UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 08-62000-CIV-ZLOCH

MARTHA and THEODORE J. GETSEE, JR.,

Plaintiff,

vs.

LIBERTY MUTUAL FIRE INSURANCE COMPANY,

Defendant.
_______________________________________/

LIBERTY MUTUAL'S RESPONSE IN OPPOSITION
TO PLAINTIFF'S MOTION FOR REMAND

Defendant, Liberty Mutual Fire Insurance Company ("Liberty Mutual"), by and through its undersigned counsel, hereby responds in opposition to Plaintiff's Motion for Remand, as follows:

I. THE AMOUNT IN CONTROVERSY EXCEEDS THE JURISDICTIONAL THRESHOLD FOR DIVERSITY JURISDICTION

Under 28 U.S.C. § 1332, this Court has jurisdiction over cases between citizens of different states where the amount in controversy exceeds $75,000. In the instant matter, there is no dispute that the parties have diverse citizenship. The only dispute, and the only basis for Plaintiffs' Motion for Remand, is Plaintiffs' argument that the amount in controversy does not exceed $75,000. Plaintiffs, however, are incorrect.

A. Liberty Mutual Need Establish Only that it is More Likely than Not that the Jurisdictional Threshold is Exceeded

As an initial matter, while Liberty Mutual bears the burden of establishing federal court jurisdiction, its burden is relatively low. Where a plaintiff affirmatively alleges that the amount in controversy is less than $75,000, then the defendant must prove to a legal certainty that the minimum amount in controversy exists. See Burns v. Windsor Ins. Co., 31 F.3d 1092, 1093 (11th Cir. 1994). Where a plaintiff pleads an unspecified amount of damages, however, then a defendant need only establish, by a preponderance of the evidence, that the total amount in controversy more likely than not exceeds the jurisdictional threshold. See Williams v. Best Buy Co., 269 F.3d 1316, 1319 (11th Cir. 2001). In the instant case, Plaintiffs have alleged only an unspecified amount of damages, and thus, Liberty Mutual's burden is the lower standard of "more likely than not."

B. It is More Likely than Not that the Amount in Controversy Exceeds $75,000

This case involves Plaintiffs' allegations that Liberty Mutual acted in bad faith with respect to the manner in which Liberty Mutual handled Plaintiff's property damage insurance claim. Specifically, Plaintiffs allege that their home was damaged by an accidental discharge of water, that they submitted a claim for property damage benefits under their policy, and that Liberty Mutual improperly delayed paying benefits that were owed.

As cited in Liberty Mutual's Notice of Removal, the amount in controversy in this litigation is comprised of several components – (1) unspecified actual and compensatory damages that exceed $15,000; (2) expenses related to the public adjuster that Plaintiffs allegedly retained for purposes of the insurance claim; (3) attorney fees and costs in the instant bad faith litigation; (4) post-judgment and pre-judgment interest; (5) disgorgement of "all unlawful or illegitimate monies Defendant profited by its bad faith claims handling practices" that were caused as a result of Liberty Mutual's alleged general business practice of acting willfully, wantonly, maliciously and/or in reckless disregard for the rights of its insureds; and (6) punitive damages. See Complaint at ¶¶ 1, 14, 36, 37, 46, 49, 50, Wherefore Clause.

Should Plaintiffs prevail, they would automatically be entitled to an award of reasonable attorney fees pursuant to Fla. Stat. § 627.428. Attorney fees that are awardable pursuant to a statute are properly considered in determining the amount in controversy. See, e.g., Morrison v. Allstate Indem. Co., 228 F.3d 1255, 1265 (11th Cir. 2000); Cohen v. Office Depot, Inc., 204 F.3d 1069, 1079 (11th Cir. 2000). Although Plaintiffs state that the attorney fees to date are no more than $3800, Plaintiffs have not limited themselves to recovering only that amount, nor would they be limited to that amount should they prevail after additional attorneys fees are incurred. Given the complex nature of bad faith lawsuits and the sweeping claims asserted by Plaintiffs, and this Court's expertise in assessing attorney fees, it is highly likely that tens of thousands of dollars in attorney fees will be incurred and subject to recovery should Plaintiffs prevail.

Most significantly, Plaintiffs have asserted a claim for punitive damages in conjunction with their cause of action for bad faith. Under Eleventh Circuit law, punitive damages must be considered in determining the amount in controversy unless it is apparent to a legal certainty that such damages cannot be recovered, and the jurisdictional threshold for the amount in controversy will be satisfied if it possible for a jury to award that amount in punitive damages. See, e.g., Ryan v. State Farm Mut. Auto. Ins. Co., 934 F.2d 276, 277 (11th Cir. 1991); Holley Equip. Co. v. Credit Alliance Corp., 821 F.2d 1531, 1535 (11th Cir. 1987). In accordance with the Eleventh Circuit case law, the Southern District has held that a claim seeking punitive damages can be the trigger to satisfy the jurisdictional threshold where the compensatory damages do not exceed that amount. See Pease v. Medtronic, Inc., 6 F. Supp. 2d 1354 (S.D. Fla. 1998); Tetzeli v. Liberty Mutual Ins. Co., Case No. 05-23071 (S.D. Fla. 2006) (attached hereto as Exhibit A) (where complaint sought $20,000 in compensatory damages, statutory attorney fees and unspecified punitive damages, existence of unspecified punitive damage claim was sufficient to exceed the $75,000 jurisdictional threshold).

In an effort to avoid the binding Eleventh Circuit case law holding that a punitive damage claim can be sufficient to satisfy the amount-in-controversy requirement, Plaintiffs argue that they have not asserted a punitive damage claim, but instead, only potentially have a punitive damages claim. Therefore, according to Plaintiffs, no claim for punitive damages can be considered when determining the amount in controversy. Such an argument, however, is directly contrary to their own complaint. In the "Wherefore" clause of the complaint, Plaintiffs specifically request an award of punitive damages. The complaint does not state that Plaintiffs may seek an award of punitive damages in the future, but instead, the complaint clearly includes a request for punitive damages in addition to the other categories of damages. Therefore, any argument that the complaint does not seek an award of punitive damages is incorrect.

Perhaps realizing that such an argument is incompatible with the complaint itself, Plaintiffs also argue that any claim for punitive damages cannot be considered because the Florida state court system does not permit a claim for punitive damages until a plaintiff has established an evidentiary basis for asserting such a claim, pursuant to Fla. Stat. § 768.72. While Plaintiffs are correct that in the Florida state court system such a punitive damage claim would be premature and improper, the same restriction does not apply in the federal court system. As Plaintiffs themselves note in the motion for remand, the punitive damage statute is procedural in nature, and thus, it does not apply in federal court, where punitive damage claims can be asserted in the initial complaint. See Motion for Remand at p. 11, n.1. Thus, because: (1) Plaintiffs have specifically requested punitive damages; (2) such a claim is procedurally proper in the federal forum; and (3) it is not "apparent to a legal certainty that such damages cannot be recovered;" the punitive damage claim must be considered when determining the amount in controversy. Because "it is possible for a jury to award" at least $75,000[1] in punitive damages to Plaintiffs, see Fla. Stat. § 624.155(5) (permitting punitive damage claim in insurer bad faith cases); Fla. Stat. § 768.73 (general cap on punitive damages is greater of three times compensatory damages or $500,000), the amount in controversy exceeds the amount necessary to confer jurisdiction in federal court. See Pease, 6 F. Supp. 2d at 1356-58 (although compensatory damage claim may not have exceeded jurisdiction threshold, inclusion of unspecified punitive damage claim was sufficient to exceed jurisdictional threshold); Tetzeli (same).[2]

In sum, given the amount of compensatory damages that Plaintiffs have claimed, the claim for attorney fees in this complex bad faith case, and the pending punitive damage claim, it is more likely than not that the amount in controversy exceeds $75,000. Therefore, this Court has jurisdiction, and the motion for remand should be denied.

II. IF THIS COURT REMANDS THE CASE TO STATE COURT, PLAINTIFFS ARE NOT ENTITLED TO AN AWARD OF ATTORNEY FEES

In the event that the Court remands this case to state court (which it should not, for the reasons set forth above), Plaintiffs have requested that they be awarded attorney fees pursuant to 28 U.S.C. § 1447(c). Such a request is unsupported by the law or the facts of this case.

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[1] This $75,000 figure ignores all other damages at issue. When factoring in the unspecified $15,000+ claimed damages plus attorney fees, the amount of punitive damages that would be necessary to confer jurisdiction is even less.

[2] Moreover, Plaintiffs have failed to affirmatively allege that they are not seeking more than $75,000 in damages. Compare Federated Mut. Ins. Co. v. McKinnon Motors, LLC, 329 F.3d 805 (11th Cir. 2003) (litigation remanded to state court where plaintiff affirmatively represented that it would not accept more than $74,000 in damages). Although Plaintiffs are not required to make such an affirmative representation, the fact that they have not done so (despite two opportunities to do so) only highlights the fact that the amount in controversy satisfies the jurisdictional threshold. Plaintiffs' sole attempt at limiting the amount of the claim is a statement in the motion for remand that "all known actual incurred compensatory extra contractual damages are less than $75,001." Such a limited, qualified statement, however, does not address the claim for fees, the pending punitive damage claim or other damages that Plaintiffs are seeking that fall outside the scope of the qualified statement, and does not affirmatively state that Plaintiffs will not accept more than $75,000 in damages.

The United States Supreme Court recently clarified the standard to be used when determining whether to award attorney fees pursuant to 28 U.S.C. § 1447(c) for an improper removal. See Martin v. Franklin Capital Corp., 126 S. Ct. 704 (2005). Under the holding in Martin, "absent unusual circumstances, courts may award attorney's fees under § 1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal. Conversely, when an objectively reasonable basis exists, fees should be denied." Id. at 711. The Court was clear that there is no automatic entitlement to attorney fees, nor is there even a presumption in favor of awarding fees. Id. at 709-10.

This Court, and federal courts across Florida, have equated "objectively reasonable basis" with a defendant's removal where there is some basis in the law for the defendant's arguments and there is no binding Eleventh Circuit law to the contrary. See, e.g., Kennedy v. Health Options, Inc., 329 F. Supp. 2d 1314, 1319 (S.D. Fla. 2004); Diebel v. S.B. Trucking Co., 262 F. Supp. 2d 1319, 1333-34 (M.D. Fla. 2003); Smith v. Health Center of Lake City, Inc., 252 F. Supp. 2d 1336, 1346 (M.D. Fla. 2003). See also Signer v. DHL Worldwide Express, Inc., 2007 WL 1521497 (S.D. Fla. 2007) (no attorney fees awarded despite improper removal); Doe v. FIU Bd. of Trustees, 464 F. Supp. 2d 1259 (S.D. Fla. 2006) (same); Lutz v. Protective Life Ins. Co., 328 F. Supp. 2d 1350 (S.D. Fla. 2004) (same). Compare Letner v. UNUM Life Ins. Co. of Am., 203 F. Supp. 2d 1291, 1302 (N.D. Fla. 2001) (attorney fees awarded for improper removal where case was removed "without a scintilla of legitimate evidence that would support the exercise of federal jurisdiction").

In this case, Liberty Mutual had an objectively reasonable basis for removal. As cited in its Notice of Removal, and as explained above, the amount in controversy is comprised of several components – (1) unspecified actual and compensatory damages that exceed $15,000; (2)

expenses related to the public adjuster that Plaintiffs allegedly retained for purposes of the insurance claim; (3) attorney fees and costs in the instant bad faith litigation; (4) post-judgment and pre-judgment interest; (5) disgorgement of "all unlawful or illegitimate monies Defendant profited by its bad faith claims handling practices" that were caused as a result of Liberty Mutual's alleged general business practice of acting willfully, wantonly, maliciously and/or in reckless disregard for the rights of its insureds; and (6) punitive damages. See Complaint at ¶¶ 1, 14, 36, 37, 46, 49, 50, Wherefore Clause. Eleventh Circuit law is clear that these components can be included when calculating the amount in controversy. See, e.g., Morrison v. Allstate Indem. Co., 228 F.3d 1255, 1265 (11th Cir. 2000) (statutory attorney fees are included when calculating the amount in controversy); Ryan v. State Farm Mut. Auto. Ins. Co., 934 F.2d 276, 277 (11th Cir. 1991) (punitive damages are included when calculating the amount in controversy). Therefore, Liberty Mutual undoubtedly had legal and factual support for its arguments, and there is no binding Eleventh Circuit law to the contrary. As a result, because Liberty Mutual had an objectively reasonable basis for removal, Plaintiffs are not entitled to an award of attorney fees pursuant to 28 U.S.C. § 1447(c) in the event that this Court remands this case to state court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of January, 2009, a true and correct copy of the foregoing was filed with the Court's CM/ECF system, which shall send a notice of electronic filing to: **David J. Pettinato, Esq.**, Merlin Law Group, 777 South Harbor Island Blvd., Suite 950, Tampa, FL 33602.

s/ Gary J. Guzzi
Attorney