UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-60589
Summary Calendar

MARIA ELENA CHOATE, Individually and as Community Survivor of the Estate of Robert Lee Choate, Deceased,

Plaintiff-Appellant,

versus

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant-Appellee.

Appeal from the United States District Court for the
Southern District of Texas
(CA L 92 4)

(July 7, 1995)

Before GARWOOD, HIGGINBOTHAM and DAVIS, Circuit Judges.[*]

GARWOOD, Circuit Judge:

Plaintiff-appellant Mary Elena Choate (Choate) appeals the district court's denial of her motion to remand. We affirm.

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[*] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Facts and Proceedings Below

This suit arises out of a single-vehicle accident that occurred at approximately 8:20 a.m. on June 6, 1986, on U.S. Highway 83 in Zapata County, Texas. The accident occurred when a pickup truck collided with a bridge railing, went over the railing, and fell to the ground below. Three individuals were in the truck at the time of the accident: Robert L. Choate (the decedent), Choate's husband, died as a result of injuries sustained in the accident, but Benjamin C. Robertson (Robertson) and Richard L. Warner (Warner) survived.

The pickup truck involved in the accident was owned by David Luna (Luna). On the day of the accident, Robertson had borrowed the truck from Luna to drive himself, the decedent, and Warner from an oil drilling site, where they worked an all-night shift, to their homes. The three men lived approximately one hundred miles from the oil drilling site and commuted some two-and-one-half hours to and from work daily. When the three men left the work site on the morning of the accident, Robertson was driving, and the decedent and Warner were passengers in the cab of the truck. Warner subsequently moved to the bed of the truck. At some point that morning, the three men stopped briefly in Laredo. It is undisputed that Warner was asleep in the bed of the truck at the time of accident. The parties, however, disagree as to whether Robertson or the decedent was driving the truck when it went off the bridge.

At the time of the accident, the decedent had an underinsured

motorist policy issued by State Farm Mutual Automobile Insurance Company (State Farm) that provided coverage of $25,000 per person. Choate filed a claim for underinsured motorist benefits, contending that her husband was a passenger in the truck at the time of the accident. State Farm denied her claim. On November 14, 1991, Choate filed suit against State Farm in the 49th Judicial District Court of Zapata County, Texas, alleging that State Farm had breached its insurance contract by not paying underinsured motorist benefits. In accordance with Tex. R. Civ. P. 47(b), the petition did not state the amount of damages sought.[1] In her petition, Choate stated that she was seeking underinsured motorist benefits but did not state the policy number or the amount of the policy; instead, she merely alleged that State Farm had issued the policy. In addition to underinsured motorist benefits, the petition sought both pre- and postjudgment interest and statutory attorneys' fees under Tex. Civ. Prac. & Rem. Code Ann. § 38.001.

On January 8, 1992, State Farm removed the case to federal court on the basis of diversity of citizenship, 28 U.S.C. § 1332, asserting in its removal petition, *inter alia*, that the amount in controversy exceeded $50,000, exclusive of interest and costs. On November 30, 1992, 10 months after State Farm removed the case to federal court, Choate filed a motion to amend her complaint to seek $25,000 in damages (the policy limit on the underinsured motorist

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[1] The rule provides: "An original pleading . . . shall contain . . . in all claims for unliquidated damages only the statement that the damages sought exceed the minimum jurisdictional limits of the court." Tex. R. Civ. P. 47(b).

policy), to request attorneys' fees of no more than $24,000, and to eliminate her request for prejudgment interest.[2] Based on her proposed amended complaint, Choate filed a motion to remand the suit to state court on the ground that diversity jurisdiction "no longer" existed. On December 21, 1992, the district court denied the motion to remand and deferred ruling on Choate's motion to amend her complaint. On December 29, 1992, Choate filed an unopposed motion to withdraw her amended complaint, stating that her amended pleadings had been filed "in an attempt to have this case remanded to state court." A magistrate judge granted this motion on January 14, 1993.

In the joint pretrial order, the parties stipulated that the policy limit on the underinsured motorist policy was $25,000 and that Choate would be entitled to underinsured motorist benefits in that amount if her husband was not driving the truck at the time of accident. State Farm contended that the decedent was driving the truck at the time of the accident. At a March 29, 1994, pretrial conference, the district court expressed concern about the jurisdictional amount in the case and invited both parties to file written briefs on the issue. State Farm filed a letter brief, and Choate did not respond. On July 12, 1994, the district court concluded that diversity jurisdiction existed and reaffirmed its earlier order denying the motion to remand.

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[2] In her motion to amend her complaint, Choate stated, "[a]fter Plaintiff submitted discovery in the form of interrogatories to the Defendant, the Defendant disclosed that the policy limits under the underinsured motorist policy in issue is [sic] only $25,000.00 dollars."

On July 20, 1994, the district court held a bench trial on the merits. It determined that the decedent was driving the truck at the time of the accident and therefore that State Farm did not breach the insurance contract by denying Choate's claim for underinsured motorist benefits. On July 27, 1994, the district court entered a take nothing judgment against Choate. Choate now appeals, arguing only that the district court should have granted her motion to remand.

Discussion

The denial of a motion to remand an action removed from state court to federal court is a question of federal subject matter jurisdiction and is subject to *de novo* review. *Carpenter v. Wichita Falls Indep. Sch. Dist.*, 44 F.3d 362, 365 (5th Cir. 1995). The removing party bears the burden of establishing the basis for federal jurisdiction. *Asociacion Nacional de Pescadores v. Dow Quimica*, 988 F.2d 559, 563 (5th Cir. 1993), *cert. denied*, 114 S.Ct. 685 (1994). The basis for jurisdiction in this case is diversity jurisdiction, and the sole issue on appeal is whether the amount in controversy exceeded $50,000, as required under 28 U.S.C. § 1332.

It is well established that attorneys' fees may be included in determining the amount in controversy for diversity jurisdiction. *Foret v. Southern Farm Bureau Life Ins. Co.*, 918 F.2d 534, 537 (5th Cir. 1990); *see also* 14A Charles Alan Wright, et al., *Federal Practice & Procedure* § 3712 (2d ed. 1985) ("The law is now quite settled that attorney's fees are a part of the matter in controversy when they are provided for by contract or by state

statute.") (footnotes omitted). Under Texas law, a plaintiff may recover attorneys' fees under section 38.001 in a claim for uninsured/underinsured motorist benefits. *Novosad v. Mid-Century Ins. Co.*, 881 S.W.2d 546, 552 (Tex. App.--San Antonio 1994, no writ); *State Farm Mut. Auto. Ins. Co. v. Clark*, 694 S.W.2d 572, 574 (Tex. App.--Corpus Christi 1985, no writ). Although some Texas courts have denied recovery of attorneys' fees on uninsured/underinsured motorist claims under the particular circumstances of the cases before them,[3] these decisions do not hold that recovery of attorneys' fees in an uninsured/underinsured motorist claim is not generally available under Texas law. *Novosad*, 881 S.W.2d at 552 (distinguishing *Sikes* and holding that "[a]ttorney's fees are recoverable in an action on a written contract, including uninsured/underinsured motorists contracts") (citations omitted).

Attorneys' fees awards under section 38.001 include prospective appellate attorneys' fees. *Cap Rock Elec. Coop., Inc. v. Texas Utilities Elec. Co.*, 874 S.W.2d 92, 102 (Tex. App.--El Paso 1994, no writ); *Gunter v. Bailey*, 808 S.W.2d 163, 165 (Tex. App.--El Paso 1991, no writ). In addition, Texas courts have held that reasonable attorneys' fees under section 38.001 can exceed the

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[3] *See Sprague v. State Farm Mut. Auto. Ins. Co.*, 880 S.W.2d 415, 417 (Tex. App.--Houston [14th Dist.] 1993, writ denied) (affirming a trial court's denial of attorneys' fees in an uninsured motorist claim on the ground that "one of statutory prerequisites had not been met"); *Sikes v. Zuloaga*, 830 S.W.2d 752, 754 (Tex. App.--Austin 1992, no writ) ("Because there was no presentment of an unpaid claim, nor any failure to tender a just amount owed, the statutory requirements for awarding attorney's fees were not met.").

amount recovered. *See, e.g.*, *Flint & Assoc. v. Intercontinental Pipe & Steel*, 739 S.W.2d 622, 626 (Tex. App.--Dallas 1987, writ denied). Accordingly, it would not be farfetched or fanciful for Choate's attorneys' fees in her underinsured motorist benefits claim to exceed $25,000, bringing the amount in controversy at the time the suit was filed in state court above the $50,000 threshold. Thus, State Farm properly removed the action to federal court. See *DeAguilar v. Boeing*, 11 F.3d 55, 57 (5th Cir. 1993) (holding that, although complaint did not specify amount of damages, it was facially apparent that the damages sought by the plaintiff could exceed $50,000).

Choate argues that, by virtue of her proposed amended pleadings, the maximum amount recoverable would be $49,000 and that the district court therefore should have granted her motion to remand the case to state court. In *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 58 S.Ct. 586 (1938), the Supreme Court held that a case may be removed to federal court unless it "appear[s] to a legal certainty that the claim is really for less than the jurisdictional amount." *Id.* at 589. In *St. Paul Mercury Indemnity Co.*, the plaintiff originally alleged damages above the jurisdictional amount in its state-court petition but subsequently amended its federal-court complaint to state less than the required amount. The Court held that the subsequent amendment did not strip the federal court of jurisdiction as long as the original claim for damages was made in good faith. *Id.* at 592 ("And though . . . the plaintiff after removal, by stipulation, by affidavit, or by

amendment of his pleadings, reduces the claim below the requisite amount, this does not deprive the district court of jurisdiction.") (footnote omitted). *See* 14A Charles Alan Wright, et al., *Federal Practice and Procedure* § 3725 ("But once a case has been properly removed, subsequent events that reduce the amount recoverable, such as plaintiff's amendment of the complaint, will not defeat jurisdiction.") (footnote omitted). Because State Farm properly removed Choate's suit to federal court, Choate cannot defeat removal by attempting to amend her pleadings to reduce the amount in controversy below the required sum.

We find additional support for our holding in Choate's pleadings before the district court. In her motion to remand, Choate stated that, in light of her proposed amended pleadings, "the jurisdictional basis under which this case was removed to this Court *no longer exists*." (Emphasis added). In her motion to withdraw her amended complaint, Choate stated that she had filed the amended complaint "in an attempt to have this case remanded to state court." Choate never disputed that the amount in controversy initially exceeded $50,000, as asserted in the removal petition; moreover, she conceded that she reduced her claim for damages in order to secure a remand to state court.[4] Choate is precluded from

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[4] In *Dow Quimica*, we held that removal was improper where (1) the complaint did not specify an amount of damages and it was not otherwise facially apparent that the damages sought were likely to exceed $50,000, (2) the defendants offered only a conclusory statement in their notice of removal that was not based on direct knowledge of the plaintiffs' claims, and (3) the plaintiffs "timely contested removal with a sworn, unrebutted affidavit indicating that the requisite amount in controversy was not present." *Dow Quimica*, 988 F.2d at 566. In *Dow Quimica*, the

employing these tactics to defeat a properly removed case. *See DeAguilar*, 11 F.3d at 58 (characterizing the plaintiffs' conduct as "artful post-removal pleading" and stating that "[d]iversity jurisdiction . . . derives from Article III of the Constitution, is defined by Congress, and is not subject to delimitation by such imaginative, post-hoc tactics of litigants").

Conclusion

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

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plaintiffs filed affidavits attesting that no individual plaintiff suffered damages in excess of $50,000. By contrast, in the instant case, Choate has never attempted to dispute that the $50,000 requirement was not satisfied at the time of removal. Instead, she argues that, because she reduced the amount of damages sought, she is entitled to a remand. Because Choate has never tried to rebut that diversity jurisdiction originally existed, *Dow Quimica* is distinguishable.