

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

LAWRENCE E. FELDMAN : CIVIL ACTION
and ROBYN FELDMAN :
 :
v. :
 :
NEW YORK LIFE INSURANCE COMPANY : NO. 97-4684

MEMORANDUM AND ORDER

HUTTON, J.

March 4, 1998

Presently before the Court are the Defendant's Notice of Removal (Docket No. 1), the Plaintiffs' Motion to Remand (Docket No. 4), the Defendant's Response (Docket No. 5), and the Plaintiffs' Reply (Docket No. 6). For the foregoing reasons, the Motion to Remand is denied.

I. BACKGROUND

In this action, Plaintiffs Lawrence and Robyn Feldman sue their insurer, the New York Life Insurance Company, under Pennsylvania law for churning, breach of contract, fraud, and violating the Pennsylvania Unfair Trade Practice and Consumer Protection Act, 73 Pa. Cons. Stat. Ann. § 201-1 (1997). Originally, the Feldmans were members of the plaintiff class in Willson v. New York Life Insurance Company, No. 94/127804, a class action lawsuit filed in the Supreme Court of the State of New York. However, on October 30, 1995, as the case approached settlement, the Feldmans notified the Willson court that they wished to opt out of the class action settlement in order to pursue their own claim

in Pennsylvania state court.

The Feldmans commenced the present action on May 5, 1997 by filing Praecipe to Issue Writ of Summons in the Court of Common Pleas of Philadelphia County, and filed their Complaint on June 18, 1997. According to the Complaint, the Feldmans are residents of Montgomery County, Pennsylvania, and the Defendant is a corporation organized under the laws of New York and headquartered in New York City. In the 1980's, the Feldmans purchased from agents of the Defendant paid-up whole life and universal life insurance policies with a total face value of \$360,000.00. They now claim that the insurance agents induced them to surrender these policies in exchange for a new financial product, known as a Premium Offset Proposal ("POP"), by misrepresenting the POP product's nature and benefits. According to the Complaint:

Plaintiffs were told by New York Life's agents as well as the illustrations used during the sale of these policies that the purchase of new whole life policies would entail making annual premium payments for a fixed number of years (typically between eight and ten years) and then, thereafter, no additional premiums would have to be paid on the policy because the policy would "POP" and thereafter pay for itself.

(Pl.'s Compl. at ¶ 12). But instead of making the premium payments for eight to ten years, the Defendant suggested that the Feldmans prepay the POP policy in one lump sum. It represented that

by surrendering or borrowing against their current policies and using proceeds therefrom, to make one lump sum prepayment of premiums, they would receive a new product with higher and increasing death benefits, cash values,

surrender values and lifetime income, and that [the Feldmans] would never have to make an additional premium payment.

(Id. at ¶ 13). In reliance upon these representations, the Feldmans used their existing policies to finance the lump-sum purchase of the paid-up POP product. However, the Defendant later notified them that contrary to the sales agent's representations, they would have to make additional premium payments in order to keep the policy in force.

In their Complaint, the Feldmans claim that the Defendant misrepresented the number of out-of-pocket premium payments they would have to make and the nature of the product being sold. They also charge the Defendant with misleading them as to the benefits of applying their existing policies to purchase the POP product, and failing to disclose its agents' interest in causing policyholders to enter additional commission-generating transactions. As a result of this conduct, the Feldmans state, they

face the prospect of losing thousands of dollars in death benefits, cash values, surrender values, and lifetime income due to their inability or unwillingness to pay additional premiums on policies they were told would require no future premium payments. Plaintiffs have now become uninsurable or will be unable to obtain additional insurance on their life for the benefit of their family and their estate.

(Id. at ¶ 17).¹ Accordingly, they filed the present action in

¹ It is not evident from the Complaint whether the Feldmans have continued to make the premium payments to keep the policy in effect. Count II states:

Pennsylvania state court, seeking unspecified compensatory and punitive damages "not to exceed \$75,000" and the imposition of a constructive trust to secure an eventual judgment. (Id. at ¶ 44).

On July 18, 1997, the Defendant timely removed the action to this Court by filing Notice of Removal pursuant to 28 U.S.C. §§ 1441 and 1446. As the Complaint raises no federal question, the Defendant premised jurisdiction upon diversity of citizenship under 28 U.S.C. § 1332(a)(1) (1997).

II. DISCUSSION

A. Standard for Motion to Remand

In general, a defendant may remove a civil action filed in state court if the federal court would have had original jurisdiction to hear the matter. 28 U.S.C. § 1441(b) (1997); see Boyer v. Snap-On Tools Corp., 913 F.2d 108, 111 (3d Cir. 1990). Once the case has been removed, however, the federal court may remand if there has been a procedural defect in removal, or if the court determines that it lacks federal subject matter jurisdiction to hear the case. 28 U.S.C. § 1447(c) (1997); see Township of Whitehall v. Allentown Auto Auction, 966 F. Supp. 385, 386 (E.D.Pa.

The plaintiffs have had their various policies canceled due to their inability or unwillingness to pay additional premiums beyond the original term agreed to between the plaintiffs and defendant. Alternatively, the plaintiffs have been compelled to continue to make premium payments, which they could not afford, due to their uninsureability, age or other factors.

(Id. at ¶ 27). Although the Complaint later asks the Court to impose a constructive trust upon additional premiums paid to prevent the policy from lapsing, (Id. at ¶ 41), implying that such payments have been made, the Court must assume there is at least some risk that the policy will be canceled.

1997). Upon a motion to remand, it is always the moving party's burden to establish the propriety of removal, and all doubts as to the existence of federal jurisdiction must be resolved in favor of remand. See Batoff v. State Farm Ins. Co., 977 F.2d 848, 851 (3d Cir. 1992); Independent Mach. Co. v. International Tray Pads & Packaging, Inc., 1998 WL 35002, *2 (D.N.J. January 5, 1998).

In their Motion, the Feldmans argue that because their Complaint explicitly calls for damages less than \$75,000.00, the case should be remanded for failure to meet the requirements of federal diversity jurisdiction. Before the Court can address this issue, however, it must first address the Defendant's argument that the Motion was untimely.

B. Timeliness

28 U.S.C. §§ 1446 and 1447 set forth the procedure for removal and remand. Under § 1447(c):

A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.

Case law confirms that the thirty day limit applies only to a motion based on a failure to follow the procedural requirements of § 1446, as opposed to a fundamental jurisdictional defect. See Whitehall, 966 F. Supp. at 386 ("Clearly, the thirty day time limit exists only for procedural defects, and we may remand for lack of

subject matter jurisdiction at any time.”).

The Defendant correctly points out that the Feldmans filed their Motion to Remand thirty-two days after it filed its Notice of Removal. However, the thirty day requirement is inapplicable to the Feldmans’ motion, because the motion goes to the existence of federal diversity jurisdiction. See id. Therefore, the Feldmans’ motion is timely, and the Court may proceed to consider its substance.

C. Diversity Jurisdiction

The Defendant’s Notice of Removal invokes the Court’s diversity jurisdiction. See 28 U.S.C. § 1332(a) (1997). To meet the diversity statute’s requirements, the party seeking to establish jurisdiction must show that there is complete diversity between the parties and that the amount in controversy exceeds \$75,000, exclusive of interest and costs. See id.; Angus v. Shiley, Inc., 989 F.2d 142, 145 (3d Cir. 1993). Here, the parties do not dispute their diversity of citizenship, so the Court will proceed to the real issues: (1) whether the amount in controversy really exceeds \$75,000; and (2) whether by artful pleading alone the Feldmans may defeat the Defendant’s statutory right to remove this case to federal court.

In the context of a motion to remand, the defendant bears the burden of proving that the amount in controversy exceeds \$75,000, exclusive of interest and costs. See id. at 145. Although the Third Circuit has not spoken as to the precise standard of proof,

in a recent case Judge Reed of this Court found that the defendant must prove the amount in controversy by a preponderance of the evidence. See Mercante v. Preston Trucking Company, Inc., 1997 WL 230826, *2 (E.D.Pa. May 1, 1997) (analyzing the circuit split and arriving at the preponderance standard).

In considering whether the defendant has made its proof, the Court must determine the amount in controversy from the complaint itself. See Angus, 989 F.2d at 145-46. The Court must make an independent appraisal of the claim, see Corwin Jeep Sales & Service, Inc. v. American Motors Sales Corp., 670 F. Supp. 591, 596 (M.D.Pa. 1986), and, after a generous reading of the complaint, arrive at the reasonable value of the rights being litigated, see Angus 989 F.2d at 146. This appraisal must include not only the reasonable value of potential compensatory damages, but the value of potential punitive damages as well. See Bell v. Preferred Life Assur. Soc. of Montgomery, 320 U.S. 238, 242-43 (1943) (evaluating potential punitive damages in amount in controversy inquiry); Angus at 145-46 (evaluating punitive damages claimed in complaint); In re Orthopedic Bone Screw Products Liability Litigation, 1997 WL 640771, *8 (E.D.Pa. October 17, 1997). "[A] plaintiff may not defeat removal simply by characterizing a case as involving equitable claims rather than damages, or by seeking less than the requisite amount in controversy when the court is informed that the value of the interest to be protected exceeds that amount." Corwin, 670 F. Supp. at 596.

In this case, the Feldmans claim that they were induced to

surrender insurance policies with a total face value of \$360,000, and paid additional unspecified amounts to keep their POP policy in effect after the transaction. Although they argue that the actual premiums paid were less than the face value of the policies exchanged, the Feldmans also state that as a consequence of the disputed events their policies may be canceled entirely, and that they themselves may be uninsurable. This places the full value of the Feldmans' insurance in dispute. Furthermore, the Feldmans seek punitive damages, to which they may be entitled if they convince a jury that the Defendant acted outrageously. See, e.g., Dean Witter Reynolds, Inc. v. Genteel, 499 A.2d 637, 642-43 (Pa. 1985) (upholding award of punitive damages in financial fraud case). And, despite the Feldmans' argument that disproportional punitive damages would be unconstitutional under BMW of North America, Inc. v. Gore, 116 S.Ct. 1589, 1598 (1996), the jurisdictional calculation "cannot be decided on the assumption that a verdict, if rendered for that amount, would be excessive and set aside for that reason,--a statement which could not, at any rate, be judicially made before such a verdict was in fact rendered." Bell, 320 U.S. at 243. Considering the above, the Court finds by a preponderance of the evidence that the value of the Feldmans' claim reasonably exceeds \$75,000.²

Finally, although the Feldmans state in the ad damnum clause

² The Court notes that the Feldmans' final Count--that seeking the imposition of a constructive trust--could alone be the basis for diversity jurisdiction if the value of the rights to be impounded appear to exceed \$75,000. See Corwin, 670 F. Supp. at 596 (finding jurisdictional amount met by reasonable value of equitable relief).

that their damages do not exceed \$75,000, inclusive of punitive damages, the Court finds that they cannot employ this approach to manipulate federal jurisdiction and defeat the Defendant's statutory right of removal. While the Third Circuit has yet to pronounce on this precise issue, other circuits offer the Court some guidance. In De Aguilar v. Boeing Co., 47 F.3d 1404, 1409-10 (5th Cir. 1995), the Fifth Circuit rejected a plaintiff class' attempts to avoid federal jurisdiction by pleading an amount in controversy "not to exceed" the then \$50,000.00 jurisdictional amount, finding that the pleading was made in bad faith. Noting that most states now have rules of civil procedure that permit a plaintiff to amend his pleadings as to damages at any time in the litigation, or receive whatever damages a jury determines regardless of the amount claimed, the Court stated:

These new rules have created the potential for abusive manipulation by plaintiffs, who may plead for damages below the jurisdictional amount in state court with the knowledge that the claim is actually worth more, but also with the knowledge that they may be able to evade federal jurisdiction by virtue of the pleading. Such manipulation is surely characterized as bad faith.

Id. at 1410. District courts in the Fourth and Ninth Circuits have also arrived at the position that a plaintiff cannot defeat removal with an ad damnum clause alone--at least in states where a plaintiff can amend the pleadings to conform with a final judgment. See Adkins v. Gibson, 906 F. Supp. 345, 348 (S.D.W.Va. 1995); Dunn v. Pepsi-Cola Metro. Bottling Co., 850 F. Supp. 853, 855 (N.D.Cal. 1994). However, in Burns v. Windsor Ins. Co., 31 F.3d 1092, 1096

(11th Cir. 1994), the Eleventh Circuit found that a plaintiff could avoid federal jurisdiction in this way unless the defendant could prove that "if plaintiff prevails on liability, an award below the jurisdictional amount would be outside the range of permissible awards because the case is clearly worth more than [the jurisdictional amount]."

Although the Third Circuit has not yet addressed the precise issue, this Court finds that the Feldmans cannot defeat the Defendant's right of removal by their ad damnum clause alone. The Feldmans' pleading tactic finds its intellectual origins in the Supreme Court's 1938 opinion in St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 288 (1938). In St. Paul Mercury, the Court held that once a defendant properly removed a case to federal court, the plaintiff could not defeat diversity jurisdiction by subsequently stipulating to an amount in controversy less than the jurisdictional amount. In rendering its decision, the Court stated:

We think this well established rule is supported by ample reason. If the plaintiff could, no matter how bona fide his original claim in the state court, reduce the amount of his demand to defeat federal jurisdiction the defendant's supposed statutory right of removal would be subject to the plaintiff's caprice. The claim, whether well or ill founded in fact, fixes the right of the defendant to remove, and the plaintiff ought not be able to defeat that right and bring the cause back to the state court at his election. If he does not desire to try his case in federal court he may resort to the expedient of suing for less than the jurisdictional amount, and though he would be justly entitled to more, the defendant cannot remove.

Id. It is upon this last sentence--where the Supreme Court suggested that a state plaintiff could avoid federal jurisdiction by limiting his damage request--that the Feldmans ultimately rely.

Although the last sentence would appear to endorse the Feldmans' artful pleading, a more critical inquiry demonstrates the opposite. This is because the St. Paul Mercury Court spoke at a time when few or no state courts permitted amendment of pleadings to conform with a final judgment, and a plaintiff who voluntarily limited the amount in controversy would have been limited in fact to the amount plead. See Burns, 31 F.3d at 1096 n.6 (noting that St. Paul Mercury predated the new civil procedure rules). As noted above, however, most states--including Pennsylvania--now have procedural rules that permit a plaintiff to receive whatever amount of damages justice requires, rendering such self-limitation a mere formality of pleading. See Pa. Ct. C.P.R. 1021 & 1033. This change in law entirely undercuts the sacrifice that the St. Paul Mercury Court assumed a plaintiff would need to make if he wished to defeat the defendant's right of removal. Treating the last quoted sentence as continuing authority for the Feldmans' maneuver would contravene the St. Paul Mercury case's more general holding that a plaintiff should not be able to defeat the defendant's statutory right of removal at his caprice. Read in light of these developments in law, the Court finds that the St. Paul Mercury case calls for a rejection of the Feldmans' approach to pleading.

The Third Circuit suggested that it would take this approach in Angus, 989 F.2d at 146 n.4. In Angus, a Pennsylvania plaintiff

sued an out-of-state defendant in state court seeking unspecified quantities of compensatory damages "in excess of" \$20,000 and punitive damages "in excess of" \$20,000. The defendant removed the case, asserting that the claim was in fact for more than the jurisdictional amount of \$50,000. The district court agreed and retained jurisdiction. Taking a generous reading of the plaintiff's complaint, the Third Circuit agreed. See id. at 146.

In reaching its decision, however, the Court carefully noted that the plaintiff had not placed an upper limit upon her request for damages. See id. In a footnote, the Court recognized that a situation such as the one now before this Court would present a different legal issue. However, the Court noted: "It is possible that the determination of whether remand would be appropriate when damages of \$50,000 or less are demanded would depend in part on whether under state law the plaintiff is limited to the damages claimed." Id. Although this is hardly a definitive source of law, it indicates that the Third Circuit has rejected the position of one influential treatise that the impact of state rules of civil procedure is, and should be, irrelevant. See 14A Charles A. Wright, Arthur R. Miller, et al., Federal Practice and Procedure § 3725, at 425-27 (2d ed. 1985). If the rules of procedure are relevant, they can only be relevant in the sense in which the Fifth Circuit was concerned in De Aguilar, 47 F.3d at 1410. This Court is convinced that the Third Circuit would agree with the Fifth that

a plaintiff cannot defeat otherwise valid diversity jurisdiction by manipulating the ad damnum clause alone.

Finally, in Mercante, 1997 WL 230826, *3, Judge Reed of this Court found that the amount in controversy exceeded the jurisdictional amount of \$50,000 although the complaint specifically plead damages "not in excess of \$50,000." The Court applied Corwin Jeep, 670 F. Supp. at 596, to find from the complaint itself that the reasonable value of the claim exceeded \$50,000.

Given the above, the Court finds that where an independent appraisal of a plaintiff's claim suggests that the amount in controversy is really greater than the jurisdictional amount, and the relevant state law does not limit a plaintiff to the amount of damages claimed, the plaintiff cannot defeat a defendant's statutory right of removal merely by pleading damages "not in excess of" the jurisdictional amount. Because the Court so finds in this case, it will not remand the Feldmans' case. But even if the Third Circuit should later take the opposite position, the Court finds that--particularly when potential punitive damages are considered--the reasonable value of the claim exceeds \$75,000, and that the Feldmans plead their ad damnum clause in bad faith to manipulate jurisdiction. See De Aquilar, 47 F.3d at 1410-11.

An appropriate Order follows.

