

PACIFIC MUTUAL LIFE INSURANCE COMPANY v. BIERMAN.

4-3247

Opinion delivered January 29, 1934.

1. REMOVAL OF CAUSES—TEST.—Removability of a cause from a State to a Federal court is tested solely by the complaint and petition for removal.
2. REMOVAL OF CAUSES—AMOUNT IN CONTROVERSY.—The “amount in controversy” in an action for \$2,675 under a health policy plus 12 per cent. penalty and a reasonable attorney’s fee, held to exceed \$3,000, entitling a nonresident defendant to removal to the Federal court.
3. REMOVAL OF CAUSES—AMOUNT IN CONTROVERSY.—Where a reasonable attorney’s fee, in addition to a specific sum in controversy exceeds \$3,000, and all other requisites are present, the cause is removable from the State to the Federal court.

Appeal from Pulaski Circuit Court, Second Division;
Richard M. Mann, Judge; reversed.

STATEMENT BY THE COURT.

This suit was instituted by appellee, Sam W. Bierman, against appellant, Pacific Mutual Life Insurance Company, in the Pulaski Circuit Court, seeking recovery upon a health and accident insurance policy. Appellee alleged that on July 21, 1932, while the policy was in force, he suffered an illness caused by tuberculosis of the spine, which wholly and continuously disabled him, and that he was permanently disabled. The prayer of the complaint was as follows:

“Wherefore, plaintiff asks judgment against the defendant in the amount of two thousand, six hundred seventy-five and no/100 (\$2,675) dollars, together with a penalty of twelve (12%) per cent. on said amount, interest on said amount at the rate of six (6%) per cent. per annum from August 21, 1932, until paid, and a reasonable attorney’s fee, and all costs herein expended.”

Within the time provided for answer, appellant filed his petition and bond for removal of the cause to the

Federal District Court. This petition alleged diversity of citizenship, and a suit of a civil nature, in which the district courts of the United States have original jurisdiction, and was brought for the purpose of recovering damages for an alleged anticipatory breach of contract, together with twelve per cent. penalty and "a reasonable attorney's fee."

The petition for removal was denied by the Pulaski Circuit Court, and this question was preserved, and is here presented as the decisive question in the case.

Owens & Ehrman, for appellant.

Fred A. Snodgrass and *Sam Robinson*, for appellee.

JOHNSON, C. J., (after stating the facts). The paramount and controlling question here presented is the removability of this cause from the Pulaski Circuit Court to the Federal court for the Eastern District of Arkansas. It is the well-settled law that removability is tested solely by the complaint and the petition for removal. Appellee's complaint shows that he was seeking to recover from appellant \$2,675 as damages for permanent disability. In addition to this, he sought recovery of twelve per cent. penalty upon \$2,675. Twelve per cent. of \$2,675 is \$321. These two items, when added, aggregate \$2,996. In addition to this sum, appellee sought to recover a reasonable attorney's fee.

We expressly held in *Mutual Life Insurance Co. v. Marsh*, 185 Ark. 332, 47 S. W. (2d) 585, that the twelve per cent. penalty, provided for by § 6155 of Crawford & Moses' Digest, was not an item of costs, and therefore should be added to the amount sought to be recovered in testing the sufficiency of a petition for removal. The headnote reads as follows:

"The amount in controversy in an action on an insurance policy for \$3,000 plus 12 per cent. penalty is \$3,600, which entitled the defendant, a nonresident, to removal of the cause to the Federal court, under title 28, § 71, USCA."

In the more recent case of *Missouri State Life Insurance Co. v. Johnson*, we had before us the question as to whether a reasonable attorney's fee should be added to the amount sought to be recovered plus the

twelve (12%) per cent. penalty, and we determined this question in favor of the insured. The effect of our holding was that the reasonable attorney's fee, provided for by statute, was an item of cost, and therefore should not be considered on the question of removability. The Johnson case was reviewed by the Supreme Court of the United States, wherein it was determined that the Supreme Court of Arkansas had erred in holding that a reasonable attorney's fee should not be added in determining the question of removability. In disposing of the question, Mr. Justice McREYNOLDS said:

"In the State court the present respondent sought to enforce the liability imposed by statute for his benefit—to collect something to which the law gave him a right. The amount so demanded became part of the matter put in controversy by the complaint, and not mere 'costs' excluded from the reckoning by the jurisdictional and removal statutes." *Missouri State Life Insurance Co. v. Jones*, 290 U. S. 199, 78 L. ed. 135.

In accordance with the opinion of the Supreme Court of the United States, we must now hold that, when a reasonable attorney's fee is a matter in controversy, and when such fee, added to the specific sum in controversy, aggregates a sum in excess of \$3,000, and all other requisites are present, such cause of action is removable from the State to the Federal courts.

In the instant case, when a reasonable attorney's fee is taken into consideration on the question of removability, it is made certain that the total amount in controversy is in excess of \$3,000. It is perfectly evident that \$4 would not be a reasonable attorney's fee in a controversy wherein practically \$3,000 is involved. We therefore conclude that the trial court erred in refusing to remove this cause to the Federal District Court for the Eastern District of Arkansas.

For the error indicated, the cause is reversed and remanded with directions to enter an order of removal, in accordance with the petition and bond therefor.