

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

PETE LENNON and JUDITH DONNELLY : CIVIL ACTION
on behalf of themselves and :
others similarly situated :
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 :
 :
 v. :
 :
 BRIDGESTONE/FIRESTONE INC. :
and FORD MOTOR COMPANY : NO. 00-4469

M E M O R A N D U M

WALDMAN, J.

October 19, 2000

Plaintiffs Lennon and Donnelly filed this class action complaint in the Philadelphia Court of Common Pleas against defendants Bridgestone-Firestone Inc. ("Firestone") and Ford Motor Company ("Ford") on behalf of themselves and all persons who purchased Firestone ATX, ATX II and Wilderness AT tires or who purchased or leased Ford Explorer sport-utility vehicles equipped with such tires. Plaintiffs assert claims for breach of implied warranties and for violations of the Pennsylvania Unfair Trade Practices and Consumer Protection Law ("UTPCPL").

This is one of numerous state and federal class actions instituted since Firestone began a recall of its ATX, ATX II and Wilderness AT tires due to an apparent defect that caused the treads of the tires to peel off their casing, particularly in warmer climates. These tires were issued as a standard accessory by Ford in certain of its cars, including the Ford Explorer. Firestone is currently collaborating with officials at the

National Highway Traffic Safety Administration ("NHTSA") to coordinate the recall of the ATX, ATX II and Wilderness AT tires.

Plaintiffs allege that the tires are neither merchantable nor fit for the ordinary purpose for which they are intended, and that defendants engaged in "unfair methods of competition" and "unfair or deceptive acts or practices" in violation of UTPCPL by making affirmative misrepresentations about the tires or by concealing information that they knew or should have known regarding the defective nature of the tires.

Plaintiffs seek compensatory damages for the cost of replacing the defective tires, as well as punitive damages and attorney fees under the UTPCPL.¹ Plaintiffs also seek an injunction against future sales of these model tires and disgorgement of any profits from prior sales.

Defendants removed this case to this court predicated on original diversity and federal question jurisdiction. Presently before the court is plaintiffs' Motion to Remand. Diversity Jurisdiction

As the party seeking to establish jurisdiction, a removing defendant bears the burden of proving that there is complete diversity of citizenship between the respective parties

¹The UTPCPL authorizes an award of up to three times the actual damages sustained and such additional relief as the court deems proper. Such additional relief has been held to encompass reasonable attorney fees. See Hines v. Chrysler Corp., 971 F. Supp. 212 (E.D. Pa. 1997).

and that the amount in controversy exceeds \$75,000, exclusive of interest and costs. See Russ v. State Farm Mut. Auto. Ins. Co., 961 F. Supp. 808, 810 (E.D. Pa. 1997); Neff v. General Motors Corp., 163 F.R.D. 478, 480 (E.D. Pa. 1995). The removal statute is strictly construed to honor the congressional intent to restrict diversity litigation in the federal courts. See Meritcare Inc. v. St. Paul Mercury Ins. Co., 166 F.3d 214, 217 (3d Cir. 1999); Packard v. Provident Nat'l Bank, 994 F.2d 1039, 1044-45 (3d Cir. 1993). All doubts as to the existence of federal jurisdiction must be resolved in favor of remand. Id. at 1045; Neff, 163 F.R.D. at 481; Johnson v. Costco Wholesale, 1999 WL 740690, *1 (E.D. Pa. Sept. 22, 1999).

The parties do not dispute their diversity of citizenship. The issue is whether the amount in controversy exceeds \$75,000. If the claims of the named plaintiffs do not satisfy the amount in controversy requirement, the court lacks subject matter jurisdiction over a putative class action. See Sanderson, Thompson, Ratledge & Simny v. AWACS, Inc., 958 F. Supp. 947, 961-62 & n.6 (D. Del. 1997).

In calculating the amount in controversy, the separate claims of each class member cannot be aggregated to meet the jurisdictional amount. See Zahn v. Int'l Paper Co., 414 U.S. 291, 301 (1973); Meritcare, 166 F.3d at 218; Packard, 994 F.2d at 1045; Pierson v. Source Perrier, S.A., 848 F. Supp. 1186, 1188

(E.D. Pa. 1994).² In determining the amount in controversy, attorney's fees and punitive damages must be distributed pro rata to all class members. See Johnson v. Gerber Prods. Co., 949 F. Supp. 327, 329-30 (E.D. Pa. 1996)(attorneys' fees may not be aggregated); Pierson, 848 F. Supp. at 1189 (punitive damages may not be aggregated); McNamara v. Philip Morris Cos., Inc., 1999 WL 554592, *2 (E.D. Pa. July 7, 1999)(attorneys' fees must be apportioned pro rata); Floyd v. Liberty Mutual Fire Ins., 1996 WL 102322, *2 (E.D. Pa. March 5, 1996)(neither attorneys' fees nor punitive damages may be aggregated to satisfy jurisdictional amount).

The amount in controversy is determined from the complaint itself. See Angus v. Shiley, Inc., 989 F.2d 142, 145-46 (3d Cir. 1993). The amount in controversy in an unliquidated claim is measured by a reasonable reading of the value of the rights being litigated. Id. at 146. The removing defendant must show the value of the rights being litigated, including that of any punitive damages claim. McFadden v. State Farm Ins. Co., 1999 WL 715162, *4 (E.D. Pa. Sept. 13, 1999).³

²Putative class actions, prior to certification, are treated as class actions for jurisdictional purposes. See Packard, 994 F.2d at 1043 n.2; Garcia v. General Motors Corp., 910 F. Supp. 160, 163-64 (D.N.J. 1995).

³Courts have variously applied a preponderance of the evidence standard and a legal certainty or reasonable probability standard in assessing whether a removing defendant has shown the requisite amount in controversy. See International Fleet Auto Sales, Inc. v. National Auto Credit, 1999 WL 95258, *4 n.7 (E.D. Pa. Feb. 22, 1999). The resolution of plaintiffs' motion would be the same under each standard.

Defendants do not contend that plaintiffs' breach of warranty claims exceed the jurisdictional minimum. Defendants assert that plaintiffs' UTPCPL claim, however, exceeds the requisite amount in controversy. Defendants suggest that one must start at \$20,000, the value of each vehicle, then treble that amount to \$60,000 and then add at least \$15,000 more for further punitive damages and attorney fees.⁴ Defendants' arithmetic is dubious and certainly does not reflect a reasonable reading of the value of the claims at issue.

In arguing that the purchase price of a vehicle should be the baseline for determining the amount in controversy in a UTPCPL case involving a motor vehicle, defendants rely on Werwinski v. Ford Motor Co., Inc., 2000 WL 375260 (E.D. Pa. April 11, 2000). All of the cases relied upon by the court in that case, however, also had Lemon Law claims. Moreover, Werwinski and the cases cited therein involved claims that the vehicles themselves were inherently defective. In the instant case, plaintiffs seek damages related to the cost of replacing the defective tires. This is quite distinct from cases where defective engines or transmissions render the entire vehicle defective and unusable. A vehicle with defective windshield wipers is rendered too dangerous to operate on days with rain or

⁴The court assumes for purposes of this motion only that a plaintiff whose damages have been trebled under the UTPCPL may receive further punitive damages as part of "additional relief" deemed proper.

snow. Yet, surely damages would be based on the cost of wipers and not the cost of the vehicle. Even in Neff where the plaintiff alleged a defective brake system, the court looked to the replacement cost of \$4,000 in assessing the amount in controversy.

Defendants have not refuted plaintiffs' assertion that the cost of the tires at issue is no more than \$800 per set. Even assuming that it is \$1,000 and that this would be trebled to \$3,000, plaintiff and each class member would have to receive additional incidental and punitive damages and prorated attorney fees in an amount exceeding \$72,000 to satisfy the jurisdictional amount. The prospect of such an outcome is beyond remote. See, e.g., Meritcare, 166 F.3d at 222-223 (where claim for punitive damages comprises bulk of amount in controversy it should receive particularly close scrutiny); McFadden, 1999 WL 715162, at *4 (remanding case where majority of damages would have been punitive); Neff, 163 F.R.D. at 482-3 (applying rule regarding extravagant punitive damage claims to claims for attorney fees).

Defendants also contend that plaintiffs' prayer for disgorgement creates a common and undivided interest of a type which may permit aggregation. This contention has been persuasively rejected. See Pierson, 848 F. Supp. at 1189. See also Aetna U.S. Healthcare, Inc. v. Hoechst Aktiengesellschaft, 54 F. Supp. 2d 1042, 1050-51 (D. Kan. 1999). There is no suggestion by plaintiffs that they seek other than a

recovery by each class member of the profit realized on the sale of tires to that class member. Should the class prevail on the legal claims asserted, each member would recover an amount which necessarily included any profit and this amount is already reflected in the court's calculation of the amount in controversy.

Defendants similarly contend that the cost of their compliance with the injunctive relief plaintiffs seek should be considered part of the amount in controversy. That proposition has been rejected in this circuit. See Packard, 994 F.2d at 1050 ("[i]n a diversity-based class action seeking primarily money damages, allowing the amount in controversy to be measured by the defendant's cost would eviscerate [the rule] that claims of class members may not be aggregated in order to meet the jurisdictional threshold"); Pierson, 848 F. Supp. at 1189 ("the longstanding rule in this circuit is that, for purposes of determining the amount in controversy, the value of equitable relief must be determined from the viewpoint of the plaintiff rather than the defendant").⁵

Under any appropriate standard, defendants have failed to show that the amount in controversy in this case even

⁵It is quite unlikely that anyone aggrieved by the purchase of the model tires in question would again purchase those tires or a vehicle equipped with them without first requiring a substitution. There also is no allegation that either defendant is selling or is reasonably likely to sell the model tires in question in the wake of the recall.

approaches the jurisdictional threshold.

Federal Question Jurisdiction

Defendants maintain that this court has jurisdiction over plaintiffs' claims based upon the doctrine of preemption. They contend that the National Traffic and Motor Vehicle Safety Act ("MVSA") together with NHSTA regulations preempt plaintiffs' state law claims because plaintiffs' claims may interfere with the NHSTA-supervised recall.

The general rule for determining the existence of federal question jurisdiction is whether or not a federal question is presented on the face of a plaintiff's well-pleaded complaint. See Caterpillar, Inc. v. Williams, 482 U.S. 386, 392 (1987). A case may not be removed to federal court on the ground that the complaint gives rise to a defense under federal law. See id. There is a corollary to the well-pleaded complaint rule. It is the complete preemption doctrine. See Metropolitan Life Insurance Co. v. Taylor, 481 U.S. 58 (1987). The doctrine is applicable when Congress "so completely pre-empt[s]" an area of law such "that any civil complaint raising this select group of claims is necessarily federal in character." Id. at 63-64. In the absence of clear evidence of an actual conflict between the state law at issue and federal legislative policy or congressional intent to preempt an entire field, a formal statement of agency preemptive intent must exist before complete preemption can be invoked. See Geier v. American Honda Motor

Co., Inc., 120 S. Ct. 1913, 1927 (2000); Pokorny v. Ford Motor Co., 902 F.2d 1116, 1119, 1122-23 (3d Cir. 1990).

Plaintiffs' complaint clearly presents no federal question on its face, and defendants do not argue otherwise. Defendants do not cite to any express statement of legislative preemptive intent in this area. In support of their preemption argument they cite to legislative history of the MVSA that expresses an intent to place responsibility for regulating the automotive industry upon the federal government. The cited history actually states that "primary" responsibility should lie with the federal government. See S.R. No. 1301 (1966), reprinted in 1966 U.S.C.C.A.N. 2709, 2712.

Defendants do not and cannot reasonably argue that the MVSA or NHSTA regulations preempt all state law claims concerning automobile defects. Safety and uniformity was the primary objective of Congress in passing the MVSA. The preservation of common law liability furthers this objective. See Pokorny, 902 F.2d at 1122.

Defendants also point to regulations concerning the conduct of recalls by manufacturers. Even assuming that federal law preempts any state law governing recalls, there is no showing that compensating plaintiffs for misrepresentation or breach of warranty conflicts with a NHTSA monitored, voluntary recall.⁶

⁶Insofar as defendants argue that state suits may frustrate the recall, the same would be true of federal court litigation.

That relief in the civil action may, as defendant posits, encompass more tires or be more extensive than the current voluntary recall does not constitute a conflict. There has been no showing that the MVSA or any NHTSA regulation expressly or impliedly preempt plaintiffs' state law claims.

Consistent with the foregoing, the court concludes that there is no original subject matter or removal jurisdiction. Accordingly, plaintiffs' motion will be granted and this case will be remanded to the state court. An appropriate order will be entered.

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O R D E R

AND NOW, this day of October, 2000, upon
consideration of plaintiffs' Motion to Remand and defendant's
response thereto, consistent with the accompanying memorandum, IT
IS HEREBY ORDERED that said Motion is **GRANTED** and, pursuant to 28
U.S.C. § 1447(c), the above action is **REMANDED** forthwith to the
Court of Common Pleas of Philadelphia.

BY THE COURT:

JAY C. WALDMAN, J.