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Federal Courts--Order Remanding Case for Reasons Not Recognized by Statute Reviewable by Writ of Mandamus

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RECENT DEVELOPMENTS

FEDERAL COURTS—ORDER REMANDING CASE FOR REASONS NOT RECOGNIZED BY STATUTE REVIEWABLE BY WRIT OF MANDAMUS. *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976).

Traditionally, many civil actions brought in state courts are also within the original jurisdiction of the district courts of the United States.[1] One congressionally created corollary of this concurrent jurisdiction is that under the proper circumstances a defendant may remove to federal court and proceed as if the case had originally been brought there.[2] However, if it subsequently appears that the case was removed "improvidently and without jurisdiction," 28 U.S.C. § 1447(c) requires that the case be remanded to state court.[3] In the past, review of almost

1. *See* C. WRIGHT, FEDERAL COURTS 171 (2d ed. 1970). Original civil jurisdiction is primarily conferred on federal district courts by sections 1331 and 1332 of title 28 of the United States Code.

Section 1331 places jurisdiction in the district courts for "all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331(a) (1970).

Section 1332 gives federal district courts original jurisdiction for all civil actions where the amount in controversy exceeds $10,000, and where diversity of citizenship exists between opposing litigants. 28 U.S.C. § 1332 (1970).

2. 28 U.S.C. §§ 1441, 1446 (1970). Section 1446 sets out the procedure for removal. Section 1441 provides:

> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.
>
> (b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.
>
> (c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

3. 28 U.S.C. § 1447(c) (1970) provides:

> (c) If at any time before final judgment it appears that the case was

all remand orders has been held barred by 28 U.S.C. § 1447(d)[4] and its predecessors.[5] In *Thermtron Products, Inc. v. Hermansdorfer*,[6] the Supreme Court has limited the scope of this restriction and may have effectively eliminated the rule.

Thermtron grew out of an action filed in Kentucky state court by two Kentucky citizens against Thermtron Products, Inc. and an employee, both citizens of Indiana, for damages for personal injuries arising out of an automobile accident. Thermtron removed the action to federal court. Following an order requesting the defendants to show cause why the case should not be remanded and a conclusory response by Thermtron,[7] Judge Hermansdorfer remanded the case to state court. In a memorandum opinion, he reasoned that the defendant's right to remove the action was outweighed by the "plaintiffs'

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removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. . . . The State court may thereupon proceed with such case.

Under this section, *only* cases improperly removed may be remanded. *E.g.*, Isbrandtsen Co. v. Marine Engineers Ben. Ass'n., 256 F. Supp. 68 (E.D.N.Y. 1966).

4. *E.g.*, Metropolitan Cas. Ins. Co. v. Stevens, 312 U.S. 563, 568 (1941); *In re* MacNeil Bros., 259 F.2d 386, 388 (1st Cir. 1958). 28 U.S.C. § 1447(d) (1970) provides:

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

Section 1443 authorizes removal of state court actions in which the defendant is unable to enforce his rights "under any law providing for the equal rights of citizens of the United States . . . ." 28 U.S.C. § 1443(1) (1970). On the civil rights exception to section 1447(d) see Georgia v. Rachel, 384 U.S. 780, 786-87 n.6 & 7 (1966); Note, *Practice and Procedure—Review of Order Remanding to State Court—Tactical Windfall Under the Civil Rights Act of 1964*, 43 N.C.L. REV. 628 (1965).

5. Prior to 1875, courts would not review any remand order, by appeal or writ of error, because no final judgment had been entered. *See, e.g.*, Chicago & A. R.R. v. Wiswall, 90 U.S. (23 Wall.) 507 (1875). The Judiciary Act of 1875, however, expressly provided for review of remand orders by writ of error or appeal. Judiciary Act of 1875, ch. 137, § 5, 18 Stat. 472.

The first statutory bar on reviewability was embodied in the Act of March 3, 1887, which provided in part:

Whenever any cause shall be removed from any State court into any circuit court of the United States, and the circuit court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the circuit court so remanding such cause shall be allowed.

Act of March 3, 1887, ch. 373, § 2, 24 Stat. 553. The same provision reappeared in the Judicial Code of 1911, and sections 71 and 80 of title 28 of the United States Code in 1926. The statute was put in its present form in section 1447 in 1949.

6. 423 U.S. 336 (1976).

7. "These defendants would not have removed this case . . . if they thought or had reason to believe that they could receive a fair and impartial trial in the Pike Circuit Court . . . ." Defendants' Objections to Removal at 1.

right to a forum of their own choice and their right to a speedy decision on the merits . . . . "; as a result of the district court's crowded docket,[8] the case could be heard at an earlier time in the state court and Thermtron had not shown that it would be prejudiced by the remand.[9]

Thermtron then petitioned the Sixth Circuit Court of Appeals for a writ of mandamus, arguing that the district court lacked authority to remand the case on grounds other than those specified in section 1447(c).[10] Finding that it lacked jurisdiction to review a remand order under section 1447(d), the circuit court denied Thermtron's petition.[11] Thermtron appealed to the Supreme Court, which reversed the Sixth Circuit.

Both the majority and dissenting Supreme Court opinions recognized that Congress was aware of two dangers when it enacted section 1447: the danger of delay to litigants,[12] and the danger of depriving litigants of a federal forum as a result of a district court judge's abuse of discretion.[13] However, they disagreed concerning the dangers against which Congress intended to provide protection. The dissent, following the traditional interpretation of the statute, found that Congress only intended to prevent delay at the expense of possible prejudice to litigants in state courts.[14] While the majority agreed with this posi-

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8. According to Judge Hermansdorfer, not only were there 474 cases on the court's docket at the time of the remand order, but the case would be among the last of these to be heard:

> [O]n February 28, 1974 there were pending on the dockets [of] . . . this Court . . . a total of eighty (80) criminal actions and three hundred ninety-four (394) civil actions. These cases have been assigned various priorities. The first priority is granted criminal actions. Social Security and Black Lung cases . . . [are] second . . . . A third priority is granted those actions in which the United States is a party. The lowest priority, as a matter of necessity, is assigned private civil actions.

Little v. Thermtron, No. 1723 at 4 (E.D. Ky., filed March 22, 1974) (footnotes omitted).

9. *Id.* at 5.

10. 423 U.S. at 341.

11. "In our opinion the District Court had jurisdiction to enter the order of remand. We have no jurisdiction to review it." Thermtron Products, Inc. v. Hermansdorfer, No. 74-1410 (6th Cir., filed June 4, 1974).

12. 423 U.S. at 351, 361, *both citing* United States v. Rice, 327 U.S. 742 (1946).

13. 423 U.S. at 351, 355.

14. Congress balanced the continued disruption and delay caused by further review against the minimal possible harm to the party attempting removal—who will still receive a trial on the merits before a state court which cannot be presumed to be unwilling or unable to afford substantial justice—and concluded that no review should be permitted in these cases.

Id. at 355. *Cf.* AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 417 (1969) ("The theory behind the preclusion

tion, it also recognized, for the first time, Congress's intent to control judicial discretion.[15] The policy assumptions of the majority and the dissent were reflected in their differing constructions of section 1447(d).

Assuming that sections 1447(c) and (d) were drafted to accommodate both interests, the majority found the two sections to be *in pari materia* and construed them together.[16] Thus, they reasoned that the limited scope of permissible remands described in section 1447(c) was incorporated in section 1447(d), so that its bar of review extended only to remand orders authorized by the statute. Conversely, appeal of remand orders issued for reasons not contemplated by the statute, as in *Thermtron*, was not prohibited by section 1447(d).[17] The dissent, assuming that the section had only one purpose, strictly construed section 1447(d) and found that it barred review of all remand orders, regardless of the reason they were issued.[18]

The cases relied on by the majority to support its *in pari materia* reading of the statute[19] reached results more consistent with the dissent's conclusion.[20] However, none of these cases reached the issue of the degree of a district judge's discretion in the remand process, so that the broad statements cited by the dissent were merely dicta.[21]

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of review is apparently that time-consuming federal proceedings should not be allowed to delay the completion of litigation commenced in a state court having at least concurrent jurisdiction over the action.").

15. [W]e are not convinced that Congress ever intended to extend carte blanche authority to the district courts to revise the federal statutes governing removal by remanding cases on grounds that seem justifiable to them but which are not recognized by the controlling statute.

423 U.S. at 351. This conclusion concerning legislative intent was based in part on a finding that section 1447 was not intended to change the law relating to the review of remand orders. *See* H.R. REP. No. 352, 81st Cong., 1st Sess. 15 (1949). Interpreting "so remanding" in previous versions of the statute to refer only to authorized remand orders, the majority inferred a legislative intent to limit the bar on review of remand orders that was readopted when the Code was revised. 423 U.S. at 348-50. See note 5 *supra*.

16. 423 U.S. at 345-46.

17. *Id.* at 351. See note 3 *supra*.

18. *Id.* at 355.

19. *E.g.*, Employers Reinsurance Corp. v. Bryant, 299 U.S. 374, 380 (1937) (The remand and review sections of the Judicial Code of 1911, ch. 231, § 28, 36 Stat. 1087, *as amended* 28 U.S.C. 1447(c)-(d) "are *in pari materia* [and] are to be construed accordingly rather than as distinct enactments . . . .").

20. *Id.* at 381 (Judicial Code of 1911, ch. 231, § 28, 36 Stat. 1087, *as amended* 28 U.S.C. 1447(d) is "intended to . . . include all cases removed from a state court into federal court and remanded by the latter.").

21. *See* United States v. Rice, 327 U.S. 742 (1946) (Judicial Code of 1911, ch. 231, § 28, 36 Stat. 1087, *as amended* 28 U.S.C. § 1447(d) (1970) bars review of remand order issued because of lack of subject matter jurisdiction); Metropolitan Cas. Ins. Co. v. Stevens, 312 U.S. 563 (1941) (Judicial Code of 1911, ch. 231, § 28, 36

Thus, even though previous Supreme Court cases supported aspects of both arguments, none were dispositive of the matter.

Since both the majority's and dissent's readings of the statute reflect equally plausible interpretations of congressional intent and prior case law, their validity must be examined in light of the assumptions that underlie each. So viewed, the majority's construction of the statute is potentially inconsistent with its finding of congressional intent. This inconsistency follows from the practical problems of implementing, without emasculating, the court's decision.

As the dissent recognized,[22] there is little difference between a remand order based on inappropriate considerations, as in *Thermtron*, and one issued as a result of a misapplication of appropriate factors. Both are unauthorized by section 1447(c) and therefore, under the majority's reasoning, appealable. Despite the majority's language to the contrary,[23] a distinction based on the form of a remand order would contravene any intent of Congress to prevent judicial abuses and would render the majority holding meaningless.[24] If review of both un-

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Stat. 1087, *as amended* 28 U.S.C. § 1447(a) (1970) bars review of remand order issued because of lack of separable controversy); Kloeb v. Armour & Co., 311 U.S. 199 (1940) (Judicial Code of 1911, ch. 231, § 28, 36 Stat. 1087, *as amended* 28 U.S.C. § 1447(d) (1970) bars review of remand order issued because of lack of diversity jurisdiction); Employers Reinsurance Corp. v. Bryant, 299 U.S. 374 (1937) (Judicial Code of 1911, ch. 231, § 28, 36 Stat. 1087, *as amended* 28 U.S.C. § 1447(d) (1970) bars review of remand order issued because of lack of personal jurisdiction over defendant); *Ex parte* Matthew Addy S.S., 256 U.S. 417 (1921) (Judicial Code of 1911, ch. 231, § 28, 36 Stat. 1087, *as amended* 28 U.S.C. § 1447(d) (1970) bars review of remand order issued because of lack of subject matter jurisdiction); Missouri Pac. Ry. v. Fitzgerald, 134 U.S. 45 (1896) (Act of March 3, 1887, ch. 373, § 2, 24 Stat. 552, *as amended* 28 U.S.C. § 1447(d) (1970) bars review of remand order issued because of lack of diversity jurisdiction); *In re* Pennsylvania Co., 137 U.S. 451 (1890) (Act of March 3, 1887, ch. 373, § 2, 24 Stat. 552, *as amended* 28 U.S.C. § 1447(d) (1970) bars review of remand issued because of lack of jurisdictional amount); Morey v. Lockhart, 123 U.S. 56 (1887) (Act of March 3, 1887, ch. 373, § 2, 24 Stat. 552, *as amended* 28 U.S.C. § 1447(d) (1970) bars review of remand order; reason for remand unclear).

22. 423 U.S. at 355-57.

23. The majority attempted to limit the decision to the facts of the case:

> In so holding we neither disturb nor take issue with the well-established general rule that § 1447(d) and its predecessors were intended to forbid review by appeal or extraordinary writ of any order remanding a case on the grounds permitted by the statute. But this Court has not yet construed the present or past prohibition against review of remand orders so as to extinguish the power of an appellate court to correct a district court that has not merely erred in applying the requisite provision for remand but has remanded a case on grounds not specified in the statute and not touching the propriety of the removal.

Id. at 351-52.

24. If review of a remand order is precluded by a judge's use of the proper language, i.e. that the case was removed "improvidently and without jurisdiction",

authorized remand orders is available, *Thermtron* effectively repeals section 1447(d), since any remand order should be reviewable in order to correct possible abuses.[25] Therefore the majority holding is unsatisfactory because it is inconsistent with the dominant purpose of the statute: preventing delay.

While *Thermtron*'s inconsistencies make its effect on future cases with slightly different facts unclear,[26] it has expanded federal jurisdiction and the potential for abuse and delay. On the surface the decision's correction of an unauthorized exercise of power by Judge Hermansdorfer is laudable, but its consequences make the ruling hard to justify. Congress expressed an intention to tolerate certain error for the overall benefit of speedy justice by enacting section 1447(d). The court should have followed this clear objective.

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federal district judges will certainly clothe future remand orders appropriately. In such cases, correction of abuse by district court judges would again be impossible, a result inapposite to the rationale of the majority.

25. By virtue of the holding in *Thermtron*, circuit courts now have jurisdiction to correct abuse of discretion by district court judges when a remand order is issued for reasons not contemplated by section 1447(c). Since district judges are put on notice to use the proper language when issuing a remand order, review by a circuit court should be predicated on substance rather than form. Likewise, all remand orders should be subject to review to determine whether the standards of section 1447(c) have been followed.

26. Since neither of the two basic readings of *Thermtron* are entirely satisfactory, it is difficult to predict which the lower courts will adopt. *See* notes 24 & 25 *supra*.