UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HUSSEIN AHMAD SLEIMAN,

Plaintiff,

Case Number 11-10694
Honorable David M. Lawson

v.

NATIONAL CASUALTY INSURANCE and ZURICH AMERICAN INSURANCE COMPANY,

Defendants.
_____/

ORDER REMANDING CASE

On February 21, 2011, defendant Zurich American Insurance Company (Zurich) removed this first-party no-fault-insurance case to this Court from the Wayne County, Michigan circuit court. Under Michigan's no fault insurance law, a covered person injured in a motor vehicle accident is entitled to recover from his insurance company (or an insurance carrier assigned priority by statute) "[a]llowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation"; "[w]ork loss consisting of loss of income from work an injured person would have performed during the first 3 years after the date of the accident"; and "[e]xpenses not exceeding $20.00 per day, reasonably incurred in obtaining" replacement services. Mich. Comp. Laws § 500.3107(1)(a)-(c). Based on the allegations in the complaint, the statements in the notice of removal, and discussions at the initial case management conference, it appears that at the time the notice of removal was filed, the plaintiff had not incurred expenses in the categories noted above that exceeded the $75,000-jurisdictional threshold prescribed by 28 U.S.C. § 1332(a). Therefore, on April 20, 2011, the Court

ordered the defendants to show cause why the case should not be remanded for want of subject matter jurisdiction for failure to meet the amount-in-controversy requirement.

Zurich responded, arguing that the amount in controversy is determined by the plaintiff's damages incurred prior to and including the date of the filing of his complaint, plus all damages to which the plaintiff is entitled as of the date of eventual judgment, plus those future damages that either defendant will become obligated to pay under their respective insurance contracts. However, Zurich acknowledged that at the time of removal, the plaintiff only had "approximately $30,000 in outstanding invoices . . . relating to the incident." Zurich's Resp. to Court's Mar. 17, 2011 Order Requiring Submission of Information Regarding Removal at 4.

Zurich is not entirely correct in arguing that the present cause of action encompasses all future damages that the defendants may be liable to pay under their insurance contracts. Under Michigan's No-Fault Act, an insurer is liable only for expenses that are reasonable, necessary, *and incurred*. *Nasser v. Auto Club Ins. Ass'n*, 435 Mich. 33, 50, 457 N.W.2d 637, 645 (1990). A plaintiff may continue to incur damages while his first-party lawsuit is pending and may recover those damages at trial; but the jury is not permitted to award future damages for first-party expenses because those damages would not have been "incurred." *See Manley v. Detroit Auto. Inter-Insurance Exchange*, 425 Mich. 140, 157, 388 N.W.2d 216, 223 (1986) (holding that a "no-fault insurer is required to pay only necessary allowable expenses actually incurred," and that a no-fault insurer is not obliged to pay for a future expense that the trial court declares to be both necessary and allowable until it is actually incurred). If the plaintiff incurs additional expenses thereafter and his insurance company refuses to pay, he must commence a new lawsuit for the newly-incurred expenses. *See Elser v. Auto-Owners Ins. Co.*, 253 Mich. App. 64, 68, 654 N.W.2d 99, 101 (2002).

The assessment of jurisdiction, on the other hand, must occur as of the time the case is removed. *Rogers v. Wal-Mart Stores, Inc.*, 230 F.3d 868, 871 (6th Cir. 2000) (stating that "[t]his circuit has recognized a rule that the determination of federal jurisdiction in a diversity case is made as of the time of removal" (citing *Ahearn v. Charter Twp. of Bloomfield*, 100 F.3d 451, 453 (6th Cir. 1996)). The defendants bear the burden of showing "by a preponderance of the evidence that the amount in controversy requirement has been met." *Hayes v. Equitable Energy Res. Co.*, 266 F.3d 560, 572 (6th Cir. 2001) (citing *Gafford v. Gen. Elec. Co.*, 997 F.2d 150, 158 (6th Cir. 1993), *abrogated on other grounds by Hertz Corp. v. Friend*, --- U.S. ----, 130 S. Ct. 1181 (2010)). The defendant must show that it is "more likely than not" that the plaintiff is seeking damages in excess of the $75,000 limit. *Gafford*, 997 F.2d at at 158. "'[A]ll doubts as to the propriety of removal are resolved in favor of remand.'" *Jacada (Europe), Ltd. v. Int'l Mktg. Strategies, Inc.*, 401 F.3d 701, 704 (6th Cir. 2005) (quoting *Coyne v. Am. Tobacco Co.*, 183 F.3d 488, 493 (6th Cir. 1999)), *abrogated on other grounds by Hall St. Assocs., L.L. C. v. Mattel, Inc.*, 552 U.S. 576 (2008).

Courts have permitted prospective damages to be considered in calculating the amount in controversy for jurisdictional purposes. *See White v. Loomis Armored US, Inc.*, 729 F. Supp. 2d 897, 902 (E.D. Mich. 2010) (citing cases). But such future damages generally are limited to those that "the plaintiff stands to recover by the time the case concludes." *Ibid.*

According to the complaint, the motor vehicle accident in this case occurred on July 20, 2010, yet by the time the case was removed the contested expenses amounted to little more than $30,000. The defendants have not pointed to any information that suggests that the plaintiff will incur an additional $45,000 in first-party benefits by the time of trial, which presently is scheduled for February 14, 2012. The expenses incurred thus far appear to involve diagnostic studies and

physical therapy. The claim submitted asks for "$1 for wage loss." Notice of Removal, Ex. D. The Court may not base its assessment of jurisdiction on speculation concerning future developments. *See Lowdermilk v. United States Bank Nat'l Ass'n*, 479 F.3d 994, 1002 (9th Cir. 2007). In his complaint in this case, the plaintiff has not sought a declaration concerning liability of the defendants for potential future liability for first-party damages yet to be incurred. The defendants have not convinced the Court that it is more likely than not that the amount in controversy exceeds $75,000, casting doubt on the Court's subject matter jurisdiction. Therefore, the Court must remand the case to state court. *See Eastman v. Marine Mech. Corp.*, 438 F.3d 544, 549-50 (6th Cir. 2006) ("[B]ecause lack of jurisdiction would make any decree in the case void and the continuation of the litigation in federal court futile, the removal statute should be strictly construed and all doubts resolved in favor of remand." (quoting *Brown v. Francis*, 75 F.3d 860, 864-65 (3d Cir. 1996))).

Accordingly, it is **ORDERED** that the case is **REMANDED** to the Wayne County, Michigan circuit court.

s/David M. Lawson
DAVID M. LAWSON
United States District Judge

Dated: June 1, 2011

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing order was served upon each attorney or party of record herein by electronic means or first class U.S. mail on June 1, 2011.

s/Deborah R. Tofil
DEBORAH R. TOFIL