

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO.: 98-2009 CIV-KING

THOMAS J. RICE, M.D.;

Plaintiff,

vs.

PROVIDENT LIFE AND ACCIDENT
INSURANCE COMPANY,

Defendant.

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

Plaintiff, Thomas J. Rice, M.D., moves this Court pursuant to 28 U.S.C. § 1446 to abstain from hearing this case and remand it to the Circuit Court of Dade County, Florida and as grounds states:

1. Dr. Rice commenced this action on July 24, 1998, in the Circuit Court of the Eleventh Judicial Circuit of the State of Florida, in and for Dade County alleging breach of contract due to Defendant's wrongful termination of Dr. Rice's individual disability benefits.

2. Defendant filed its Notice of Removal on August 24, 1998 claiming ERISA¹ preemption and diversity of citizenship².

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 (11th Cir. 1996).

¹ Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001, *et seq.*

² 28 U.S.C. §1332.

“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 1433, 1440 (11th Cir. 1983).

4. Dr. Rice Complaint alleged a breach of contract claim under Florida law and attached a copy of the individual insurance policy issued to “Thomas J. Rice, MD.” Complaint, Exhibit A, p. 2 previously attached to Defendant’s Notice of Removal.

5. This action is not governed by ERISA and Defendant’s mere assertion that the subject policy was issued “through plaintiff’s employer” (Notice of Removal, para. 5) does not sustain the burden of proving this Court’s jurisdiction; the Defendant has offered no proof that this claim is governed by ERISA.

6. Dr. Rice’s Complaint asks for damages in the amount of \$49,979.93 plus attorneys’ fees.

7. It is the Defendant’s burden to prove that the amount in controversy will, more likely than not, exceed the jurisdictional requirement. Tapscott, supra. “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). Also see, St. Paul Mercury Indemnity C. v. Red Cab Co., 303 U.S. 283, 58 S.Ct. 586, 82 L.Ed. 845 (1938) (jurisdiction may not be defeated by post removal events); Chadwick v. Shell Oil Co., 828 F.Supp. 26, 27 (E.D. La. 1993)(it is well settled that the question of subject matter jurisdiction is a snapshot of the complaint at the time of removal).

8. The Defendant has given this Court no basis for proving that the amount of attorneys' fees will be in excess of \$25,020.08 which is the only justification for triggering the \$75,000 jurisdictional threshold.

9. The Defendant's Notice of Removal is defective in all respects. ERISA has been improperly plead and the amount in controversy does not exceed the jurisdictional limit of this Court.

10. "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 (6th Cir. 1993) (removal followed by remand warrants an award of attorney's fees in ERISA actions); *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).

11. Dr. Rice was forced to respond to Defendant's baseless Notice of Removal and is entitled to reasonable attorneys' fees and costs associated with this Motion.

WHEREFORE, Plaintiff, Thomas J. Rice, M.D., respectfully requests this Court to remand the above styled action to the Eleventh Judicial Circuit of Dade County, Florida for further proceedings and for reasonable costs and attorneys' fees associated with this Motion.

MEMORANDUM OF LAW

Introduction and Facts

Plaintiff, Thomas J. Rice, M.D., was a successful and respected gastroenterologist. In order to protect himself in the unlikely event that he was no longer able to practice medicine, Dr. Rice purchased an individual disability insurance policy from the Defendant

on February 1, 1990. The purpose of the policy is to compensate Dr. Rice \$12,064.00 per month if he is unable to perform the substantial and material duties of his occupation as a gastroenterologist.

On December 31, 1995, Dr. Rice suffered a head injury. As a result of his injury, Dr. Rice has been diagnosed as suffering from Cluster-Migraine Headaches which become so severe that he loses vision and the ability to speak. Certain things, especially bright lights, trigger the onset of these debilitating migraines. This has left Dr. Rice unable to practice medicine as even the lights on the various medical displays can cause him to suddenly lose his vision and ability to speak; he is totally disabled from his occupation.

Since Dr. Rice was unable to practice medicine, he applied for the disability benefits promised under the terms of his policy with the Defendant. The Defendant acknowledged Dr. Rice's disability and paid benefits for more than a year. Without any medical evidence and ignoring Dr. Rice's treating physicians' conclusions, the Defendant suddenly ceased paying benefits. This action ensued in state court to recover the contractual benefits promised under the individual disability insurance policy. The Defendant removed this action to this Court claiming ERISA preemption and diversity of citizenship. The sole purpose of the Defendant's removal is to further harass the Plaintiff, delay recovery and mislead this Court into destroying the protection of Florida insurance law that regulate the Defendant's improper behavior.

Remand versus Removal

The Defendant has the right to remove an action from State Court to Federal Court if the District Court has jurisdiction over a claim or right arising under the laws of the United States 28 U.S.C. § 1441. This does not give a Defendant the unlimited right to

remove a case to District Court and the burden is on the Defendant to prove federal jurisdiction. Burns v. Windsor Ins. Co., 31 F.3d 1092, 1095 (11th Cir. 1994).

“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 v. Windsor Ins. Co., 31 F.3d 1092, 1095 (11th Cir. 1994). Also see, Caterpillar, Inc. v. Williams, 482 US 386 (1987); Great Northern R.Co. v. Alexander, 246 US 276 (1918); Infinga v. Labella, 485 F.2d 249 (11th Cir. 1988).

“Defendant’s right to remove and plaintiff’s right to choose his forum is **not on equal footing**. . . [W]here plaintiff and defendant clash about jurisdiction, uncertainties are resolved in favor of remand.”

Id (emphasis added).

This Court must only look to Dr. Rice’s Complaint in determining whether Federal jurisdiction exists. This is known as the Well-Plead Complaint Rule. See, 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 (11th Cir. 1991). Dr. Rice has the right to choose his own venue. He chose the Circuit Court of Dade County and in absence of sufficient proof that this Court has jurisdiction, that is where this action should return.

“[T]he party who brings suit is master to decide what law he will rely upon, and therefore does determine whether he will bring a “suit arising under” the . . . law[s] of the United States by his declaration and bill. That question cannot depend upon the answer, and accordingly jurisdiction cannot be conferred by the Defense, even when anticipated and replied to in the bill.”

The Fair v. Kohler Die and Specialty Co., 228 US 22, 25, 57 L.Ed. 716, 33 S.Ct. 410 (1913).

Defendant has improperly injected ERISA in this action

There is no reasonable argument neither fact or law that supports Defendant's position that ERISA applies. For this argument to even be considered as a good faith and reasonable interpretation under ERISA, the Defendant must believe that Dr. Rice's policy is an "Employee Welfare Benefit Plan." There must be a plan, fund or program established by an employer or employee organization as a bare minimum. Donovan v. Dillingham, 688 F.2d 1367 (11th Cir. 1982). The Defendant has offered no evidence of any plan, fund or program and no evidence of any involvement by Dr. Rice's employer.

"For an employee welfare benefit plan or program to come within ERISA's sphere of influence, it must, among other things, be "established or maintained" by an employer, employee organization or both."

Johnson v. Watts Regulator Co., 63 F.3d 1129, 1132 (1st Cir. 1995).

A bare assertion that ERISA applies, without supporting facts, is insufficient as a matter of law to bring a case within ERISA's sphere of influence. Mitchell v. Investors Guaranty Life Ins. Co., 861 F.Supp. 1039, 1040 (N.D. Ala. 1994).

The Secretary of Labor has made it abundantly clear what does and does not constitute an ERISA Plan:

"Employee welfare benefit plan should not include a group or group type insurance program offered by an insurer to employees or members of an employee organization, under which:

- (1) No contributions are made by an employer or employee organization;
- (2) Participation in the program is completely voluntary for employees or members;
- (3) The sole functions of the employer or employee organization with respect to the programs are, without endorsing the program, to permit the insured to publicize the program to employees and members, to collect premiums through payroll deductions or dues check off and to remit them to the insurer; and

(4) The employer or employee organization receives no consideration in the form of cash or otherwise in connection with the program, other than reasonable compensation, excluding any profit, for the administrative services actually rendered in connection with payroll deductions.

29 C.F.R. § 2510.3-1 (j)(1987).

An employer's participation is mandatory in finding that an ERISA Plan exists. If an employer offers no welfare benefit plan to its employees but leaves each employee free to shop around for his or her own health (accident, disability, life, etc.) insurance, ERISA does not apply. Brundage-Petersen v. Comp Care Health Serv. Ins. Co., 877 F.2d 509, 510 (7th Cir. 1989). This is known as the safe harbor provision.

“A program that satisfies the regulation's standards will be deemed not to have been “established or maintained” by the employer. The converse, however, is not necessarily true; a program that fails to satisfy the regulation's standards is not automatically deemed to have been “established or maintained” by the employer, but, rather, is subject to further evaluation under the conventional tests.”

Watts, *supra*, at 1133.

1. Employer Contributions

Dr. Rice personally paid all the premiums for this individual disability policy. At no time did his employer, Rice and Goldberg, P.A., ever pay the premiums, or any portion thereof. At the inception of this policy, the premiums were automatically deducted from Dr. Rice's paycheck by Rice and Goldberg, P.A. pursuant to the salary allotment agreement in the policy. The employer was simply performing an administrative task by deducting the premiums from Dr. Rice's paychecks. At all times, the amounts of the premiums were listed on Dr. Rice's W-2's as earned income. An employer may accept payroll deductions, pass them on to the insurer, and perform other

ministerial tasks without bringing ERISA into play. Watts, supra, at 1134. Since no contributions were made by an employer or employee organization, this program satisfies the first prong of the safe harbor provisions.

Even if this Court should somehow find that the premiums were paid by Dr. Rice's employer, after 1995, Dr. Rice began paying premiums by having them automatically deducted from his personal checking account as opposed to having the premiums deducted from his payroll. Furthermore, Rice and Goldberg, P.A. is no longer active. Assuming that the only regulation standard that has not been fulfilled is the first one, the fact that the P.A. is no longer active together with Dr. Rice's actions of personally paying his premiums would be enough to take this case out of the provisions of ERISA. Mizrahi v. Provident Life and Accident Ins. CO., 994 F. Supp. 1452 (S.D. Fla. 1998); Loudermilch v. The New England Mutual Life Ins. Co., 942 F. Supp. 1434 (S.D. Fla. 1996); Grimo v. Blue Cross/Blue Shield, 34 F.3d 148 (2nd Cir. 1994).

2. Participation was voluntary

Dr. Rice voluntarily took this individual disability policy out on his own. This fact is first evidenced by the language of the salary allotment rider itself. Specifically, paragraph four states: "If this rider is voided, premiums will be due and payable as required in the policy." This would mean that Dr. Rice would have to pay the premiums out of his personal bank account. When this event did happen in 1995, Dr. Rice voluntarily chose to pay the premiums out of his personal bank account as evidenced by a April 28, 1995 letter contained in Defendant's claim file. Because Dr. Rice voluntarily chose to participate in this program, the second prong of the regulation standard has been satisfied.

3. The employer performed only ministerial duties

The only function of Dr. Rice's employer was to accept payroll deductions and pass them on to the insurer. Dr. Rice's employer never endorsed the plan or did anything else which would take its activities out of the Safe Harbor provisions.

“The department of labor has linked endorsement of the program in part of the employee organization to its engagement “in activities that would lead a member reasonably to conclude that the program is part of the benefit arrangement established or maintained by the employee organization.”

...

“In short, the agency has suggested that the employees view point should constitute the principal frame of reference in determining whether endorsement occurred. “

Watts, supra, at 1134.

A reasonable person cannot conclude that by simply accepting payroll deductions and passing them on to an insurer would bring this plan under the auspices of an ERISA. Furthermore, there was no mention of ERISA in the policy which would also lead a reasonable person to believe that ERISA did not apply. Dr. Rice's employer served no function other than that of a conduit with regard to the insurance. See, Zavora v. Paul Revere Life Ins. Co., 145 F.3d 1118 (9th Cir. 1997). The Defendant drafted the policy, set the premium rates, determined eligibility for coverage, interpreted policy language, investigated, allowed and disallowed the claims, and handled litigation. Under the Watts and Zavora cases, this behavior falls well short of an endorsement of a Plan. The program satisfies the third prong of the regulation's standards and cannot be deemed to be “established or maintained” by the employer as that term is defined by ERISA.

4. The employer received no consideration for the program

Dr. Rice's employer did not receive any consideration in any form for this policy. The Defendant kept 100% of all premiums paid. The fourth prong of the regulation's standards has been satisfied.

Dr. Rice's policy was not an employee welfare benefit plan established or maintained by an employer or employee organization. The only activity performed by the employer was to collect premiums to payroll deductions and pass them on to the insurer. This activity clearly falls within the Safe Harbor provisions established by the Secretary of Labor. ERISA does not apply to this policy and the Defendant has failed to sustain its burden of proving the establishment of an ERISA plan.

The Amount in Controversy is Insufficient for Federal Jurisdiction

Dr. Rice alleged damages in the amount of \$49,979.93. A claim cannot be brought in Federal Court unless there is complete diversity³ and the amount in controversy exceeds \$75,000.00, exclusive of interest and costs. 28 U.S.C. § 1332. The Defendant must carry the burden of showing this Court that Dr. Rice's claim meets the jurisdictional limit of this Court. It is a heavy burden.

"Because removal is only permissible when plaintiff's claim could have been filed in federal court originally, we must look to plaintiff's claim to determine whether removal was appropriate.

...

So, the critical question is to what extent must defendant prove jurisdiction exists despite plaintiff's express claim to less than the minimum jurisdictional sum? We believe the defendant's burden of proof must be a heavy one.

Burns, supra, at 1095. Accord, Bolling v. Union National Life Ins. Co., 900 F.Supp. 400 (M.D. Ala. 1995).

³ Diversity does exist in this case because the Plaintiff and Defendant are from different states.

The Defendant has not carried its heavy burden. The statement that “the matter in controversy exceeds the sum or value of \$75,000.00⁴” is self serving, unsupported, and inadequate to carry its heavy burden. The only legitimate argument Defendant can make is that the attorney’s fees will push this matter over the \$75,000.00 threshold. The Defendant offers no evidence to support this contention. This is a simple contract claim. Defendant cannot say to a legal certainty that the amount in controversy exceeds the jurisdictional limit of this Court.

Conclusion

The Defendant’s Notice of Removal is defective in all respects. The Defendant has offered no evidence to sustain its burden of proving federal subject matter jurisdiction of this case. ERISA has been improperly injected into this action. The subject policy clearly falls within the Safe Harbor provisions established by the Secretary of Labor. Additionally, the Defendant has failed to offer any evidence that the amount in controversy exceeds \$75,000.00. Dr. Rice has alleged damages in an amount less than \$50,000.000. Plaintiff was forced to respond to Defendant’s baseless Notice of Removal and is entitled to reasonable attorneys’ fees and costs associated with the removal to this Court. 28 U.S.C. § 1447(c).

Respectfully submitted,

Kirk W.B. Wagar
Florida Bar No. 994936

⁴ Notice of Removal, para. 9.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed/faxed this 12th day of October, 1998 to: John E. Meagher, Esq., Shutts & Bowen, Attorneys for Provident, 201 South Biscayne Boulevard, 1500 Miami Center, Miami, FL 33131.

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