

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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| VERNIQUE SEWARD, | : | |
| | : | |
| Plaintiff, | : | |
| | : | |
| v. | : | CIVIL ACTION NO. 05-6363 |
| | : | |
| DOMENIC CERTO and | : | |
| UNITED INSURANCE COMPANY OF | : | |
| AMERICA, | : | |
| | : | |
| Defendants. | : | |

MEMORANDUM

BUCKWALTER, S.J.

February 2, 2006

Presently before the Court are Plaintiff’s Motion to Remand (Docket No. 3) and Defendants’ Response (Docket No. 4).

I. FACTS AND PROCEDURAL HISTORY

Plaintiff claims that Defendant Certo, an agent of Defendant United Insurance Company of America (“Defendant United”), came to her home and discussed the terms of a life insurance policy for Plaintiff’s husband. Plaintiff claims that her husband specifically advised Defendant Certo that he was being treated for congestive heart failure. According to Plaintiff, Defendant Certo stated that “there were no problems with the new policy even though he had a pre-existing heart problem and was still being treated for same.” (Pl.’s Mot. Remand at 2.) Defendant Certo filled out the application, which Plaintiff and Plaintiff’s husband signed. According to Plaintiff, Defendant Certo did not fill out the answers to a few questions and told Plaintiff that he would “take care of those answers.” Id.

Plaintiff and her husband paid all monthly premiums on the policy until the death of Plaintiff's husband on May 2, 2005. Plaintiff then applied for death benefits under the policy. Defendant United denied coverage and returned the premiums that Plaintiff had paid on the policy.

Plaintiff filed the present case in the Philadelphia Court of Common Pleas in November 2005. Plaintiff brings the same four counts against Defendant Certo, a resident of Pennsylvania, and Defendant United, an Illinois corporation with its principal place of business in St. Louis, Missouri: (1) breach of contract; (2) fraud; (3) violation of Pennsylvania's Unfair Trade Practices and Consumer Protection Law ("UTPCPL"), 73 Pa. C.S.A. §§ 201-1 et seq. (2005); and, (4) statutory bad faith, 42 Pa. C.S.A. § 8371 (2005). Defendants then filed Notice of Removal to this Court on the ground that Defendant Certo is "improperly joined as defendant and thus may be disregarded for purposes of assessing whether this Court has diversity jurisdiction under 28 U.S.C. § 1332." (Def.'s Notice of Removal ¶ 6.) Shortly thereafter, Defendants filed a Motion to Dismiss all four Counts against Defendant Certo and Counts II and III against Defendant United. Plaintiff then filed this Motion to Remand.

II. STANDARD OF REVIEW

Joinder is fraudulent "where there is no reasonable basis in fact or colorable ground supporting the claim against the joined defendant, or no real intention in good faith to prosecute the action against the defendants or seek a joint judgment" Batoff v. State Farm Ins. Co., 977 F.2d 848, 851 (3d Cir. 1990) (quoting Abels v. State Farm Fire & Casualty Co., 770 F.2d 26, 29 (3d Cir. 1985)). But, "if there is even a possibility that a state court would find that the complaint states a cause of action against any one of the resident defendants, the federal court

must find that joinder was proper and remand the case to state court.” Batoff, 977 F.2d at 851 (quoting Coker v. Amoco Oil Co., 709 F.2d 1433, 1440-41 (11th Cir. 1983)).

“In evaluating the alleged fraud, the district court must ‘focus on the plaintiff’s complaint at the time the petition for removal was filed. In so ruling, the district court must assume as true all factual allegations of the complaint.’” Batoff, 977 F.2d at 851-52 (quoting Steel Valley Auth. v. Union Switch & Signal Div., 809 F.2d 1006, 1012 n.6 (3d Cir. 1987)). The district court should also “resolve any uncertainties as to the current state of controlling substantive law in favor of the plaintiff.” Batoff, 977 F.2d at 852 (quoting Boyer v. Snap-On Tools Corp., 913 F.2d at 108, 111 (3d Cir. 1990)).

III. DISCUSSION

Defendants argue that Plaintiff’s UTPCPL claims are barred under the economic loss doctrine. “The economic loss doctrine ‘prohibits plaintiffs from recovering in tort economic losses to which their entitlement flows only from a contract.’” Werwinski v. Ford Motor Co., 286 F.3d 661, 671 (3d Cir. 2002) (quoting Duquesne Light Co. v. Westinghouse Elec. Corp., 66 F.3d 604, 618 (3d Cir. 1995)). The Pennsylvania Supreme Court has not addressed whether a plaintiff can recover for pure economic loss under the UTPCPL. The Third Circuit Court of Appeals and Pennsylvania state courts interpreting the UTPCPL are split on this issue. In Werwinski, 286 F.3d at 674-81, the Third Circuit Court of Appeals predicted that the Supreme Court of Pennsylvania would apply the economic loss doctrine to claims under the UTPCPL. By contrast, Pennsylvania courts, noting that lower federal court holdings are not binding on state courts, have expressly disagreed with Werwinski’s holding and refused to apply the economic loss doctrine to UTPCPL claims. Zwiercan v. General Motors Corp., 58 D. & C. 4th 251,

266–70 (C.P. Phila. 2002); Smith v. Reinhart Ford, 68 Pa. D. & C. 4th 432, 437-38 (C.P. Lanc. 2002).

In the present case, under the standard for fraudulent joinder, the Court must resolve any uncertainties as to the state of the controlling substantive law in favor of Plaintiff. Therefore, given the Pennsylvania courts' holdings in Zwiercan and Smith, the Court finds that Plaintiff can state a colorable claim against Defendant Certo by alleging pure economic loss. Consequently, remand is appropriate.¹

IV. CONCLUSION

For the foregoing reasons, Plaintiff's Motion to Remand is granted. An appropriate order follows.

1. Because the Court finds that Plaintiff has stated one colorable claim against Defendant Certo, the Court declines to address the validity of Plaintiff's other claims against Defendant Certo (breach of contract, fraud, and statutory bad faith).

