

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

Joseph S. Brown

Plaintiff,

v.

Hartford Accident and Indemnity
Company,

Defendant.

Case No.:
06-81010-CIV
MIDDLEBROOKS/JOHNSON

MOTION TO REMAND AND INCORPORATED MEMORANDUM OF LAW

Plaintiff, Joseph S. Brown, by undersigned counsel, moves this court to remand this action to the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida pursuant to 28 U.S.C. 1447(c) and as grounds says:

1. 28 U.S.C. § 1441 requires that the amount in controversy be in excess of \$75,000.00.
2. Defendant alleges that "...it is beyond dispute that Brown's claim for damages and, therefore, the amount in controversy is in excess of this court's jurisdictional prerequisite." Defendant further states that this conclusion is based upon a "reasonable interpretation of the pleadings and record before this court".
3. A reasonable interpretation of the pleadings shows that the amount in controversy is \$50,000.00 not \$75,000.00. Plaintiff merely alleged in the complaint that the damages claimed were in excess of \$15,000.00.

4. Plaintiff attached the cover page of the most recent policy as exhibit "3" to the complaint which shows the maximum benefit to be \$50,000.00 and stated that the original policy is in the possession of the defendant. A copy of the complaint is attached hereto as exhibit "1". If only the pleadings and attachments thereto are considered, the face amount of the cover page of the policy clearly shows a policy amount of \$50,000.00.

5. Attached hereto as exhibit "2" is the complete policy which is the same policy in effect at the time of the accident except for the reduction in benefits from \$100,000.00 to \$50,000.00.

6. At the time of the accident, on November 9, 2006, the policy in effect was for a maximum benefit of \$100,000.00, however, as defendant well knows, the benefit payable for loss of sight in one eye is 50% of the maximum benefit as shown on page 3 of the policy attached hereto and therefore the most that the plaintiff could possibly recover under the policy is \$50,000.00.

7. Plaintiff has only claimed benefits under the policy for loss of vision in his left eye which benefits are limited to \$50,000.00 well under the requisite threshold of \$75,000.00 for removal under 28 U.S.C. § 1441.

8. Plaintiff cannot and will not make a claim for damages under the policy for more than \$50,000.00.

9. Federal courts are courts of limited jurisdiction. *Burns v. Windsor Insurance Co.*, 31 F.3d 1092, 1095 (11th Cir. 994). Because removal of a state court

action is only permissible when plaintiff's claims could have been filed in federal court originally, the Court must look to the plaintiff's complaint to determine if removal is appropriate. Id. Federal question jurisdiction can only arise from the allegations contained in the plaintiff's complaint. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392, 107 S.Ct. 2425, 2429 (1987). A case may be removed only when the plaintiff's statement of his own cause of action shows that it is based on federal law. *BLAB T.V. of Mobile, Inc. v. Comcast Cable Communications, Inc.*, 182 F.3d 851, 854 (11th Cir. 1999). The plaintiff is master of the claim and may prevent removal by choosing not to plead available federal claim. Id. Presence of a federal defense does not make case removable based on the presence of a federal question even if the defense is preemption and even if the validity of preemption defense is the only issue to be decided. Id. Defendant's right to removal and plaintiff's right to chose his forum do not stand on equal footing as removal statutes are construed narrowly; where plaintiff and defendant clash about jurisdiction, uncertainties should be resolved in favor of remand. *Burns v. Windsor, Ins. Co.*, supra at 1095.

10. In *Kirkland v. Midland Mortgage Co.*, 243 F.3d 1277 (11th Cir.2001) the court held that "[in] removal cases, the burden is on the party who sought removal to demonstrate that federal jurisdiction exists. Where the plaintiff has not plead a specific amount of damages ... the defendant is required to show ... by a preponderance of the evidence that the amount in controversy" can be satisfied. Id. At 1281 n.5

11. Plaintiff's affidavit is attached hereto which states that plaintiff cannot, will not and does not claim more than \$50,000.00 under the policy at issue.

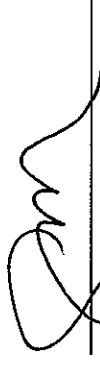
CONCLUSION:

Based on the foregoing there is no federal jurisdiction of this matter and this action therefore must be remanded to the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida. Also see: *Zahn v. International Paper Co.*, 414 U.S. 291 (1973); *Darden v. Ford Consumer Finance Company, Inc.*, 200 F.3d 753 (11th Cir. 2000).

The undersigned, prior to filing this motion the undersigned pursuant to local rule 7.1(3)(a) provided defendant's counsel a draft of this motion and through correspondence and telephone discussion attempted to resolve this matter extra judicially.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by regular mail on November 20, 2006 to: William J. Galloway, III, Shuits & Bowen, 1500 Miami Center, 201 South Biscayne Blvd., Miami, FL 33131.

GEOFFREY C. BURDICK, P.A.
1110 North Olive Avenue
West Palm Beach, FL 33401
(561) 655-9700 (fax) 833-8335
Attorneys for plaintiff


GEOFFREY C. BURDICK
Florida Bar No.: 353175