

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION

ALAN HOCHMAN,

CASE NO. 993189-CIV-JORDAN  
Magistrate Judge Bandstra

Plaintiff,

v.

MASS MUTUAL LIFE INSURANCE  
COMPANY,

Defendant.

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**MOTION TO REMAND AND**  
**MEMORANDUM OF LAW IN SUPPORT**

Plaintiff, Alan Hochman, by and through undersigned counsel, hereby files this Motion to Remand pursuant to 28 U.S.C. § 1447 and as grounds states:

1. Mr. Hochman commenced this action in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida alleging Count I-Breach of Contract, Count II-Statutory Bad Faith, and Count III-Unfair Claims Practices due to Mass Mutual Life Insurance Company's (hereinafter "MassMutual") wrongful termination of Mr. Hochman's individual disability benefits.

2. MassMutual filed its Notice of Removal on November 22, 1999 claiming diversity jurisdiction pursuant to 28 U.S.C. § 1332.

3. "A removing defendant has the burden of proving the existence of federal jurisdiction." Tapscott v. MS Dealer Serv. Corp., 77 F.3d 1353, 1356 (11<sup>th</sup> Cir. 1996). "Removability should be determined according to the plaintiff's pleading at the time of the petition for removal." Coker v. Amoco Oil Co., 709 F.2d F.2d 1433, 1440 (11<sup>th</sup> Cir. 1983). It is well settled that the question of subject matter jurisdiction is a snapshot of the

complaint at the time of removal. Chadwick v. Shell Oil Co., 828 F.Supp. 26, 27 (E.E. La. 1993). “Only the amount of the installments unpaid at the commencement of the suit may be taken into account, even though the judgment will be determinative of the company’s liability for future installments.” 14A Charles Alan Wright et al., Federal Practice and Procedure § 3710 (2d ed. 1985). Jurisdiction may not be defeated by post removal events. St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 58 S.Ct. 586, 82 L.Ed. 845 (1938).

4. MassMutual’s Notice of Removal contains liquidated damages in the amount of \$41,792.64<sup>1</sup> which is far from the required \$75,000 jurisdictional minimum and its estimates for the unliquidated damages is too speculative to sustain its burden of proving that the amount in controversy will exceed the jurisdictional limit of this Court.

5. “An order remanding the case may require payment of just costs and actual expenses, including attorney fees, incurred as a result of the removal.” 28 U.S.C. § 1447 (c). Also see, Morris v. Bridgestone/Firestone, Inc., 985 F.2d 238 (6<sup>th</sup> Cir. 1993)(removal followed by remand warrants an award of attorney’s fees); Gray v. New York Life Ins. Co., 906 F.Supp. 628 (N.D. Ala.)(good faith is no defense to a 28 U.S.C. § 1447 (c) fee claim).

6. Mr. Hochman was forced to respond to MassMutual’s defective Notice of Removal and is entitled to reasonable attorney’s fees and costs associated with this Motion.

WHEREFORE, Plaintiff, Alan Hochman, respectfully requests this Court to remand the above styled action to the Eleventh Judicial Circuit of Dade County, Florida

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<sup>1</sup> This amount is based on MassMutual’s calculation contained in paragraph 12 of its Notice of Removal.

for further proceedings and for reasonable costs and attorney's fees associated with this Motion.

## **MEMORANDUM OF LAW**

### **Introduction**

This case ensued as the result of MassMutual's wrongful termination of Mr. Hochman's disability benefits. Mr. Hochman was a trial attorney until 1997 when he became permanently disabled from his occupation. MassMutual acknowledged Mr. Hochman's disability and paid monthly disability benefits in accordance with its insurance policy until March 1999 when it unlawfully terminated his benefits. As a result, Mr. Hochman filed suit against MassMutual in a three count complaint<sup>2</sup> originating this action in state court.

MassMutual removed this case to this Court by asserting diversity jurisdiction. MassMutual has claimed that the amount in controversy<sup>3</sup> exceeds the \$75,000 jurisdictional minimum as follows: (1) \$72,406.15 in benefits paid under a reservation of rights; (2) \$41,792.64 in past due benefits; (3) \$3,256.11 of a waiver of premiums; (4) \$18,019.50 in attorney's fees; and (5) \$12,000 for statutory bad faith and unfair claims practices<sup>4</sup>. Even if all doubts are resolved in favor of MassMutual<sup>5</sup>, it is apparent that the actual amount in controversy does not exceed \$75,000.

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<sup>2</sup> The three counts are: Count I-Breach of Contract, Count II-Statutory Bad Faith and Count III-Unfair Claims Practices.

<sup>3</sup> Plaintiff will stipulate that there is complete diversity of citizenship between the parties; therefore, diversity jurisdiction is allowed if the amount in controversy exceeds \$75,000. 28 U.S.C. § 1332.

<sup>4</sup> Notice of Removal, para. 17.

<sup>5</sup> This is actually a more deferential standard than allowed under the applicable caselaw to determine whether the allegations contained in MassMutual's Notice of Removal meet the diversity requirements, as will be discussed *infra*.

## II. MassMutual is Required to Prove that Jurisdiction Exists

Since diversity of citizenship exists in this case, MassMutual has the right to remove the case if the amount in controversy exceeds \$75,000. 28 U.S.C. § 1332. “Jurisdictional facts are assessed on the basis of plaintiff’s complaint as of the time of removal.” Burns v. Windsor Ins. Co., 31 F.3d 1092, fn 13 (11<sup>th</sup> Cir. 1994)(citing, Pullman Co. v. Jenkins, 305 U.S. 534, 537, 59 S.Ct. 347, 348, 83 L.Ed. 334 (1939)). This is known as the Well-Plead Complaint Rule. E.g., Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 63, 95 L.Ed. 2d 55, 107 S.Ct. 1542 (1987); Brown v. Connecticut General Life Ins. Co., 934 F.2d 1193, 1195-96 (11<sup>th</sup> Cir. 1991).

“Federal courts are courts of limited jurisdiction. While a defendant does have a right, given by statute, to remove in certain situations, plaintiff is still the master of his own claim.”

Burns, 31 F.3d at 1095. Also see, Caterpillar, Inc. v. Williams, 482 U.S. 386 (1987).

Mr. Hochman did not ask for a specific amount of damages in his Complaint. Contrary to MassMutual’s assertion<sup>6</sup>, it is MassMutual’s burden to prove that Mr. Hochman’s damages will exceed \$75,000.

“[W]here a plaintiff has made an unspecified demand for damages in state court, a removing defendant must prove by a preponderance of the evidence that the amount in controversy more likely than not exceeds the [\$75,000] jurisdictional requirement.”

Tapscott v. MS Dealer Service Corp., 77 F.3d 1353, 1357 (11<sup>th</sup> Cir. 1996).

If there is any doubt that the amount in controversy does not exceed \$75,000, the Court must remand the case.

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<sup>6</sup> MassMutual states that it must appear to a legal certainty that the claim is for less than the jurisdictional amount to defeat diversity jurisdiction. Notice of Removal, para. 10. This is necessary for a defendant to prove in order to dismiss a case for lack of federal jurisdiction. A plaintiff does not need to meet this burden of proof to remand a case.

“Defendant’s right to remove and plaintiff’s right to choose his forum is **not on equal footing** ; . . . removal statutes are construed narrowly; where plaintiff and defendant clash about jurisdiction, uncertainties are resolved in favor of remand.”

Burns, 31 F.3d at 1095. Accord, Continental Carriers, Inc. v. Roger Goodpasture and Indiana Refrigeration Lines, Inc., 169 F.Supp. 602, 604 (M.D. Ga. 1959)(“United States District Courts are courts of limited jurisdiction; thus, the presumption is against jurisdiction, and jurisdiction must always affirmatively appear. [R]emoval should not be allowed where there is any doubt as to the right of removal.” (citations omitted)).

When all doubts are resolved in Mr. Hochman’s favor, the actual amounts that can be proven to be in controversy do not exceed the jurisdictional minimum of this Court.

III. The Benefits Already Paid to Mr. Hochman and Waiver of Premium Amounts are Not in Controversy

The first figure that MassMutual has stated as supporting its notion that this case meets the jurisdictional minimum is \$72,406.15<sup>7</sup> which is the amount that it has already paid to Mr. Hochman. This amount cannot be considered for jurisdictional purposes<sup>8</sup> anymore than the future benefits could be considered. Massachusetts Casualty Ins. Co. v. Harmon, 88 F. 3d 415, 416 (6<sup>th</sup> Cir. 1996)(prevailing view in disability cases is that future benefits cannot be considered for jurisdictional purposes). Even if MassMutual had counter-claimed for this amount, it could not be considered.

“After careful consideration of the authorities, the Court concludes that the amount claimed in a counterclaim or cross-action cannot be considered in determining whether or not the jurisdictional amount is involved.”

Continental Carriers, Inc., 169 F.Supp. at 604. Accord, Merchants’ Heat & Light Co. v. James B. Clow & Sons, 204 U.S. 286, 27 S.Ct. 285, 51 L.Ed. 488 (1907).

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<sup>7</sup> Notice of Removal, fn 7, para. 17.

<sup>8</sup> The only relevance of the fact that MassMutual previously paid Mr. Hochman is that the burden shifts to MassMutual to prove that he is no longer disabled. Aetna Life Ins. Co., Inc. v. Fruchter, 283 So.2d 36 (Fla. 1973).

MassMutual has not counter-claimed for the benefits already paid nor has it even hinted in its Notice of Removal that it could legitimately bring a claim against him for this amount. The amount already paid has not been contested by MassMutual; it is not “in controversy<sup>9</sup>.”

Similarly, the waiver of premiums amount of \$3,256.11 is not in controversy. There is no allegation in the Complaint that this amount has actually been paid or for a repayment of this amount; therefore, this amount is not in controversy either.

IV. MassMutual has Failed to Prove the Amounts for Attorney’s Fees and/or Statutory Bad Faith and Unfair Claims Practices Damages

This Motion can be decided at this point because, assuming *arguendo*, that MassMutual’s figures for attorney’s fees of \$18,019.50 and bad faith/unfair claims practices damages of \$12,000 are correct, the amount in controversy is less than \$75,000 when added to the past due benefits owed<sup>10</sup> ( $\$41,792.64 + \$18,019.50 + \$12,000 = \$71,812.14$ ). This amount does not exceed \$75,000; therefore, the case must be remanded. Kliebert v. Upjohn Co., 915 F.2d 142 (5<sup>th</sup> Cir. 1990)(remanding the case where the plaintiff sought exactly \$10,000 when the jurisdictional amount was in excess of \$10,000).

Furthermore, the amounts stated by MassMutual for attorney’s fees and bad faith/unfair claims practices damages are highly inflated. The \$18,019.50 figure for attorney’s fees was arrived at by taking forty percent of the past due benefit amount plus

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<sup>9</sup> Its reliance on Massachusetts Cas. Ins. Co. v. Rossen, 953 F.Supp. 311 (C.D. Cal. 1996) is misplaced. In that case, the insurance company sued its insured in a declaratory action and the defendant sought to dismiss the case. The requirement to dismiss a case is different than requirement to remand a case. Furthermore, the amount used to determine what is at controversy in a declaratory action is different than in a breach of contract action.

<sup>10</sup> Plaintiff has also assumed for the purposes of this Motion that the Defendant’s figure for past due benefits is correct.

the waiver of premium amount. As discussed *supra*, the waiver of premium amount cannot be considered. Forty percent of the past due amount is \$16,717.06 which is the largest amount possible for attorney's fees using MassMutual own reasoning<sup>11</sup>. The amount is further reduced if the twenty-five percent figure is used (\$10,448.16). This is a simple breach of contract claim requiring no special knowledge or research; therefore, the lower, twenty-five percent amount would be a more accurate figure than the forty percent figure.

The \$12,000 figure used to calculate the damages for bad faith/unfair claims practices is equally inflated. None of the cases cited by MassMutual is based on the Florida Bad Faith and Unfair Claims Practices Statutes<sup>12</sup>. The statutes and damages allowed differ from state to state; therefore, only Florida cases would be relevant. Plaintiff's counsel has not found a single reported case where damages have been awarded for bad faith or unfair claims practices in a disability case. Therefore, any amount stated by MassMutual is pure speculation. Speculation alone will not sustain MassMutual's burden of proving that federal jurisdiction exists. This doubt should be resolved in favor of remand. Burns, 31 F.3d at 1095.

#### V. Conclusion

MassMutual has failed to prove that the amount in controversy will exceed \$75,000. At best, MassMutual has barely proved damages exceeding \$50,000 (past due benefits plus attorney's fees). MassMutual's passing allusion that Mr. Hochman must

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<sup>11</sup> Plaintiff disagrees that Hall v. Travelers Ins. Co., 691 F.Supp. 1406 (N.D. Ga. 1988) stands for the proposition that attorney's fees run in the range of 25 to 40 percent of judgment amounts. This was the amount stated in the Defendant's brief in opposition to the Plaintiff's Motion to Remand. The Court did not agree with this amount, it only stated that based on the facts *in that case*, the amount of attorney's fees would push the amount in controversy over the jurisdictional threshold. *Id* at 1410.

<sup>12</sup> Fla.Stat. §§ 624.155 and 624.9541 respectively.

stipulate that he is seeking less than \$75,000 is way off base<sup>13</sup>. **Federal jurisdiction either exists at the time of removal or it does not.** Post removal events have no effect on whether jurisdiction exists<sup>14</sup>. It is the defendant's burden to prove that federal jurisdiction exists. A defendant either meets this burden or it does not. MassMutual has failed to prove that federal jurisdiction exists. This case must be remanded.

***Respectfully submitted,***

THE WAGAR LAW FIRM  
3250 Mary Street, Suite 207  
Coconut Grove, FL 33133  
305-443-7772  
305-443-1969 - fax

BY: \_\_\_\_\_  
KIRK W.B. WAGAR  
Fla Bar No.994936

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<sup>13</sup> Notice of Removal, fn 8.

<sup>14</sup> Burns, 31 F.3d at fn 12 ["In addition, we are not convinced that congress would find the result Windsor fears (that is, an amendment for greater damages after the one year deadline for removal) to be bad. . . . Congress has recognized and accepted that, in some circumstances, plaintiff can and will intentionally avoid federal jurisdiction."]

**CERTIFICATE OF SERVICE**

WE HEREBY CERTIFY that a true and correct copy of the foregoing was faxed/mailed to Jay Blumenkopf, Esq., Proskauer Rose LLP, 2255 Glades Road, Suite 340 West, Boca Raton, Florida 33431 (561)-241-7145 (fax).

Todd Stewart, Esq.  
Slawson Cunningham Whalen & Stewart  
2401 PGA Blvd., Suite 140  
Palm Beach Gardens, FL 33410  
561-625-6260  
561-625-6269 - fax

and

THE WAGAR LAW FIRM  
3250 Mary Street, Suite 207  
Coconut Grove, FL 33133  
305-443-7772  
305-443-1969 - fax

BY: \_\_\_\_\_  
KIRK W.B. WAGAR  
Fla Bar No.994936