

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

KEITH P. DEVIT,	:	
Plaintiff,	:	CIVIL ACTION NO.
v.	:	3-02-CV-270 (JCH)
	:	
CONTINENTAL GENERAL	:	
INSURANCE COMPANY	:	
Defendant.	:	APRIL 12, 2002

RULING ON MOTION TO REMAND [DKT. NO. 22]

On February 14, 2002, the defendant, Continental General Insurance Company (“Continental”), removed this case to federal court on the basis of diversity jurisdiction. On February 22, 2002, the plaintiff, Keith Devit (“Devit”), filed an objection to removal, but no motion to remand. Based on Devit’s representations in the objection, the court ordered Continental to show cause why this case should not be remanded to state court. On March 11, 2002, Devit filed a motion to remand. On March 20, 2002, Continental filed its response to the court’s order and the plaintiff’s motion to remand. The court now addresses whether the plaintiff’s claim satisfies the amount in controversy required for diversity jurisdiction in federal court.

Federal courts have subject matter jurisdiction based on diversity of citizenship if the suit is between citizens of different states and “the matter in

controversy exceeds the sum or value of \$75,000, exclusive of interest and costs.”

28 U.S.C. § 1332(a). “A party invoking the jurisdiction of the federal court has the burden of proving that it appears to a ‘reasonable probability’ that the claim is in excess of the statutory jurisdictional amount.” Tongkook America, Inc. v. Shipton Sportswear Co., 14 F.3d 781, 784 (2d Cir. 1994). “Where, as here, jurisdictional facts are challenged, the party asserting jurisdiction must support those facts with ‘competent proof’ and ‘justify [its] allegations by a preponderance of evidence.’”

United Food & Commercial Workers Union, Local 919, AFL–CIO v. CenterMark Prop. Meriden Square, Inc., 30 F.3d 298, 305 (2d Cir. 1994). “[If] the pleadings themselves are inconclusive as to the amount in controversy, . . . federal courts may look outside those pleadings to other evidence in the record.” Id. “Moreover, because the right to remove a state court action to federal court on diversity grounds is statutory, federal courts review compliance with the removal statute ‘narrowly, resolving any doubts against removability.’” Gilman v. BHC Sec., Inc., 104 F.3d 1418, 1428 (2d Cir. 1997) (quoting Lupo v. Human Affairs Int’l, Inc., 28 F.3d 269, 273-74 (2d Cir. 1994)).

Since Continental asserted federal jurisdiction by removing Devit's case from state court, it has the burden of proving to a reasonable probability that Devit's claim exceeds \$75,000. In Devit's complaint, he alleges claims for breach of contract and breach of covenant of good faith and fair dealing and causes of action under the Connecticut Unfair Trade Practices Act ("CUTPA") and Connecticut Unfair Insurance Practices Act ("CUIPA") based on Continental's failure to reimburse him for medical expenses incurred as the result of an April 11, 2000 accident. The ad damnum statement attached to the complaint states that the plaintiff's damages exceed \$15,000. In its notice of removal, Continental claims the damages exceed \$75,000.

Given the ambiguity of plaintiff's statement of damages in the complaint and the lack of jurisdictional facts in the notice of removal, the court considers evidence outside the pleadings. Continental proffers the plaintiff's summary of his medical bills, Continental's speculation regarding expected attorney's fees, and the possibility of punitive damages under CUTPA as a basis for the court to conclude that it has subject matter jurisdiction.

According to the evidence submitted, Devit's medical bills at issue total

\$35,399.89. Continental asserts that the bills do not include the future expenses Devit may incur and consider reimbursable in relation to his injuries from April 11, 2000. Continental has not presented any evidence that supports its allegation that Devit has continued to or will incur expenses in addition to those summarized by the plaintiff. Accordingly, the court considers Devit's actual damages in this case to equal \$35,399.89.

Continental attempts to supplement that amount by claiming that attorney's fees for this case will be significant. The Second Circuit held, however, that the jurisdictional amount only includes attorney's fees that are "recoverable as a matter of right." Givens v. W.T. Grant Co., 457 F.2d 612, 614 (2d Cir.), vacated on other grounds, 409 U.S. 56 (1972). Since Devit's claims are state causes of action, whether attorney's fees are recoverable as a matter of right is an issue of state law. Connecticut follows the American Rule for attorney's fees, awarding fees only where explicitly permitted by the terms of a contract or a statute. Doe v. State, 216 Conn. 85, 106 (1990); Marsh, Day & Calhoun v. Solomon, 204 Conn. 639, 653 (1987). From the record before it, the court concludes that Devit's claims for attorney's fees are premised on his CUTPA claim.

The relevant section of CUTPA states: “In any action brought by a person under this section, the court *may* award, to the plaintiff, in addition to the relief provided in this section, costs and reasonable attorneys’ fees based on the work reasonably performed by an attorney and not on the amount of recovery.” Conn. Rev. Stat. § 42-110g(d) (emphasis added). The Connecticut Appellate Court has held that “[t]he trial court has discretion whether to award attorney’s fees under CUTPA.” Riggio v. Orkin Exterminating Co., Inc., 58 Conn. App. 309, 317 (2000). Based on the statutory language and the Appellate Court’s holding, the court concludes that attorney’s fees are not recoverable as a matter of right under CUTPA. Accordingly, the court will not consider attorney’s fees in calculating the amount in controversy.

Finally, Continental argues that an award of punitive damages would exceed the jurisdictional limit. While punitive damages are included in the amount in controversy, A.F.A. Tours, Inc. v. Whitchurch, 937 F.2d 82, 87 (2d Cir. 1991) (“[I]f punitive damages are permitted under the controlling law, the demand for such damages may be included in determining whether the jurisdictional amount is satisfied.”), claims for punitive damages as a basis for the jurisdictional amount are

subject to closer scrutiny than claims for actual damages. Zahn v. Int'l Paper Co., 469 F.2d 1033, 1033 n.1 (2d Cir. 1972).¹

Devit claims punitive damages under his CUTPA cause of action. CUTPA itself “provides no guidance as to a method for determining the amount of a punitive damages award.” Staehele v. Michael's Garage, Inc., 35 Conn. App. 455, 463 (1994). Nevertheless, “courts generally award punitive damages in amounts equal to actual damages or multiples of the actual damages.” Perkins v. Colonial Cemeteries, Inc., 53 Conn. App. 646, 649 (1999) (citing Staehele, 35 Conn. App. at 462-63). While using actual damages to calculate punitive damages would be reasonable for most CUTPA claims since they involve minor amounts, e.g., Bailey

¹Continental also argues that it attempted to confer in good faith with the plaintiff before removing this case. A federal court does not have subject matter jurisdiction, however, where the defendant on removal has a good faith, but unsupported belief that the amount in controversy exceeds the jurisdictional limit. See Tongkook Am., Inc. v. Shipton Sportswear, Co., 14 F.3d 781, 785-86 (2d Cir. 1994) (addressing a plaintiff's good faith claim regarding the amount in controversy and concluding that “[a] plaintiff's subjective belief, alone, cannot be the controlling factor where, pre-trial, there is '[a] showing that, as a legal certainty, [the] plaintiff cannot recover the jurisdictional amount’” (quoting Am. Mut. Liab. Ins. Co. v. Campbell Lumber Mfg. Corp., 329 F. Supp. 1283, 1285 (N.D. Ga. 1971))).

Further, Continental argues that the court should rule on the pending motion to dismiss before remanding this case to state court. If a federal court lacks subject matter jurisdiction, however, it cannot rule on any dispositive motions prior to remand. Univ. of S. Ala. v. Am. Tobacco Co., 168 F.3d 405, 411 (11th Cir. 1999) (citing authority from the Fifth, Seventh, Ninth, and Tenth Circuits).

Employment Sys., Inc. v. Hahn, 545 F. Supp. 62, 73 (D. Conn. 1982) (actual damages of \$13,473); Barco Auto Leasing Corp. v. House, 202 Conn. 106, 110 n.3 (1987) (\$9596.76); Stahle, 35 Conn. App. at 463 (\$2025); Barnes v. Holliday, No. 09 26 95, 1990 WL 269884, at *5 (Conn. Super. Ct. June 6, 1990) (Austin, J.) (\$3582.70); Eamiello v. Liberty Mobilehome Sales, Inc., CVWA 8503-1777, 1987 WL 349041, at *25 (Conn. Super. Ct. Aug. 31, 1987) (Barnett, J.) (\$5356.70); accord Jiminez v. Going Forward, Inc., 25 F. Supp. 2d 54, 55 n.1 (D. Conn. 1998) (surveying punitive damages awards under CUTPA to conclude that they are “ordinarily minor amounts”), other methods of calculating punitive damages may be appropriate where larger awards of actual damages are involved, e.g., Tingley Sys., Inc. v. Norse Sys., Inc., 49 F.3d 93, 96-97 (2d Cir. 1995) (affirming a district court’s reduction of a jury’s punitive damages award under CUPTA from \$1 million to \$20,000 where actual damages totaled \$360,500); Societa Bario E. Derivati v. Kaystone Chem., Inc., No. 5:90-CV-599 (EBB), 1998 WL 182563, at *10-11 (D. Conn. Apr. 15, 1998) (awarding \$10,000 in punitive damages from a \$92,700 award of actual damages); Jones v. Ippoliti, No. CV 93 53116 S, 1995 WL 405697, at *1 (Conn. Super. Ct. June 30, 1995) (Rittenband,

J.) (awarding \$25,000 in punitive damages from a \$98,702.62 award of actual damages).

Without addressing whether Devit's claim for punitive damages may be justified given the alleged facts, see Jiminez, 25 F. Supp. 2d at 55 (refusing to consider punitive damages in calculating the amount in controversy on removal because the court had doubts about whether the plaintiff deserved punitive damages and "the highly speculative nature of the inquiry"), the court concludes, based on the Connecticut practice regarding punitive damages under CUTPA, that an award of punitive damages for Devit would not bridge the \$39,600.11 gap between Devit's actual damages and the jurisdictional limit. Assuming punitive damages were appropriate, the court doubts that any award would exceed \$30,000 given the present record.

For the foregoing reasons, Continental has failed to prove to a reasonable probability that Devit's claim exceeds \$75,000. Accordingly, the court lacks subject matter jurisdiction. Plaintiff's Motion to Remand [Dkt. No. 22] is GRANTED. The clerk is hereby directed to remand this case to the Connecticut Superior Court, Judicial District of New Haven, at New Haven.

SO ORDERED.

Dated at Bridgeport, Connecticut this 12th day of April, 2002.

_____/s/_____
Janet C. Hall
United States District Judge