UNITED STATES DISTRICT COURT
THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

OP-1436-11

MARK DEMEULENAERE and
LAURA DEMEULENAERE

Plaintiffs,

v.

FARM BUREAU INSURANCE COMPANY
and MICHIANA AREA ELECTRICAL
WORKERS HEALTH AND WELFARE FUND,

Defendants.
_____/

Case No. 1:99-CV-413

HON. ROBERT HOLMES BELL

O P I N I O N

Before this Court is a motion to remand filed by the Plaintiffs, Mark and Laura Demeulenaere. Having considered the briefs and relevant case law, the Court grants the motion for the reasons stated herein.

I

On June 24, 1997, the Plaintiffs, Michigan residents, sustained injuries in a motor vehicle accident caused by another vehicle. They were insured by Farm Bureau Insurance Company ("Farm Bureau") under a motor vehicle insurance policy that provided personal injury protection and uninsured motorist coverage. At the time of the accident, the Plaintiffs had health benefits under the Michiana Area Electrical Workers Health and Welfare Fund

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("Michiana"), a health insurance plan funded under the Employment Retirement Income Security Act of 1974 ("ERISA").[1] Both the automobile and health insurance policies have coordination of coverage clauses. Michiana paid the Plaintiffs' medical bills arising from the automobile accident.

The Plaintiffs seek a declaratory judgment as to the rights and obligations of the parties with respect to the coordination of coverage clauses in Farm Bureau's automobile insurance policy and Michiana's health insurance plan (count I). Count I also seeks non-economic damages from Farm Bureau pursuant to uninsured motorist coverage. Count II alleges that Farm Bureau improperly failed to pay personal protection benefits pursuant to Michigan state law and the automobile insurance contract. Michiana brought a cross claim against Farm Bureau seeking reimbursement of the Plaintiffs' medical expenses.

On April 14, 1999, the Plaintiffs commenced this action against the Defendants in the Circuit Court for the County of Cass, Michigan. On June 3, 1999, Farm Bureau removed the action to federal court. On June 16, 1999, the Plaintiffs filed a motion for remand and on June 30, 1999, an amended motion for remand. On

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[1] This forms the basis of the Court's federal subject matter jurisdiction and Farm Bureau's removal pursuant to § 1441.

July 20, 1999, Farm Bureau filed a brief in response and an amended notice of removal.[2]

II

The Plaintiffs move to remand this action to state court because Michiana did not join in the notice of removal as required by 28 U.S.C. § 1446(b).[3] In the alternative, the Plaintiffs request that the Court remand the state law claims.

In opposition, Farm Bureau argues that Michiana's joinder was not required in the notice of removal because: (1) the Plaintiffs' rights of recovery against Farm Bureau are distinct and separable pursuant to 28 U.S.C. § 1441(c) from those against Michiana and thus only Farm Bureau's consent to removal is needed; and (2) Michiana's cross claim is a separate and independent claim such that Michiana's joinder is not needed. In the alternative, Farm Bureau contends that it should be permitted to amend its motion for removal to provide an explanation for why it did not obtain Michiana's joinder.

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[2]Docket ##10, 11.

[3]The Plaintiffs' motion to remand is timely. Section 1447(c) provides that a motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a).

The removing party bears the burden of establishing that removal was proper. Alexander v. Electronic Data Sys. Corp., 13 F.3d 940, 949 (6th Cir. 1994); Her Majesty the Queen v. Detroit, 874 F.2d 332, 339 (6th Cir. 1989); Greater Lansing Ambulatory Surgery Center, Co., L.L.C. v. Blue Cross & Blue Shield of Michigan, 952 F. Supp. 516, 518 (E.D. Mich. 1997); 16 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶107.11[3] (3rd. ed. 1999); 14C WRIGHT, MILLER & COOPER, FEDERAL PRACTICE & PROCEDURE: JURISDICTION 3d § 3739, at 424 (1998) (it is well-settled that the burden is on the party seeking to preserve the district court's removal jurisdiction, not the party moving for remand to state court, to show that the requirements for removal have been met). Removal statutes, moreover, are strictly construed against removal. Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 108-09 (1941); Alexander, 13 F.3d at 949; Her Majesty The Queen, 874 F.2d at 339; Wilson v. U.S. Dept. of Agriculture, 584 F.2d 137, 142 (6th Cir. 1978). Cases may be remanded under 28 U.S.C. § 1447(c) for lack of subject matter jurisdiction or a defect in the removal procedure.[4]

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[4]Section 1447(d) provides that an order remanding a case to state court is not reviewable by appeal. That section bars review of remands for the reasons stated in § 1447(c). Thus, § 1447(d) precludes review of remand orders that are based on either a lack of subject matter jurisdiction or defects in removal procedure.

(continued...)

The procedure for removal, as provided in 28 U.S.C. § 1446, requires that "[a] defendant or defendants desiring to remove any civil action . . . shall file . . . a notice of removal." Ordinarily, all of the defendants in the state court action must consent to the removal and the notice of removal must be signed by all of the defendants. Chicago, R.I. & P. Ry. Co. v. Martin, 178 U.S. 245 (1900); Balazik v. County of Dauphin, 44 F.3d 209, 213 (3rd. Cir. 1995) (cases cited within). Failure of all defendants to join is a "defect in removal procedures" within the meaning of § 1447(c) and is not deemed jurisdictional. 16 MOORE, supra, ¶107.41[1][c]. Therefore, according to this well settled rule, if any properly joined and served defendants fail to join timely in the removal, the action may not be removed.

Farm Bureau first argues that Michiana's joinder in the notice of removal was not required because the Plaintiffs' claim of recovery against Farm Bureau involves a separable right of recovery from the claim against Michiana.

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[4] (...continued)
Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 712 (1996). Denial of a motion to remand is reviewed de novo. Ahearn v. Charter Twnshp. of Bloomfield, 100 F.3d 451, 453 (6th Cir. 1996).

Title 28 U.S.C. § 1441(c)[5] provides an exception to the rule of unanimity with respect to the notice of removal. When a separate and independent claim that is removable under § 1441(c) is joined with non-removable claims, only the defendant to the separate and independent claim need seek removal. To be separate and independent, the asserted claims must have arisen from different sets of acts and different wrongs inflicted on the Plaintiff. 16 MOORE, supra, ¶107.14[6][f].

This action, however, does not fall within the exception of § 1441(c). Count I seeks a declaratory judgment of the Plaintiffs' rights against each Defendant vis-a-vis their competing coordination of coverage clauses. Farm Bureau attempts to reduce Count I into two separate and independent claims, on the grounds that "Plaintiffs' claims against Michiana arise out of the health insurance plan and the Plaintiffs' claims against Farm Bureau arise from the automobile insurance policy and the Michigan No-Fault

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[5]Section 1441(c) provides:

> Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise 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.

statute."[6] The Court disagrees that the Plaintiffs' request for declaratory judgment as to the parties' rights and responsibilities as affected by the application of ERISA can be separated into independent claims against each Defendant. Separable and independent claims must arise from different sets of acts or transactions and different wrongs. The Plaintiffs' claim in Count I against Farm Bureau cannot be viewed in isolation of its claim against Michiana. Rather, the Plaintiffs' rights must be resolved in the context of both Defendants' policies. These are interlocked obligations. The Plaintiffs' claim against Michiana is not separate and independent from the claim against Farm Bureau. Accordingly, Farm Bureau's removal under § 1441(c) is not proper because both Defendants are subject to the underlying federal claim and thus need to assent to the removal. See Dunn v. Ayre, 943 F. Supp. 812 (E.D. Mich. 1996).

Farm Bureau next argues that pursuant to § 1441(c), Michiana's "assertion of its cross-claim would permit removal of the action."[7] Farm Bureau reasons that Michiana's action would be removable if sued upon alone and thus permits this entire action to be removed.

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[6]Farm Bureau's Resp. to Mtn for Remand (docket #10) at 3.

[7]Farm Bureau's Resp. to Mtn for Remand (docket #10) at 4.

Farm Bureau's removal of Michiana's action would not require Michiana to join the notice of removal.

The Court disagrees with Farm Bureau's characterization of Michiana's cross claim as a separate and independent claim such that only Farm Bureau as a defendant is required to consent to removal. The cross claim arises out the insurance coverage dispute and seeks to coordinate benefits between the two policies.

Farm Bureau's final claim is that, even assuming that joinder was required, the Court should not remand the case. On July 20, 1999, Farm Bureau filed an Amended Notice of Removal in which it explains its failure to join Michiana was because it was unaware that service upon Michiana had been obtained. Farm Bureau requests the Court permit it to amend its removal petition to explain the non-joinder of Michiana, despite it being beyond the thirty day removal period. Farm Bureau offers as support Klein v. Manor Health Care Corp., 19 F.3d 1433 (6th Cir. 1994) (unpublished per curiam).[8]

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[8]Citation of unpublished decisions in briefs and oral argument within this Circuit is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case. If a party believes, nevertheless, that an unpublished disposition has precedential value in relation to a material issue in a case, and that there is no published opinion that would serve as well, such decision may be cited if that party serves a copy thereof on all (continued...)

The Sixth Circuit in Klein declined to enforce statutory removal provisions and permitted the removing defendants to amend their removal petition after the thirty day period to explain the non-joinder. Although Klein indicates a disinclination by the Sixth Circuit to strictly apply statutory removal notice provisions under the facts of that case, it is not binding on this court. An unpublished opinion "has no precedential value [and] cannot be given any weight in this case." Manufacturers' Indus. Relations Ass'n v. East Akron Casting Co., 58 F.3d 204, 208 (6th Cir. 1995). See also United States v. Ables, 167 F.3d 1021, 1031 (6th Cir.) ("an unpublished opinion has no precedential force"), cert. denied, 119 S.Ct. 2378 (1999); Greater Lansing Ambulatory Surgery Center, Co. 952 F. Supp. at 529 (same).

The time requirement for removal in civil cases is a creature of statute. Title 28 U.S.C. § 1446(b) provides:

> The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant . . . of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based. . . .

Section 1446(b)'s time requirement for filing a notice of removal "is not jurisdictional; rather, it is a strictly applied rule of

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(...continued)
other parties in the case and on this Court. 6 Cir.R. 28.

procedure and untimeliness is a ground for remand so long as the timeliness defect has not been waived." Seaton v. Jabe, 992 F.2d 79, 81 (6th Cir.), cert. denied, 510 U.S. 871 (1993) (internal quotation marks omitted); Kerr v. Holland America-Line Westours, Inc., 794 F. Supp. 207, 209 (E.D.Mich. 1992); Shadley v. Miller, 733 F. Supp. 54, 55 (E.D.Mich. 1990). See Green v. Clark Refining & Mktg., Inc., 972 F. Supp. 423, 424 (E.D.Mich. 1997) (thirty day time limitation is to be strictly construed against the extension of federal jurisdiction). Untimeliness is a ground for remand. Schollenberger v. Sears, Roebuck & Co., 876 F. Supp. 153, 155 (E.D.Mich. 1995); Kerr, 794 F. Supp. at 210; Shadley, 733 F. Supp. at 55. In view of these principles of federal jurisdiction, the Court declines to permit Farm Bureau's untimely amended notice of removal. The Court grants the Plaintiffs' motion to remand pursuant to § 1447(c) because of the procedural defect in the removal procedure.

As a final matter, § 1447(c) provides that if remand is ordered, the district court has discretion to assess the "just costs" of opposing the improper removal and securing the remand to state court including attorney fees against the removing party. An award of costs is solely within the discretion of the district

court. Morris v. Bridgestone/Firestone, Inc., 985 F.2d 238, 240 (6th Cir. 1993). The Court declines to impose such an award.

An order and judgment consistent with this opinion will be entered.

Date: November 8, 1999

ROBERT HOLMES BELL
UNITED STATES DISTRICT JUDGE

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HON. ROBERT HOLMES BELL

O R D E R

In accordance with the opinion entered this date,

IT IS HEREBY ORDERED that Plaintiffs' Motion for Remand (docket #3) and Amended Motion for Remand (docket #5) are **GRANTED**.

Date: November 8, 1999

ROBERT HOLMES BELL
UNITED STATES DISTRICT JUDGE