation was added by the Judicial Improvement and Access to Justice Act of 1988, the *Lopez* opinion recited the following passage from the Act, "which provided only the following discussion of the amendment's purpose."¹³¹

Subsection (b)(2) amends 28 U.S.C. § 1446(b) to establish a one year limit on removal based on diversity jurisdiction as a means of reducing the opportunity for removal after substantial progress has been made in state court. The result is a modest curtailment in access to diversity jurisdiction. The amendment addresses problems that arise from a change of parties as an action progresses toward the trial in state court. The elimination of parties may create for the first time a party alignment that supports diversity jurisdiction. Under section 1446(b), removal is possible whenever this event occurs, so long as the change of parties was voluntary as to the plaintiff. Settlement with a diversity-destroying defendant on the eve of trial, for example, may permit the remaining defendants to remove. Removal late in the proceedings may result in substantial delay and disruption.¹³²

The *Lopez* court, acknowledging that the purpose of 28 U.S.C. § 1446(b) was to prevent removal late in the proceedings, determined, however, that "commencement of the action' . . . cannot mean one thing under one set of

126. *Id.*
 127. *Id.* at *2, *4–5.
 128. *Id.* at *2.
 129. *Lopez*, 2010 WL 3584446, at *2.
 130. *Id.* at *3.
 131. *Id.*
 132. *Id.*

circumstances and another thing in a different set of circumstances.”¹³³ The phrase “‘commencement of the action’ must have the same definition in every set of circumstances” and thus, an action was commenced when the original complaint was filed.¹³⁴

In *Potts v. Harvey*,¹³⁵ the Southern District confronted the question of whether cases removed to federal court based on diversity jurisdiction were entitled to an exception of the one year limitation in 28 U.S.C. § 1446(b) when the cases involved “separate and independent” claims.¹³⁶ In *Potts*, the plaintiff filed suit against the defendant tortfeasor in September 2006, which resulted in an \$8,000,000 verdict for the plaintiff.¹³⁷ On April 14, 2011, the state court granted the plaintiff’s motion to join the insurer as a defendant, and the tortfeasor then asserted a crossclaim against the insurer on April 21, 2011, alleging bad faith.¹³⁸ The insurer removed the tortfeasor’s claim to the Southern District Court on May 4, 2011.¹³⁹ In remanding the action back to state court, the *Potts* court recited the current version of 28 U.S.C. § 1441(c) and noted that the 1990 amendment to 28 U.S.C. § 1441 eliminated diversity jurisdiction as a basis for removal and limited removal under 28 U.S.C. § 1441 to claims involving federal questions.¹⁴⁰ The *Potts* court reasoned that the defendant insurer was attempting to do exactly what Congress intended to prohibit through the 1990 amendment.¹⁴¹ Further, although acknowledging that bad faith claims in Florida are “separate and independent” causes of action, the court noted that Congress deemed “separate and independent” causes of action irrelevant when a party seeks removal in diversity cases.¹⁴²

The *Potts* court did acknowledge that it was reaching a decision inconsistent with those cited herein from the Middle District.¹⁴³ The *Potts* court, however, criticized the progeny of cases favoring removal because the cases “fail[ed] to discuss when it is appropriate to apply a ‘separate and independent’ analysis in the removal context, let alone the statutory prohibition against such an application in the diversity context.”¹⁴⁴

The Southern District Court stayed its course in *Moulthrop v. Geico Gen. Ins. Co.*¹⁴⁵ when it remanded a bad faith cause of action to state court on facts very similar to those in *Potts*.¹⁴⁶ In so doing, the Southern District Court again noted the divergence of opinion and again criticized those opinions refusing remand as “devoid of any persuasive statutory interpretational theory or logic for recognizing

133. *Id.* at *4.

134. *Id.*

135. *Potts v. Harvey*, No. 11-80495-CIV-MARRA, 2011 WL 4637132, at *1–4 (S.D. Fla. Oct. 6, 2011).

136. *Id.* at *1.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* at *2.

141. *Potts*, 2011 WL 4637132 at *2.

142. *Id.*

143. *Id.* at *7–8.

144. *Id.* at *9.

145. *See Moulthrop v. Geico Gen. Ins. Co.*, 858 F. Supp. 2d 1342, 1342 (S.D. Fla. 2012).

146. *Id.*

a ‘separate and independent claim’ exception to the one-year repose bar of § 1446(b) otherwise applicable in diversity cases.”¹⁴⁷ The *Moulthrop* court went on to acknowledge that the Eleventh Circuit had not ruled on the issue¹⁴⁸ and as of the time of this writing, this remains true.

The two most recent decisions from the Southern District are evidence that the Southern District remains unpersuaded by the Middle District’s decisions in *Lahey* and its progeny: *Van Niekerk v. Allstate Insurance Company*¹⁴⁹ and *Hoggins v. Mid-Continent Casualty Company*.¹⁵⁰ In *Van Niekerk*, the court granted plaintiff leave to amend its complaint to add the insurer as a defendant, and to assert a claim for bad faith against the insurer.¹⁵¹ Relying on its earlier decision in *Lopez*, finding that 28 U.S.C. § 1446 is not party or claim specific, the *Van Niekerk* court remanded the action to the state trial court but denied the plaintiff’s motion for attorney’s fees and costs.¹⁵² The *Van Niekerk* court ultimately concluded that “the bad faith claim [was] part of the ‘action,’ which, for purposes of § 1446(b) was commenced upon the filing of the complaint,” because a claim’s independence is not relevant in a removal action based on diversity.¹⁵³

Similarly, the *Hoggins* decision involved a plaintiff that was able to amend a negligence action, nearly three years after it was initially filed, to include a breach of contract action against a newly named defendant, the tortfeasor’s insurer.¹⁵⁴ Following consideration of plaintiff’s motion to remand and following defendant’s removal to the Southern District, the *Hoggins* court relied on the Southern District’s earlier decisions in *Potts* and *Moulthrop* to remand the case back to the state trial court.¹⁵⁵

VI. HAS THE MIDDLE DISTRICT COME AROUND TO THE SOUTHERN DISTRICT’S WAY OF THINKING?

An August 30, 2012 decision from the Middle District *may* have marked an end to *Lahey* and the need for the Eleventh Circuit to resolve the diverging opinions between the Southern and Middle Districts.¹⁵⁶ *AFO Imaging v. State Farm*¹⁵⁷ came before the Middle District on the plaintiff’s motion to remand the action to state court on August 30, 2012.¹⁵⁸ The *AFO* plaintiff-healthcare provider originally filed suit against the defendant-insurer in state court on October 22, 2008, as assignee of insurance benefits of certain patients who had received

147. *Id.*

148. *Id.*

149. *Van Niekerk v. Allstate Ins. Co.*, No. 12-62368-CIV, 2013 WL 253693 (S.D. Fla. Jan. 23, 2013).

150. *Hoggins v. Mid-Continent Cas. Co.*, No. 12-81159-CIV, 2013 WL 394882 (S.D. Fla. Jan. 31, 2013).

151. *Van Niekerk*, 2013 WL 253693, at *1.

152. *Id.* at *2, *4.

153. *Id.* at *4.

154. *Hoggins*, 2013 WL 394882 at *1.

155. *Id.*

156. *AFO Imaging, Inc. v. State Farm Mut. Auto. Ins. Co.*, No. 8:12-cv-996-T-33TGW, 2012 WL 3764887 (M.D. Fla. Aug. 30, 2012).

157. *Id.*

158. *Id.* at *1.

medical care from the plaintiff.¹⁵⁹ Relying on the plaintiff's statement at a motion to compel hearing that "it would seek 'millions of dollars in punitive damages,'" the defendant removed the case to the Middle District on May 4, 2012.¹⁶⁰ On May 13, 2012, the plaintiff filed an amended complaint which pertained to the benefits of additional patients, not included in the original complaint.¹⁶¹

In arguing against remand, the defendant urged that the plaintiff's statement at the hearing "constituted an 'other paper' from which Defendant first ascertained that this case was removable."¹⁶² The defendant further argued that the plaintiff's amended complaint "commenced a new and independent action completely distinct from the action asserted in the 2008 complaint" because the identities of the patients in the first complaint were not the same as those listed in the amended complaint.¹⁶³

In a very short opinion, the *AFO* court relied on the Southern District's opinion in *Lopez*.¹⁶⁴ At the time, the *AFO* court remanded the action, it conceded that "commencement of the action" under 28 U.S.C. § 1446(b) occurred when the original complaint was filed.¹⁶⁵ In the *AFO* opinion, the Middle District made no mention of its earlier decisions, most notably *Lahey* or its progeny of cases, nor did it mention "separate and independent" or 28 U.S.C. § 1441.¹⁶⁶ So, is that it? Is *Lahey* dead?¹⁶⁷

The answer to this appears to be "maybe so," based on *Bolen v. Illinois Nat'l Ins. Co.*¹⁶⁸ and two other recent decisions wherein the Middle District addressed a "separate and independent" bad faith action (as recognized by current Florida law), removed more than a year after the initial complaint was filed, in the context of 28 U.S.C. § 1446(b).¹⁶⁹

In *Bolen*, following a motor vehicle accident, the plaintiff filed a two-count complaint on April 12, 2007.¹⁷⁰ Count one of the complaint alleged a claim for UM benefits and count two alleged a claim for statutory bad faith.¹⁷¹ Although the defendant moved to dismiss the bad faith count, the trial court instead abated the

159. *Id.*

160. *Id.*

161. *Id.*

162. *AFO Imaging, Inc.*, 2012 WL 3764887 at *1.

163. *Id.* at *2.

164. *Id.*

165. *Id.* at *1–3.

166. *Id.*

167. See *U.S. Bank Nat'l Assoc. v. Cavalcante*, No. 6:12-cv-1342-Orl-18DAB, 2012 WL 4466514, at *2 (M.D. Fla. Sept. 11, 2012) (finding that foreclosure action brought years after the commencement of the action could not be removed as a matter of law because "the mortgage foreclosure complaint [did] not present a federal question and, assuming removal [was] attempted to be predicated on diversity jurisdiction, such removal [was] barred under the one year limit of 28 U.S.C. § 1446(c)(1)").

168. *Bolen v. Illinois Nat'l Ins. Co.*, No. 6:10-cv-1280-Orl-36DAB, 2012 WL 4856753 (M.D. Fla. Oct. 12, 2012) (cause coming before the court upon objection to the Report and Recommendation of the Magistrate Judge filed on August 28, 2012); see *Bolen v. Illinois Nat'l Ins. Co.*, No. 6:10-cv-1280-Orl-37DAB, 2012 WL 4856811 (M.D. Fla. Aug. 28, 2012).

169. *Ludwig v. Liberty Mut. Fire Ins. Co.*, No. 2:13-cv-212-Ftm-99SPC, 2013 WL 2406320 (M.D. Fla. June 3, 2013); *Bolen*, 2012 WL 4856753 at *4.

170. *Bolen*, 2012 WL 4856753 at *1.

171. *Id.*

bad faith claim until there was a final judgment or final order entered as to the UM claim.¹⁷² In 2010, the trial court entered an order of partial final judgment as to the UM claim and, thereafter, entered an order granting the plaintiff's motion to dissolve the abatement of the bad faith action.¹⁷³ The defendant thereafter removed the case from the state trial court to the Middle District Court.¹⁷⁴

In support of removal, the defendant argued that the bad faith claim "commenced" on the date it accrued, not on the date the complaint was filed, and the court should treat the state trial court's order abating the bad faith claim as a dismissal without prejudice for removal purposes.¹⁷⁵ Noting that there was no controlling authority from the Eleventh Circuit, the *Bolen* court ultimately remanded the case back to the state trial court.¹⁷⁶ The court explained that "because Plaintiff included a bad faith claim in her initial complaint and the state trial court did not dismiss it, it is deemed part of that case from the onset."¹⁷⁷ In so ordering, the *Bolen* court noted an apparent anomaly in Florida law: "Florida courts allow a plaintiff to assert a claim for bad faith at the onset of litigation [despite *Blanchard*, which established that a bad faith cause of action does not exist or accrue until the underlying claim is adjudicated in favor of the plaintiff], and further allow the claim to stand while the removal clock is ticking."¹⁷⁸ The *Bolen* court went on to note two further important pieces of this puzzle: "[u]nder Florida law, [t]he proper remedy for premature litigation is an abatement or stay of the claim for the period necessary for its maturation under the law;"¹⁷⁹ and that "Florida courts have made clear that the abatement of a premature claim is treated as a stay, not a dismissal."¹⁸⁰

How can it be that, although a bad faith cause of action in Florida cannot "exist" or "accrue" until the underlying claim giving rise to the alleged bad faith is adjudicated in favor of the plaintiff, it nevertheless "commences" at the time the initial complaint is filed? The Middle District Court most recently addressed this issue in *Ludwig v. Liberty Mutual*.¹⁸¹

Similar to the facts of *Bolen*, the plaintiff in *Ludwig* filed a complaint alleging a count for UM benefits and a count for the insurer's bad faith in 2009.¹⁸² Upon motion by defendant, the trial court abated the bad faith action until the UM claim could be adjudicated.¹⁸³ Once the UM claim was rendered moot by the insurer's tender to the plaintiff of the limits of the subject UM policy, and the trial court

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* at *2-3.

176. *Bolen*, 2012 WL 4856753, at *2, *4.

177. *Id.* at *3.

178. *Id.* (citing *Daggett v. Am. Sec. Ins. Co.*, No. 2:08-CV-46-FTM-29DNF, 2008 WL 1776576, at *3 (M.D. Fla. Apr. 17, 2008)).

179. *Id.* (quoting *Blumberg v. USAA Cas. Ins. Co.*, 790 So. 2d 1061, 1065 n.2 (Fla. 2001)).

180. *Id.* (citing *Pecora v. Signature Gardens, Ltd.*, 25 So. 3d 599 (Fla. 4th DCA 2009)).

181. *Ludwig v. Liberty Mut. Fire Ins. Co.*, No. 2:13-cv-212-Ftm-99SPC, 2013 WL 2406320, at *1 (M.D. Fla. June 3, 2013).

182. *Id.* at *6.

183. *Id.*

denied defendant's motion to dismiss the bad faith count, the defendant removed the action to the Middle District, approximately four years after the initial complaint was filed, in 2013.¹⁸⁴

The ultimate issue faced by both the *Ludwig* and *Bolen* courts was whether or not the bad faith claim commenced/accrued before the removal deadline expired under 28 U.S.C. § 1446(b).¹⁸⁵

If, as Liberty Mutual argues, the action for Count II commenced on March 6, 2013, after Count I was dismissed, then the removal is timely and the case should stay in this Court. However, if the Plaintiff is correct and Count II commenced/accrued when the case was originally filed in 2009 then the action was improperly removed from the State Court and the action must be remanded under 28 U.S.C. § 1446.¹⁸⁶

The *Ludwig* court observed that Florida courts have “moved toward the greater use of abatement,”¹⁸⁷ and “[t]his practice presents several conceptual and practical difficulties in the removal context.”¹⁸⁸ Ultimately, the court determined that, although the bad faith action was abated during the pendency of the UM claim, the bad faith action commenced in 2009, and thus, removal to federal court was untimely in 2013.¹⁸⁹

The *Bolen* and *Ludwig* decisions are important for three reasons, when we consider the hypothetical with which we began. First, both decisions indicate that, in the Middle District, *Lahey* is still alive; *Bolen* and *Ludwig* appear to make clear that removal was untimely because the bad faith cause of action was plead in the plaintiffs' initial complaints, a fact distinguishable from *Lahey*.¹⁹⁰ Thus, at least in the Middle District, a removing defendant could still, arguably, successfully remove a bad faith cause of action added to a complaint more than one year from the date the complaint was initially filed.¹⁹¹ Second, although 28 U.S.C. § 1447(c) provides that “[a]n order remanding a case ‘may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal,’”¹⁹² both the *Bolen* and *Ludwig* courts refused to award attorney fees given the “conflict in authority regarding removal of similar claims in this district.”¹⁹³ As a result, a defendant removing a bad faith action more than one year

184. *Id.* at *1–2.

185. *Id.* at *3.

186. *Id.*

187. *Ludwig*, 2013 WL 2406320 at *4 (quoting *O'Rourke v. Provident Life and Accident Ins. Co.*, 48 F. Supp. 2d 1383, 1385 (S.D. Fla. 1999)).

188. *Id.*

189. *Id.* at *6.

190. *See Bolen v. Illinois Nat'l Ins. Co.*, No. 6:10-cv-1280-Orl-37DAB, 2012 WL 4856811, at *3–4 (M.D. Fla. Aug. 28, 2012); *see also Ludwig*, 2013 WL 2406320 at *5.

191. *Lahey v. State Farm Mut. Auto. Ins. Co.*, No. 8:06-CV-1949-T27TBM, 2007 WL 2029334, at *1 (M.D. Fla. July 11, 2007).

192. *Ludwig*, 2013 WL 2406320 at *7.

193. *Id.* *See also Bolen*, 2012 WL 4856753 at *4.

after the action commences, at least for now, may still do so without fear of being hit with plaintiff's attorney's fees and costs should the case be remanded.¹⁹⁴

The third and most poignant aspect of *Bolen* and *Ludwig* with regard to the Sly hypothetical is presented most clearly in *Ludwig*, "[i]f a plaintiff chooses to include the inchoate bad faith claim in his original complaint, [is it] part of the 'case' in determining the amount in controversy? Most federal courts have said no, finding that removal is premature."¹⁹⁵ Consequently, if Sharp wants to avoid potentially being unable to remove Sly's action more than a year after its commencement and seeks to remove it immediately, he must abate the bad faith action, given that the underlying property damage claim is limited to the \$25,000 limits of the property damage policy. Sharp may very likely be unable to rely on the value of the bad faith action to establish the \$75,000 jurisdictional threshold required for diversity cases¹⁹⁶ to remove Sly's action. So how can Attorney Sharp preserve his client's ability to adjudicate the bad faith action in the more favorable, federal jurisdiction?

While the Middle District had not, since *Lahey*, addressed the issue of a bad faith cause of action added to a state action more than one year after the initial action was commenced, the Middle District recently addressed a similar issue in *Ingram v. Forbes Company*.¹⁹⁷ In *Ingram*, the injured plaintiff brought a negligence action in state court against the mall, the store where she was injured, and the store manager.¹⁹⁸ After the store manager was terminated as a party to the action, the remaining defendants removed the action on diversity grounds and the plaintiff sought to remand, arguing that removal was untimely.¹⁹⁹

The basis for the defendants' removal of the action in *Ingram* is the same basis that a defendant in a state action would utilize if a bad faith cause of action was added to an action that was pending for more than one year and was not removable when initially filed: 28 U.S.C. § 1446(b).²⁰⁰ To support their remand of the action, the *Ingram* defendants argued that the court granted the order to allow the plaintiff to amend her complaint and add parties; the decision also reset the clock on removal.²⁰¹ Even if the removal clock had not been reset, the defendants contended that the court should equitably toll the one-year limitation on removal because the plaintiff acted in bad faith to defeat diversity, until the one year deadline to remove had run.²⁰² The *Ingram* court did not adopt the defendants' argument, however, and the court remanded the action back to state court, noting that "[e]ven if Plaintiff had added an additional defendant—which she did not—the addition of a party or claim does not commence the action anew."²⁰³ The court went on to quote a case

194. *Bolen*, 2012 WL 4856753 at *4.

195. *Ludwig*, 2013 WL 2406320 at *4 (citing *Bolen*, 2012 WL 4856753 at *3).

196. 28 U.S.C.A. § 1332(a) (2013).

197. *Ingram v. Forbes Co.*, No. 6:13-cv-381-Orl-37GJK, 2013 WL 1760202 (M.D. Fla. Apr. 24, 2013).

198. *Id.* at *1.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.* at *2.

203. *Ingram*, 2013 WL 1760202 at *4. *Id.* at *2; *Sasser*, 126 F. Supp. 2d at 1336 ("[T]he term 'commencement of action' should be understood to refer to commencement of the action initially, and not as to any later addition of a particular party or claim." (emphasis added)).

from the Southern District in its opinion, agreeing that, “[t]here is no indication in § 1446 that an ‘action’ would ‘commence’ anew each time a claim is asserted or a party is added.”²⁰⁴

In addressing the *Ingram* defendants’ argument that the plaintiff acted in bad faith by committing fraudulent joinder, the court stated that 28 U.S.C. § 1446 “admits of no exceptions to the one-year limitation” and that the Eleventh Circuit and the U.S. Congress contemplated that, in some circumstances, plaintiffs can and will intentionally avoid federal jurisdiction.²⁰⁵ Further driving home its position, the *Ingram* court quoted the Eleventh Circuit: “a plaintiff who artfully pleaded his claim could avoid federal jurisdiction . . . such a result (*if* it is not good policy) should be remedied by congressional and not judicial action.”²⁰⁶

Thus, the decision of the Middle District Court begs the question: In light of *Ingram*, will the Middle District conform to the Southern District’s holding in *Lopez*, in a situation similar to that presented in *Lahey*, where the initial complaint does not include a cause of action for bad faith, but rather the complaint is amended to, for the first time, add a claim for bad faith more than a year after the initial complaint is filed?²⁰⁷ Or, as intimated in *Bolen* and *Ludwig*, will the Middle District remain true to *Lahey*?²⁰⁸ And, perhaps more importantly, if the Eleventh Circuit is called to task, how should the Eleventh Circuit resolve the dispute?

Further muddying the waters is a recent remand order from the Southern District in *Symonette v. MGA Insurance Company*.²⁰⁹ *Symonette* involved facts very similar to the hypothetical posed in this comment and, admittedly, provided the inspiration for this comment.²¹⁰ Following a *sua sponte* order to show cause and timely response by defense counsel, the Southern District in *Symonette* determined that the defendant had not met its burden of demonstrating that removal was proper and remanded the case back to state court.²¹¹ The *Symonette* court reasoned that “[a] court’s analysis of the amount-in-controversy requirement focuses on how much is in controversy at the time of removal, [and] not later.”²¹² At the time of removal, plaintiff’s bad faith claim was not ripe and consequently the bad faith claim should not have been considered in determining the amount in controversy.²¹³ Having been briefed by defense counsel’s motion opposing remand on the diverging views between the Middle and Southern District Courts, the

204. *Ingram*, 2013 WL 1760202 at *2 (quoting *Van Niekerk v. Allstate Ins. Co.*, No. 12-62368-CIV, 2013 WL 253693, at *2 (S.D. Fla. Jan. 23, 2013)).

205. *Ingram*, 2013 WL 1760202 at *2–3 (citing *Burns v. Windsor Ins. Co.*, 31 F.3d 1092, 1095 (11th Cir. 1994)).

206. *Id.* at *3 (quoting *Burns*, 31 F.3d at 1094, n.4).

207. *Lahey v. State Farm Mut. Auto. Ins. Co.*, No. 8:06-CV-1949-T27-TBM, 2008 WL 1766764, at *1 (M.D. Fla. Apr. 17, 2008).

208. *Id.*

209. Order Remanding Case to State Ct., *Symonette v. MGA Ins. Co.*, No. 12-21428 CIV-SEITZ/SIMONTON (S.D. Fla. Oct. 4, 2012).

210. See Def’s. Resp. to Order to Show Cause and Integrated Mem. of Law Opposing Remand of Cause, at 1–3, *Symonette v. MGA Ins. Co.*, No. 12-21428 CIV-SEITZ/SIMONTON (S.D. Fla. Aug. 31, 2012) (stating procedural history of the case).

211. Order Remanding Case to State Ct., *supra* note 209, at 3.

212. *Id.* at 2 (quoting *Pretka v. Kolter City Plaza II, Inc.*, 608 F.3d 744, 751 (11th Cir. 2010)).

213. *Id.*

Symonette court, responded to defendant's argument that not removing the case when it did could mean that the defendant was precluded from removing it later pursuant to 28 U.S.C. 1446(c)(1).²¹⁴ In so doing, the court cited two Middle District opinions—one of which was *Lahey*—noting that “several cases have held that the addition of a bad faith claim after conclusion of the underlying coverage claim constitutes a separate and distinct cause of action from the underlying coverage claim and, thus, removal is not barred by the 1-year limitation in the removal statute.”²¹⁵ Is the Southern District suggesting that it (or at least some of its judges) may be coming around to the Middle District's line of thinking with regard to separate and independent bad faith causes of action?

VII. A PROPOSED RESOLUTION TO THE CLEVER/SHARP HYPOTHETICAL AND THE DILEMMA FACING INSURERS SEEKING TO REMOVE BAD FAITH ACTIONS TO FEDERAL COURT MORE THAN A YEAR AFTER THE ACTION HAS COMMENCED

Resolution of this issue is important for a number of reasons; among them are concerns over the attorney's fees and costs and appeals provisions in 28 U.S.C. § 1447(c) and (d).²¹⁶ Specifically, under 28 U.S.C. § 1447(d), the Southern District Court's order remanding the case back to state court in *Symonette* is not appealable.²¹⁷ Thus, in light of the divergence in opinion among the Southern and Middle District Courts (assuming *arguendo* that the Middle District stays true to *Lahey* in separate and independent bad faith cases), whether a defendant can currently adjudicate a bad faith cause of action (removed more than one year after commencement in state court) in federal court largely depends on whether the case is removed to the Southern or Middle District Court.

In *AFO*, the plaintiff requested attorney's fees and costs, arguing that the defendant had no reasonable grounds for removing the case to federal court.²¹⁸ In declining to award attorney's fees and costs under 28 U.S.C. § 1447(c), the *AFO* court noted:

[t]he Supreme Court has held that, “absent unusual circumstances, attorney's fees should not be awarded [under Section 1447(c)] when the removing party has an objectively reasonable basis for removal. . . .”²¹⁹ Although the district court has discretion in awarding such fees, the court should consider “the desire to deter

214. Order Remanding Case to State Ct., *supra* note 209, at 3.

215. *Id.*

216. 28 U.S.C.A. § 1447 (c)-(d) provide, in relevant part respectively, that “[a]n order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal,” and that “[a]n order remanding a case to the state court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the state from which it was removed pursuant to section 1442 and 1443 of this title shall be reviewable by appeal or otherwise.” § 1442 pertains to federal officers or agencies sued or prosecuted and § 1443 pertains to civil rights cases.

217. *Id.* § 1447(d).

218. *AFO*, 2012 WL 3764887 at *2.

219. *Id.* (quoting *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 136 (2005)).

removals sought for the purpose of prolonging litigation . . . while not undermining Congress' basic decision to afford defendants a right to remove."²²⁰

In light of the most recent opinions from the Middle and Southern District Courts on this issue, the question then becomes: At what point will a party removing a bad faith action filed in Florida state court to federal district court, no longer have "objectively reasonable" grounds for removal?²²¹

Let us return once again to the hypothetical lawsuit with which we began. Assuming arguendo that the Middle District adheres to *Lahey* and that the Southern District stays true to *Lopez* in bad faith causes of action, how should the Eleventh Circuit resolve this dispute?

"A defendant's right to remove an action against it from state to federal court 'is purely statutory and therefore its scope and the terms of its availability are entirely dependent on the will of Congress.'"²²² Considering the stated purpose of the 1988 Judicial Improvements and Access to Justice Act and congressional commentary related thereto and discussed in preceding sections, the purpose of the "modest curtailment" in diversity cases was to relieve the burgeoning federal court caseloads and to reduce the opportunity for removal after substantial progress has been made in state court.²²³ As amended, 28 U.S.C. § 1446 appears to accomplish the former; however, the latter does not generally apply to separate and independent bad faith causes of action in Florida, which do not ripen until resolution of the underlying coverage or breach action.²²⁴

Seemingly, to address the "tactical chicanery," David D. Siegel wrote about in his commentary on the amendments to 28 U.S.C. §1446,²²⁵ on December 7, 2012, 28 U.S.C. § 1446 was again amended by modifying section 1446 in relevant part to reflect:

(c) Requirements; removal based on diversity of citizenship.—(1) A case may not be removed under subsection (b)(3) on the basis of jurisdiction conferred by section 1332 more than 1 year after commencement of the action, *unless the district court finds that*

220. *Id.* (quoting *Bauknight v. Monroe Cnty, Fla.*, 446 F.3d 1327, 1329 (11th Cir. 2006)).

221. The issue of objective reasonableness and when an award of attorney's fees and costs under 28 U.S.C. § 1447(c) goes beyond the scope of this comment and will not be discussed further herein. The question is posed, however, to accentuate the need for a prompt resolution on Florida federal district courts' interpretation of 28 U.S.C. § 1446 in the context of separate and independent bad faith causes of action. For a detailed analysis of treatment of the attorney's fees and costs issue, see Thomas Fusco, 119 A.L.R. Fed. 433 and more specifically, *Roxbury Condo. Ass'n, Inc. v. Anthony S. Cupo Agency*, 316 F.3d 224 (3d Cir. 2003); *Coman v. Int'l Playtex, Inc.*, 713 F. Supp. 1324 (N.D. Cal. 1989); *Smith v. Health Cent. of Lake City, Inc.*, 252 F. Supp. 2d 1336 (M.D. Fla. 2003); *Ruiz v. Carnival Corp.*, No. 11-23170-CIV, 2012 WL 626222, at *2 (S.D. Fla. Feb. 24, 2012).

222. *Potts v. Harvey*, No. 11-80495-CIV-MARRA, 2011 WL 4637132, at *1 (S.D. Fla. Oct. 6, 2011) (quoting *Global Satellite Commc'n Co. v. Starmill U.K. Ltd.*, 378 F.3d 1269, 1271 (11th Cir. 2004)).

223. 28 U.S.C. § 1446 cmt. (LEXIS through PL 113-36) (David D. Siegel).

224. 28 U.S.C.A. § 1446 (West 2013).

225. 28 U.S.C. § 1446 cmt. (LEXIS through PL 113-36) (David D. Siegel).

the plaintiff has acted in bad faith in order to prevent a defendant from removing the action

(3)(A) If the case stated by the initial pleading is not removable solely because the amount in controversy does not exceed the amount specified in section 1332(a), *information relating to the amount in controversy in the record of the State proceeding, or in responses to discovery, shall be treated as an ‘other paper’ under subsection (b)(3).*

(B) *If the notice of removal is filed more than 1 year after commencement of the action and the district court finds that the plaintiff deliberately failed to disclose the actual amount in controversy to prevent removal, that finding shall be deemed bad faith under paragraph (1).*²²⁶

This most recent amendment, though it will undoubtedly level the tactical playing field for defendants seeking adjudication of claims in federal jurisdiction, does nothing to resolve the problem for insurer defendants who, after verdict is entered and appellate review is exhausted, seek for the first time to remove a newly added bad faith cause of action to a complaint originally served two years earlier. This is true especially in light of the current version of 28 U.S.C. § 1441, which was specifically amended to exclude “separate and independent” causes of action from diversity actions.²²⁷ Further, as evidenced by the Middle District Court’s unwillingness in April 2013 to equitably toll the deadline for removal of *Ingram*—wherein the defendants claimed that the plaintiff had fraudulently joined a store manager, who was ultimately dismissed from the action on summary judgment, in order to destroy diversity until the removal clock had run—how heavy is the defendant’s burden to prove a plaintiff’s bad faith in destroying diversity?²²⁸

As evidenced by the most recent amendment to 28 U.S.C. § 1446, Congress arguably could, but has yet to *further* amend section 28 of the U.S. Code to provide relief for diverse defendants seeking to remove separate and independent causes of action (such as the formally recognized Florida bad faith cause of action).²²⁹ Given that the “separate and independent” language that once existed in the federal removal statute that gave diversity actions an avenue to remove cases to federal court more than thirty days after they were commenced was removed in 1990, Congress’ intent appears clear. As such, the Eleventh Circuit will likely determine that it is Congress’ intent to exclude even separate and independent bad faith causes of action from diversity removal jurisdiction absent bad faith by the

226. See current version of 28 U.S.C. § 1446 as amended by the Federal Courts Jurisdiction and Venue Clarification Act of 2011 (emphasis added).

227. 28 U.S.C.A. § 1446.

228. *Ingram v. Forbes Co.*, No. 6:13-cv-381-Orl-37GJK, 2013 WL 1760202, at *1–2 (M.D. Fla. Apr. 24, 2013).

229. 28 U.S.C.A. § 1446.

plaintiff. Once again returning to our Sly hypothetical, Sly's action will be remanded to the state court, perhaps to return again to federal district court, if Sly's breach of contract action can be adjudicated in his favor within the approximately six months that remain on the one-year limitation after the cause is remanded, or if the proper federal jurisdiction for Sly is the Middle District.

Consideration of well-established and often cited rules of law espoused by the Eleventh Circuit lend further support for the Eleventh Circuit's likely resolution of the dispute between the Southern and Middle District courts (and the Sly hypothetical), consistent with the Southern District's well-reasoned opinions in *Lopez* and *Moulthrop*. Removal statutes are construed narrowly, with uncertainties about jurisdiction resolved in favor of remand.²³⁰ "A presumption in favor of remand is necessary because if a federal court reaches the merits of a pending motion in a removed case where subject matter jurisdiction may be lacking[,] it deprives a state court of its right under the Constitution to resolve controversies in its own courts."²³¹

If "Congress extends the benefits and safeguard of federal courts to 'provide a separate forum for out-of-state citizens against the prejudices of local courts and local juries,'"²³² then certainly preventing insurers from adjudicating bad faith causes of action in federal court is not what Congress intended by amending 28 U.S.C. § 1441. If the *Lopez* court is correct and Congress' goal in amending 28 U.S.C. § 1441 was to prevent removal after substantial progress is made in state court,²³³ then, arguably, this goal is not served in cases like the one presented in the Sly hypothetical, wherein the underlying breach of contract action would be proven by substantially different evidence than that of the later accruing bad faith cause of action. Further, because bad faith actions do not exist or accrue until the underlying action is adjudicated favorably to the plaintiff, this necessarily means that the underlying action will have concluded by the time the bad faith action is alleged by amended pleading and removal sought. The same holds true with bad faith actions alleged in the initial complaint that are abated.

The Florida Supreme Court made clear in *Blanchard* and *Vest* that a statutory action for bad faith does not exist until the underlying breach of contract action is adjudicated in favor of the insured.²³⁴ As the Southern District has acknowledged, commencement of an action is generally determined by state law,²³⁵ which, in Florida, is when the complaint is filed.²³⁶ Since an action for bad faith cannot exist until the bad faith claim accrues, how can it be said to have "commenced" when

230. *Moulthrop v. Geico Gen. Ins. Co.*, 858 F. Supp. 2d 1348 (S.D. Fla. 2012) (citing *Henderson v. Washington Nat. Ins. Co.*, 454 F.3d 1278 (11th Cir. 2006); *Miedema v. Maytag Corp.*, 450 F.3d 1322 (11th Cir. 2006)).

231. *Lopez v. Robinson Aviation (RVA), Inc.*, No. 10-60241-CIV, 2010 WL 3584446, at *1 (S.D. Fla. Apr. 21, 2010) (quoting *Univ. of S. Ala. v. Am. Tobacco Co.*, 168 F.3d 405, 411 (11th Cir. 1999)).

232. *Holston Investments, Inc. v. LanLogistics Corp.*, 677 F.3d 1068, 1070 (11th Cir. 2012) (quoting S. Rep. No. 1830, at 3 (1958), reprinted in 1958 U.S.C.A.N. 3099, 3101-02).

233. *Lopez*, 2010 WL 3584446 at *3.

234. See *Blanchard v. State Farm Mut. Auto. Ins. Co.*, 575 So. 2d 1289, 1291 (Fla. 1991); *Vest v. Travelers Ins. Co.*, 753 So. 2d 1270, 1270 (Fla. 2000).

235. See *Moulthrop*, 858 F. Supp. 2d at 1346.

236. *Id.* (quoting FLA. R. CIV. P. 1.050).

the initial complaint is filed, whether or not the claim for bad faith is initially pled? Should a separate and independent bad faith cause of action only commence once it has accrued?

Unfortunately, until the Eleventh Circuit resolves this divergence in opinion consistent with the Middle District Court's decision in *Lahey*, or until Congress further amends 28 U.S.C. § 1441 to once again allow removal of separate and independent causes of action, Florida insurers and defense counsel attempting to defend bad faith actions added more than a year after commencement of the underlying action (when the underlying claim does not on its own meet the \$75,000 federal jurisdictional threshold or is otherwise not removable) may be left adjudicating bad faith causes of action in state court—especially in the Southern District. In light of “[t]he Eleventh Circuit[‘s] [urging] district courts to heed the ‘bright line limitations on federal removal jurisdiction’ as ‘an inevitable feature of a court system of limited jurisdiction that strictly construes the right to remove,’”²³⁷ perhaps the time has come for the Florida legislature to pick up where it left off in 2011 and reconsider amending Florida's statutory bad faith laws, if Florida insurers are to find more equal footing in the face of the rather ugly bad faith “set up.”

237. Suncoast Country Clubs, Inc. v. U.S. Fire Ins. Co., No. 8:06-CV-1238-T-23MSS, 2006 WL 2534197, at *1 (M.D. Fla. Aug. 31, 2006) (quoting *Russell Corp. v. Am. Home Assur. Co.*, 264 F.3d 1040, 1050 (11th Cir. 2001)).