

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

STEPHEN BAER, : CIVIL ACTION
Plaintiff, :
 :
v. :
 :
HARFORD MUTUAL INS. CO., and :
DAVID M. FREES INS., INC., :
Defendants. : No. 05-1346

MEMORANDUM AND ORDER

November 10, 2005

Pratter, District Judge

In response to this insurance coverage claim which was removed to this Court, Defendant Harford Mutual Insurance Company (hereinafter, “Harford”) has filed a Motion to Dismiss Count II (Bad Faith) and Count III (Unfair Trade Practices and Consumer Protection Law) of the Complaint pursuant to Fed.R.Civ.P. 12(b)(6). Plaintiff Stephen Baer thereafter filed a response, including a cross-motion seeking remand of the instant matter to the Court of Common Pleas of Montgomery County on the grounds that there is a lack of diversity jurisdiction.¹ (Docket No. 3). A few days later, Defendant Harford filed a Cross-Motion to Dismiss Count IV of the Complaint pursuant to Rule 12(b)(1). (Docket No. 4). David M. Frees Insurance Company (“Frees”) also filed a Motion to Dismiss Count IV. (Docket No. 7). Each of the parties has filed at least one

¹Baer contends that the Court should remand this action to the state court because there is no diversity of citizenship. Baer (a Pennsylvania citizen) further counters that he did not fraudulently join Frees (a Pennsylvania corporation) to defeat diversity, as contended by Harford.

response or reply to the above-mentioned filings.

For the reasons set out below, the Harford Motions will be granted. Because the Court will grant the Frees Motion in view of the Court's conclusion that Baer's action against Frees is time-barred, Baer's Cross-Motion for Remand will be denied on the basis of fraudulent joinder or, alternatively, as moot. The case will proceed on Count I only.

I. PROCEDURAL BACKGROUND

Stephen Baer commenced this insurance coverage and professional negligence action by filing a writ of summons on January 1, 2005 and, subsequently, a complaint on February 22, 2005, in the Court of Common Pleas of Montgomery County, Pennsylvania. Mr. Baer seeks insurance coverage for a third-party liability claim based upon lead poisoning at an apartment building he owns. Harford removed the case to this Court. (Docket No. 1). Harford's Notice of Removal alleges that Mr. Baer fraudulently joined Frees on a professional malpractice claim in order to defeat diversity jurisdiction pre-emptively. Notice of Removal, ¶¶ 6-7. The Complaint against Harford presents three causes of action: Count I (Breach of Contract); Count II (Bad Faith)²; and Count III (Violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law (the "UTPCPL")). Count IV alleges that Frees, Baer's insurance agent, was negligent in failing to alert Baer to the flaw in coverage and/or to make sure Baer had the requisite insurance coverage.

²Baer asserts a cause of action for bad faith against Harford pursuant to 42 Pa.C.S.A. § 8371. The underlying factual basis for the bad faith claim asserted in Count II of Baer's Complaint is Harford's action of denying insurance coverage to Baer on May 4, 1999. Harford contends that there is a lead paint exclusion in Baer's Harford Policy.

II. FACTUAL BACKGROUND

On April 9, 1999, Harford received a General Liability Notice of Occurrence/Claim from its insureds, Stephen I. Baer and Nancy K. Barton-Baer, reporting that the Baers had received a letter from an attorney who had informed them that a child of the Pettigrews, a family residing in an apartment building owned by the Baers at 411 West High Street, Apartment 2, Phoenixville, Pennsylvania, had been diagnosed with lead poisoning. In response to Baer's notice of claim, on May 4, 1999, Harford sent Baer a denial of coverage letter by certified mail, acknowledging receipt of the claim notice concerning the alleged lead poisoning at the Pettigrew residence. Specifically, Harford advised Baer that, based upon a review of the Baers' insurance policy, "this claim does not fall within the coverage provided by our insurance." In fact, Harford reiterated that there is "no coverage available for a lead poisoning claim under these policies."

On October 7, 1999, in response to a letter received by Harford from Baer's lawyer, Harford sent Baer a second denial of coverage letter to Baer by certified mail. Harford considered the letter it received from the Baers' lawyer as Harford's "second notice of the claim." In its October 7, 1999 letter, Harford enclosed a copy of the May 4, 1999 coverage denial letter, and, for a second time, advised Baer that "there is no coverage available for the lead poisoning claim . . . therefore Harford will be unable to assist you in this matter." A third coverage denial letter was issued on or about April 9, 2002.

The Pettigrews allegedly did not sue Baer until May 8, 2003. Mr. Baer also alleges in his Complaint that he "promptly tendered the lawsuit to Harford for coverage, which Harford denied." As recounted above, on January 5, 2005, Baer filed a writ of summons in the Court of

Common Pleas of Montgomery County to initiate suit against Harford and Frees. On February 22, 2005, Baer filed his Complaint against both Defendants.

The claim against Harford relates to an interpretation of Baer's insurance policy as to whether Baer is entitled to coverage from Harford for the Pettigrew claim. As to Frees, Baer's allegations stem from a claim that, given Harford's declination of coverage, Baer was improperly without insurance coverage for lead contamination to cover claims on his rental property. As a background for the dispute, Baer avers in his Complaint that in, or before, 1992, Baer obtained a property insurance policy from Harford insuring the premises at 411 High Street, Phoenixville, Pennsylvania. Frees was the insurance agent who recommended and placed the policy. Baer continued to insure the premises through Harford and Frees. Baer avers that he was "shocked" by the Harford coverage denial letters because he expected to be covered by the policy.

III. DISCUSSION

A. Motions to Dismiss

1. Standard of Review

In deciding a motion to dismiss filed pursuant to Rule 12(b)(6), the Court must draw all reasonable inferences from the facts pled in the complaint and construe them in the light most favorable to the claimant. Unger v. National Residents Matching Program, 928 F.2d 1392 (3d Cir. 1991). The Court, however, need not accept as true "conclusory allegations of law, unsupported allegations of law, unsupported conclusions and unwarranted inferences." Pennsylvania House, Inc. v. Barret, 760 F. Supp. 439 (M.D. Pa. 1991). See also Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906 (3rd Cir. 1997). Thus, a Rule 12(b)(6) motion does not serve to question a plaintiff's well-pled facts, but rather tests the legal foundation of the

plaintiff's claim. Carino v. Stefan, 376 F.2d 156, 159 (3rd Cir. 2004).

2. The Bad Faith Allegation (Count II)

Harford's motion to dismiss Baer's claim for bad faith rests on the argument that the statute of limitations began to run when Harford first notified Mr. Baer in 1999 that it would not provide coverage for lead claims, notwithstanding that the Pettigrews did not formally sue Baer until 2003.

In this diversity case, substantive Pennsylvania law applies. A statute of limitations begins to run as soon as the right to institute and maintain suit arises, Crouse v. Cyclops Industries, 560 Pa. 394, 745 A.2d 606, 611 (Pa. 2000), regardless of whether the full extent of harm is known when the action arises. Adamski v. Allstate Insurance Company, 738 A.2d 1033, 1043 (Pa. Super. 1999). In claims against insurers for bad faith failure to defend, indemnify, or make payment, such harm accrues at the time of the initial denial of coverage. Estate of Schoch v. Amerisure Insurance Company, 2000 WL 502700 (E.D. Pa. April 25, 2000) (citing Adamski, 738 A.2d at 1043) (where the court held that insurer's denial letter clearly put the insured on notice that he would not be covered, defended or indemnified in existing or future actions under the applicable policy). In Estate of Schoch, the court also explained that "Adamski holds that in claims for bad faith failure to defend, indemnify or make payment, such harm accrues at the initial denial of coverage." Estate of Schoch, supra. at *2. A plaintiff's misunderstanding as to when the statute accrues does not toll the running of the statute. Nesbitt v. Erie Coach Company, 416 Pa. 89, 204 A.2d 473, 475 (1964). Once a cause of action has accrued and the prescribed statutory period has run, an injured party is barred from pursuing his cause of action by a civil suit. Id.

Fundamentally, the harm from the alleged wrongful act here was Baer's exposure to potential suit by the Pettigrews without insurance coverage. The fact that a case was not filed against Baer when he first learned that the Pettigrews were contending their rented premises caused lead poisoning in their child did not prevent Baer from instituting a coverage suit upon learning of the denial of coverage. Baer, in essence, requests that this Court toll the statute of limitations, without providing the Court with a legally recognized reason to do so. Without a legally recognized reason, the statute may not be tolled. See Meehan v. Archdiocese of Philadelphia, 870 A.2d 912 (Pa. Super. 2005).

The principle underlying Adamski cannot be ignored because of superficial or irrelevant factual differences. Adamski involved a motor vehicle accident that occurred in 1984. In 1986, Allstate denied coverage to the driver on the grounds that he was not a permissive user. The underlying plaintiff won a verdict against the driver in 1989 and entered judgment in 1991. The driver assigned his claim to the plaintiff in 1992, and the plaintiff filed a writ of summons for the bad faith action in 1993. The court held the bad faith action was untimely, finding that there were "outstanding claims" that the denial of coverage made clear would not be paid, in addition to not providing the driver/insured with a defense. See 738 A.2d 1033, 1039. Mr. Baer contends that unlike the present case in which he only received a lawyer's letter concerning a potential future claim, which he forwarded to his insurer, Adamski does not stand for the proposition that a person in Mr. Baer's position must file suit for bad faith before he has been sued, and, hence, before the denials of defense and coverage causes him harm.

The Adamski court refused to "separate initial and continuing refusals to provide coverage into distinct acts of bad faith." Id. at 1042. For purposes of a bad faith claim, "one must

look to the date on which the defendant insurance company first denied the insured's claim in bad faith.” Id. at 1040 (internal citation and quotations omitted). The insurance company's initial denial of liability protection stated clearly that the insurance company would not take any action with respect to any claim or suit against the driver arising from the accident. Id. at 1038. All of the conduct underlying plaintiff's allegations of bad faith was apparent when the insurance company made its position clear, and the plaintiff could have commenced a bad faith action against the insurance company at any point after that time. Id. at 1039. The statute of limitations started running as soon as the right to institute suit arose. Id. at 1042. Because the initial denial "clearly put [the driver] on notice that he would not be covered, defended or indemnified in existing or future actions under the policy," the statute of limitations started running at the point of the initial denial and plaintiff could not avoid any applicable statute of limitations under Section 8371 by asserting that continuing refusals to cover the driver were separate acts of bad faith.

Baer acknowledges Adamski, and attempts to distinguish it. That effort cannot be successful here. In Adamski, the Superior Court found that “reasonably construed, this letter [from the insurer] indicated Allstate would neither pay outstanding claims against Miller nor defend or indemnify him in future litigation.” 738 A.2d at 1038 (emphasis added). Similarly, in this matter, there was an outstanding allegation by the Pettigrew attorney on behalf of the child with alleged lead poisoning, and, as of the time of the Harford denial letter, Baer knew that Harford would not be providing him with coverage or defense. Thus, upon receipt of the Harford denial letter Baer began to suffer damage. Indeed, he promptly hired personal counsel to represent him in dealing with Harford’s denial letters. Moreover, taking Baer at his word, Baer

also suffered damages because he alleges he believed he had coverage, which Harford denied.

Thus, Mr. Baer's effort to distinguish Adamski fails to consider: (a) after the Harford denial of coverage letter, Mr. Baer could have and should have filed a declaratory action against Harford with regard to the lead coverage dispute; (b) as will be discussed more directly below, Mr. Baer was on notice that Frees may have been negligent in not securing a policy for lead coverage from Harford on Baer's behalf and (c) the harm suffered, at least at the initial denial of coverage, is that Mr. Baer believed he had paid (or here, overpaid) for coverage that would respond to problems with lead.

As soon as Baer was placed on notice that Harford would not defend or indemnify him for a lead exposure claim, he could and should have brought a declaratory judgment action seeking to determine his rights under the insurance contract. Courts in this circuit have held that uncertainty as to coverage is sufficient to create a case or controversy for purposes of maintaining a declaratory judgment action in federal court. See Riehl v. Travelers Ins. Co., 772 F.2d 19, 22-23 (3d Cir. 1985) ("neither immediate liability for damages, nor a liquidation to the extent of an insurer's indemnification obligation, is necessary in this Circuit to establish a justiciable controversy"). See also Metro Transp. Co. v. Balboa Ins. Co., 677 F. Supp. 376, 377 (E.D.Pa. 1988) (finding that an insured's uncertainty with respect to its rights under the policies is a cognizable interest sufficient to create a basis for standing in a declaratory judgment action).

Harford emphasizes that its initial denial of coverage occurred on May 4, 1999, the date on which Harford sent Baer a letter stating, in no uncertain terms, that "this claim does not fall within the coverage provided by our insurance." The letter also states that "there is no coverage available for a lead poisoning claim under these policies." Id. Just as in Adamski, Harford

advised Baer on May 4, 1999, that a Pettigrew lead poisoning claim would not be covered, defended or indemnified under its policy due to the lead paint exclusion. Thus, Harford contends, in accordance with Adamski and Estate of Schoch, Baer's right to institute suit arose when Harford denied coverage under Baer's policy on May 4, 1999.

In Pennsylvania, a bad faith action such as alleged by Baer against Harford here under 42 Pa.C.S.A. § 8371 is governed by a two year statute of limitations. Ash v. Continental Insurance Company, 861 A.2d 979, 984 (Pa. Super. 2004). In Ash, the Superior Court noted that the issue was one of first impression in the state appellate courts and affirmed the trial court's ruling that "a bad faith action under § 8371 is a statutorily created tort action subject to a two year statute of limitations." Ash, 861 A.2d at 984.

The Pennsylvania Supreme Court has not yet issued an opinion on the issue. However, absent an opinion from a state's highest court on a matter of state law, a federal court determining state law must predict how that court would rule on a matter if confronted with it. Packard v. Provident National Bank, 994 F.2d 1039, 1046-47 (3d Cir. 1993). In Ash the Superior Court thought it significant that the majority of federal courts which have addressed the subject have predicted that the Pennsylvania Supreme Court would conclude that bad faith actions are subject to a two-year statute of limitations. Ash at 982. This Court sees no analytically sound basis on which to make a different prediction.

In Nelson v. State Farm Mutual Auto Insurance Company, 988 F. Supp. 527 (E.D. Pa. 1997), the court expressly predicted "that the Supreme Court of Pennsylvania would conclude that an action under § 8371 sounds in tort, and thus would be subject to a two year statute of limitations" Id. at 534. The Nelson result was based "upon the history of bad

faith as a cause of action, the nature of a bad faith cause of action, and approaches taken by the heavy majority of other state supreme courts.” Id. at 531. In Nelson the court also took note of the fact that “at least twenty-nine states which recognize a cause of action in bad faith have chosen to characterize the cause of action as a tort.” Id. at 533.

In Haugh v. Allstate Insurance Company, 322 F.3d 227 (3d Cir. 2003), the United States Court of Appeals for the Third Circuit affirmed the district court’s determination that a two-year statute of limitations is applicable to bad faith actions in Pennsylvania. The Haugh court predicted that “the Supreme Court of Pennsylvania would hold that an action under section 8371 sounds in tort and thus is subject to a two-year statute of limitations” Id. at 236. The court made this determination after considering “relevant state precedents, analogous decisions, considered dicta, scholarly works, and any other reliable data tending convincingly to show how the highest court in the state would decide the issue at hand.” Id. at 234.

Citing Nelson, the Haugh court also enumerated the following factors to support the application of a two year statute of limitations: 1) courts historically have treated bad faith causes of action as torts; 2) the nature of a bad faith action suggests that it is based upon a standard of conduct imposed by society and is therefore similar to a tort; 3) the “emerging jurisprudence” among the lower courts in Pennsylvania treats an action for bad faith under section 8731 as a separate and distinct cause of action from the underlying contract; 4) the vast majority of states which have recognized a cause of action for bad faith have chosen to characterize the action as a tort; and 5) courts have a duty to construe section 8731 so as not to produce an absurd or unreasonable result. Thus, as the court stated in Nelson, “it is hard to conceive that the Pennsylvania General Assembly could have intended to provide a six year statute of limitations

period for a bad faith claim under section 8731 if the cause of action sounded in areas of the law with only two and four year statute of limitations periods.” See Haugh, 322 F.3d at 236.

In Sikirica v. Nationwide Ins. Co., 416 F.3d 214 (3d Cir. 2005), the United States Court of Appeals for the Third Circuit reiterated its prediction in Haugh, for the application of a two-year statute of limitations to a bad faith claim under Pennsylvania law. Id. at 224. Taking the limitations analysis a step beyond its dicta in Haugh, the court of appeals expressly adopted the Adamski rule for accrual of a bad faith claim. Id. at 225. Finding that the plaintiff’s bad faith claim against his insurance company began to run when he first received a letter of refusal to defend and indemnify the plaintiff in a class action suit, and not when final judgment in the class action was rendered against the plaintiff, the court in Sikirica found plaintiff’s claims to be time-barred. Id.

Baer’s reliance upon Simon Wrecking Company, Inc. v. AIU Insurance Company, 350 F. Supp. 2d 624 (E.D. Pa. 2004) is misplaced. The Simon plaintiff sued three insurance companies for bad faith denial of his claim. Granting two of the three carriers’ motions for summary judgment, the Simon court applied the Adamski standard described above to hold that a plaintiff is required to file his claim within the two years of the denial of coverage.

Therefore, in the instant matter, the statute of limitations for Mr. Baer’s bad faith action began to run on May 4, 1999, the date on which Harford unequivocally denied coverage. Mr. Baer would have had to file an action on or before May 4, 2001, to have successfully filed suit within the applicable period. Instead, Mr. Baer filed a writ of summons on January 1, 2005, some

five years and eight months after Harford denied coverage.³

3. The Pennsylvania UTPCPL Claim (Count III)

The Unfair Trade Practices and Consumer Protection Law (“UTPCPL”) is Pennsylvania’s consumer protection law. 73 P. S. § 201-1. To state a claim under the UTPCPL, a plaintiff must allege acts which constitute misfeasance, or the improper performance of a contractual obligation. Horowitz v. Federal Kemper Life Assurance Co., 57 F.3d 300, 307 (3d Cir. 1995). Mere refusal to pay an insurance claim constitutes nonfeasance, i.e., the failure to perform a contractual obligation, and is not actionable under this statute. Id. See also Hardinger v. Motorists Mut. Ins. Co., 2003 WL 21250664, *2 (E.D.Pa. Feb. 27, 2003) (refusal to pay benefits does not rise to the level of misfeasance). Moreover, alleged acts which are simply “part and parcel” of the insurer’s refusal to pay benefits do not constitute misfeasance. Smith v. Nationwide Mutual Fire Ins. Co., 935 F. Supp. 616, 621 (W.D. Pa. 1996). Nonfeasance alone is not sufficient to raise a claim pursuant to the UTPCPL. Gordon v. Pennsylvania Blue Shield, 378 Pa. Super. 256, 548 A.2d 600 (Pa. Super. 1988).

Mr. Baer contends that Harford’s motion to dismiss Count III should be denied because he claims he adequately alleges misfeasance by Harford.

The Complaint alleges that Harford committed “misfeasance” in one or more of the

³Harford also sent Mr. Baer a second denial of coverage letter on October 9, 1999, after Harford had received a letter from Baer’s attorney. In the October 1999 letter Harford reiterated that Harford would not provide coverage under the policy. Even if the Court were to consider October 1999 as the point at which Harford denied coverage, which Harford submits is contrary to the facts pled and to the applicable law recounted above, Mr. Baer would have been required to file suit on or before October 9, 2001, to successfully file a claim within the applicable time period. Instead, he waited another three years and three months before doing so.

following ways:

- a) Wrongfully denying coverage;
- b) Denying coverage in reliance on a purported policy change of which Mr. Baer did not receive timely and/or effective notice;
- c) Attempting to materially change Mr. Baer's coverage in reliance on a change from Endorsement DPHGO1 (adding lead contamination coverage) to Endorsement DPHGO2 (deleting lead contamination coverage), without proper notice or advice of such change;
- d) Failing to notify Mr. Baer of a material change in his policy so that Mr. Baer could obtain replacement coverage;
- e) Failing to alert its agent, Frees, of the policy change eliminating lead contamination coverage so that Frees would make sure to bring the policy change to Mr. Baer's attention and advise replacement with a different policy providing lead contamination coverage. Compl. ¶ 35.

At first blush, some of the conduct alleged may seem to involve misfeasance. The case law is instructive in understanding the distinctions. In Smith v. Nationwide Mutual Fire Insurance Company, *supra*, the court denied Nationwide's motion to dismiss a UTPCPL claim, distinguishing between a claim that the insurer had conducted no investigation, which would amount to nonfeasance, and a claim that it improperly conducted an investigation, which would be misfeasance. *Id.* at 621. In Smith, the court denied the defendants' motion to dismiss, reasoning that it was unclear from the complaint whether the plaintiffs were stating that the investigation was performed improperly or was never performed at all. *Id.* The Smith plaintiff

alleged only that the insurance company failed to conduct a “reasonable and prompt investigation.” Id.

Relying on Smith, Plaintiff Baer contends that his allegations in the Complaint that Harford wrongfully denied him coverage presumes “an improper, unfair, and non-objective investigation and analysis.” Pl.’s Suppl. Resp. at 5. The Court disagrees. The essence of the instant Complaint is that Harford wrongfully denied him coverage, and failed to perform its contract with Mr. Baer by failing to provide proper notice of a material change in the insurance policy and/or by failing to alert the agent, Frees, concerning such change. Although Mr. Baer contends that such allegations constitute a valid claim of misfeasance under the UTPCPL, neither appear to rise to the level of “misfeasance” as courts interpreting the UTPCPL have constructed the distinction. Misfeasance requires affirmative conduct, such as an act of misrepresentation or deception, or a reckless mistake made. See, e.g., Shorb v. State Farm Mut. Auto. Ins. Co., 2005 WL 1137881, *5 (M.D. Pa. April 25, 2005) (misrepresentation of qualifications of architect hired by insurance company to design home for handicapped insured constituted misfeasance); Cooper v. Nationwide Mut. Ins. Co., 2002 WL 31478874, *5 (E.D. Pa. Nov. 7, 2002) (allegation that insurer’s counsel sought to delay arbitration proceedings by repeatedly requesting documents he already had and by concealing medical reports was sufficient to constitute a claim for misfeasance under the UTPCPL).

Even reading the Complaint expansively, the most Mr. Baer alleges is nonfeasance, not misfeasance, inasmuch as he alleges that Harford omitted doing, or neglected to do, something which Harford should have done, e.g., notify Baer of the endorsement change. The allegation closest to one of misfeasance is the claim that Harford wrongfully relies upon the endorsement

change. However, close examination of that claim discloses it as one where Baer is actually averring that Harford failed to provide notice of the change, not, for example, that the change itself the product of a mistake, was wrongful or was made with the intention to deny plaintiff the benefit of coverage previously negotiated. Indeed, the actual allegations are more germane to Count I of the Complaint, Mr. Baer's breach of contract claim. They will not support a UTPCPL claim and, therefore, Count III will be dismissed.

4. Negligence Action Against Frees Insurance (Count IV)

Mr. Baer also filed suit against David F. Frees Insurance, Inc. alleging malpractice or negligence on the part of his insurance agent. The claim against Frees was filed five years after being placed on notice in writing in 1999 by Harford that the claim for coverage was being denied. The detailed analysis set forth above in consideration of the Harford motion to dismiss Count II is equally applicable here. Thus, the two year statute of limitations for any negligence action against Frees expired long ago, and the claim of negligence is not colorable as a matter of law. See Kapil v. Assoc. of PA State Colleges and University Faculty, 478 A. 2d 482, 485 (Pa. 1983).

Mr. Baer's claim against Frees for negligence alleges that he relied upon Frees to monitor his insurance with Harford, and to notify him of changes, problems or issues affecting the adequacy of insurance coverage on the insured premises. Therefore, Mr. Baer contends that if Harford provided Frees with notice of a change in coverage on the insured premises eliminating coverage for injuries arising from lead contamination, which is implied in Harford's communications with Mr. Baer, then Frees should have advised Mr. Baer of the change and made appropriate recommendations for replacement coverage. According to Mr. Baer's claims, if

Frees had advised Mr. Baer of a change in coverage on the insured premises eliminating coverage for injuries arising from lead contamination and had made appropriate recommendations for replacement coverage, Mr. Baer would have obtained such replacement coverage. Instead, Frees never contacted Mr. Baer to advise him of a change in his Harford insurance policy eliminating coverage for injuries arising from lead contamination, and never advised plaintiff to obtain replacement coverage. Mr. Baer avers that Frees's failure to provide advice to Mr. Baer concerning Harford's putative change in coverage was negligent and has caused Mr. Baer damages as a proximate result of that negligence.

This is not a case where an insured only received the insurance policy and failed to read it to learn that he did not have coverage. Rather, as detailed above, Mr. Baer was specifically advised in writing on May 4, 1999 that he did not have coverage after making a request for coverage under his policy. As a result, Mr. Baer was made expressly aware of the harm of Frees' alleged failure to acquire and monitor the Baers' insurance coverage in 1999, over five years prior to filing suit for Frees' alleged negligent services.

Under Pennsylvania law, dismissal is appropriate if a plaintiff's cause of action is barred by the statute of limitations. Moyer v. Rubright, 651 A.2d 1139, 1141 (Pa. Super. 1994). In the present case, Mr. Baer admits that he was made aware by Harford on May 4, 1999, that his request for coverage for any claims relating to lead exposure under his policy was denied.

In a negligence action, the right arises when the injury is inflicted. See Ayers v. Morgan, 154 A.2d 788, 791 (Pa.1959). Mistake, misunderstanding, or lack of knowledge do not toll the running of the statute. Nesbitt v. Erie Coach Company, 204 A.2d 473, 475 (Pa. 1964). Once a cause of action has accrued and the prescribed statutory period has run, an injured party is barred

from bringing his cause of action. Id. In the instant matter, based upon the information gleaned from the Complaint itself, when Mr. Baer was informed by Harford that he did not have any coverage for lead exposure the alleged injury caused by Frees failing to secure coverage for lead exposure and to monitor the acquisition of the proper insurance had been inflicted, and the statute of limitations as to the negligence claim against Frees attached at that point in time.

In this case, there can be no question that Harford denied coverage on May 4, 1999 and on October 7, 1999 again made Baer aware of the final determination that it was denying coverage for this matter. Harford wrote Baer:

Enclosed kindly find a copy of the disclaimer letter which was forwarded to you on May 4, 1999, this letter advised that there is no coverage available for the lead poisoning claim filed on behalf of Thomas Pettigrew, a minor. Therefore, Harford Mutual will be unable to assist you in this matter. Compl. Ex. 3

Harford's denial of coverage could not be more clear, and the two year statute of limitations commenced from the point in time when Harford put Mr. Baer on notice that his request for coverage was denied, and ended on May 4, 2001 and certainly no later than October 7, 2001.

Harford's letters of May 4, 1999 and October 7, 1999, which are attached to the Complaint as Exhibits 2 and 3, respectively, placed Mr. Baer on notice that Harford was denying coverage for this matter under the lead paint exclusion of the policy and that "there is no coverage for the lead poisoning claim." Therefore, as in Simon, because Baer was placed on notice of the denial of coverage, at the very latest on October 7, 1999, and the statute began to run at that time, Baer's claim of negligence against Frees is barred by the statute of limitations.

In the present case, Mr. Baer also alleges that Frees failed to keep him advised regarding any changes in his insurance. Nevertheless, Mr. Baer admits that he was advised by Harford that he did not have coverage for any lead paint exposure claims on May 4, 1999. Therefore, if Frees breached any duty to Baer, that duty necessarily was breached prior to May 4, 1999, and Plaintiff was made aware of it by written notice from Harford of the circumstances alerting Baer to Frees' possible breach of duty when he learned on that date that coverage had been denied.

The Pennsylvania Supreme Court has held where the issue in the case involves a factual determination of what constitutes a reasonable time for a plaintiff to discover his or her injury and its causes, the issue is usually for the jury. See Cochran v. GAF Corp., 666 A.2d 245, 248 (Pa. 1995). However, where the facts are so clear that reasonable minds could not differ, the commencement period maybe determined as a matter of law. Id. An action to recover damages which is founded on negligence is governed by a two year statute of limitations pursuant to 42 Pa. C.S.A. § 5524(7). See Toy v. Metropolitan Life Insurance Co., 863 A.2d 1 (Pa. Super. 2005). In this matter, Mr. Baer had the right to initiate suit against Frees on May 4, 1999, when he admittedly learned that he did not have coverage that he claims he believed he secured through Frees. When Mr. Baer initially learned through Harford's letter that Frees did not obtain the coverage or monitor the coverage and had not advised him of this lack of coverage, Baer knew or reasonably should have known that Frees violated its duty to monitor Baer's insurance coverage. Since the statute of limitations has run on any negligence claim against Frees, the cause of action is not colorable, and Frees will be dismissed from this case as a matter of law.

B. Plaintiff Baer's Motion for Remand

In his Motion for Remand, Plaintiff Baer argued for remand because he is a

Pennsylvania citizen and Defendant Frees is a Pennsylvania corporation. Thus, Mr. Baer claims that the requisite diversity does not exist. Harford opposed this Motion on the basis that Frees was fraudulently joined in order to defeat diversity jurisdiction.

When a federal question is not involved and an action is removed to federal court is challenged on the basis of a lack of diversity among the parties, the removing party, in order to avoid remand, must demonstrate that the non-diverse party was fraudulently joined or that a colorable claim is not viable against the non-diverse party. See Steel Valley Authority v. Union Switch and Signal Division, 809 F. 2d 1006, 1012 n.6 (3d Cir. 1987), cert. dismissed, 484 U.S. 1021 (1988); see also, Ables v. State Farm Fire and Casualty Company, 770 F.2d 26, 29 (3d Cir. 1988). A joinder is “fraudulent” where there is no reasonable basis in fact or colorable grounds supporting the claim against the non-diverse defendant. Ables, 770 F. 2d at 32. The joinder of a party against which there is not a viable cause of action constitutes a "fraudulent joinder" because there is not a possibility that a state court would find that the complaint states a cause of action. See Batoff v. State Farm, 977 F.2d 848 (3d Cir. 1992).

As the foregoing discussion indicates with regard to Baer’s negligence claim against Frees, the statute of limitations on that claim expired well before Mr. Baer filed his action in the Court of Common Pleas. Thus, the joinder of Frees by Baer was “fraudulent” because there is no possibility that a state court would find that the Baer complaint stated a viable cause of action against Frees. The Court’s decision on the negligence claim against Frees essentially renders Baer’s Motion moot. However, for clarity’s sake, the Court holds that Mr. Baer’s Motion for Remand is denied because of fraudulent joinder.

IV. CONCLUSION

For the reasons set forth above, the Court dismisses Counts II and III and IV of Stephen Baer's Complaint. Because this decision dismisses Defendant Frees from the instant litigation, Plaintiff Baer's Motion for Remand is denied.

An appropriate Order follows.

BY THE COURT:

/S/

Gene E.K. Pratter
United States District Judge

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

STEPHEN BAER,	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	
	:	
HARFORD MUTUAL INS. CO., and	:	
DAVID M. FREES INS., INC.,	:	
Defendants.	:	05-cv-1346

ORDER

November 10, 2005

Pratter, District Judge

AND NOW, this 10th day of November, 2005, upon consideration of Defendant Harford's Motion to Dismiss Count II and Count III (Docket No. 2), Plaintiff Stephen Baer's Cross-Motion for Remand (Docket No. 3), Defendant Harford's Motion to Dismiss Count IV (Docket No. 4), Defendant Frees' Motion to Dismiss Count IV (Docket No. 7), the various responses and replies to the above motions, and oral arguments heard by the Court on September 6, 2005, **IT IS**

HEREBY ORDERED that:

1. Defendant Harford's Motions to Dismiss are GRANTED (Docket Nos. 2 and 4) and Counts II, III and IV of the Complaint are DISMISSED;
2. Defendant Frees' Motion to Dismiss Count IV is GRANTED (Docket No. 7);
3. Plaintiff Baer's Motion for Remand is DENIED (Docket No. 3); and

4. This case shall only proceed with regard to Count I of the Complaint. Harford shall file its answer to Count I within twenty-one (21) days of the date of this Order.

It is so ORDERED.

BY THE COURT:

/S/
Gene E.K. Pratter
United States District Judge