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# Congress, judges diverge on remand review

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Lawyers take for granted that there will be an opportunity for appellate review - at least eventually. If a federal district court's pretrial ruling is not appealable immediately, it may be reviewed later on appeal from a final judgment. But Congress controls the scope of federal appellate jurisdiction, and Congress has discretion to eliminate appellate review for particular categories of orders.

Congress has exercised that control with respect to remand orders. Orders remanding cases from federal court to state court are presumptively appealable final decisions, but Congress has withdrawn appellate jurisdiction: "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." 28 U.S.C. Section 1447(d). (There are two exceptions not pertinent here.) If the growing body of case law interpreting the statute is any guide, many federal judges are dissatisfied that they may not review the "merits" of remand orders. This dissatisfaction has spawned creative efforts to avoid the statutory bar to review.

Courts have acknowledged that the statute's broad language forecloses review in many forms - by writ petition, Whitman v. Raley's Inc., 886 F.2d 1177, 1180 (9th Cir. 1989), by certified interlocutory appeal under 28 U.S.C. Section 1292(b), Krangel v. Gen. Dynamics Corp., 968 F.2d 914, 914 (9th Cir. 1992), and even by motion for reconsideration in the district court, Seedman v. U.S. Dist. Ct., 837 F.2d 413, 414 (9th Cir. 1988).

But federal courts have narrowed Section 1447(d) to cover fewer types of remand orders than its categorical language might suggest. The Supreme Court has held that the bar to review in Section 1447(d) must be read in harmony with Section 1447(c), the subsection authorizing district courts to remand actions because of a defect in removal procedure or lack of subject-matter jurisdiction. According to the court, Section 1447(d) bars review only of remand orders made on those grounds. If a district court remands for a different reason, such as an overcrowded docket, Thermtron Products Inc. v. Hermansdorfer, 423 U.S. 336 (1976), Section 1447(d) does not apply, and the remand order may be reviewed.

Since Thermtron Products, federal judges have explored several ways to review remand orders without running afoul of the statutory bar. For example, since orders denying remand are not subject to Section 1447(d), a district judge can facilitate immediate appellate review of a remand issue by denying remand and promptly certifying that order for interlocutory review under 28 U.S.C. Section 1292(b). Sheeran v. Gen. Elec. Co., 593 F.2d 93, 97 (9th Cir. 1979). Courts have also held that an order awarding fees in connection with a remand is appealable, and on appeal from the fees order they have reviewed the merits of the remand order to assess whether fees were properly awarded. Durham v. Lockheed Martin Corp., 445 F.3d 1247, 1250 & n.1 (9th Cir. 2006).

The 9th U.S. Circuit Court of Appeals has also avoided Section 1447(d)'s bar by holding that a district court lacked authority to remand under Section 1447(c). In Kelton Arms Condo. Owners Ass'n v. Homestead Ins. Co., 346 F.3d 1190, 1191 (9th Cir. 2003), a district court stated that a case had been "'improperly removed'" and remanded sua sponte, without explaining why. The 9th Circuit held that Section 1447(c) does not authorize such a ruling, meaning that Section 1447(d)'s bar to review did not apply and the court could review the remand order.

The 9th Circuit built on Kelton's reasoning in a decision earlier this month in Flam v. Flam, 2015 DJDAR 6175 (9th Cir. June 8, 2015). The plaintiff sued her former husband in state court over the division of pension assets following their divorce. The defendant removed the action to federal court arguing it was completely preempted by ERISA. Plaintiff moved to remand. A magistrate judge granted the motion, concluding that the district "[c]ourt lacks subject matter jurisdiction over Plaintiff's claims." Flam v. Flam, 12-1052 (E.D. Cal. Sept. 6, 2012). The defendant then moved for reconsideration before the district judge, who denied the motion on the ground that Section 1447(d) barred him from reviewing the remand order.

The defendant appealed from the order denying reconsideration. The 9th Circuit held it could review the district judge's reconsideration order, but would not review the magistrate judge's remand order. The court explained that the magistrate judge lacked authority to remand. According to the court, an order remanding to state court is "dispositive" because it terminates proceedings in federal court, and (absent the parties' consent) magistrate judges lack the authority to resolve dispositive civil motions, see 28 U.S.C. Section 636(b)(1). Because the magistrate judge lacked authority to remand, the district judge erred in denying the motion for reconsideration - unless Section 1447(d) deprived the district judge of authority to grant reconsideration in the first place.

The court turned next to the question of the district judge's authority. The court recognized that Section 1447(d) "preclude[s] not only appellate review but also reconsideration by the district court." But the 9th Circuit joined other circuits in concluding that this principle applies only to reconsideration of remand orders made under Section 1447(c). Because the magistrate judge lacked authority to remand under Section 1447(c), the remand order was not immunized from reconsideration by the district judge (or from appellate review by the 9th Circuit) under Section 1447(d). The court therefore reversed to allow the district judge to consider the merits of the plaintiff's remand motion in the first instance.

Flam builds on Kelton's rationale that Section 1447(d) is no impediment to reviewing an order that a court lacked authority to issue under Section 1447(c). Yet Flam is a more difficult case because the magistrate judge issued an order remanding for lack of jurisdiction. Everyone agrees that under Section 1447(d) - even as narrowly construed in Thermtron Products - an order remanding for lack of jurisdiction may not be reviewed. How could the 9th Circuit reverse an order that belongs to a category of orders that may not even be reviewed? By recharacterizing the order as one the magistrate judge lacked authority to enter.

On its face, the magistrate judge's order remanded for lack of jurisdiction. The 9th Circuit looked behind the face of the order to the circumstances in which the order was issued (by a jurist not empowered to remand), and therefore recharacterized the order as unauthorized under Section 1447(c). This recharacterization is the latest creative effort to expand federal courts' power to review remand orders.

This form of recharacterization is not without controversy. In Powerex Corp. v. Reliant Energy Servs. Inc., 551 U.S. 224, 232-33 (2007), the Supreme Court reversed the 9th Circuit for "look[ing] behind the district court's characterization" of a remand order. Although it was "quite clear" that the district court had remanded for lack of subject-matter jurisdiction, the 9th Circuit adopted a different construction of the district court's reason for remanding. The Supreme Court rejected that approach and held the order was unreviewable under Section 1447(d).

Powerex differs from Flam, of course. The debate in Powerex concerned the ground for remand, not whether a judge had authority to remand. Yet it is unclear whether that distinction should make any difference. The magistrate judge in Flam ordered a remand based on lack of subject-matter jurisdiction, and that was the point that carried the day in Powerex: "it is quite clear that the District Court was purporting to remand on th[e jurisdictional] ground." 551 U.S. at 232. If the plaintiff in Flam seeks a writ of certiorari, perhaps we will learn the extent of the Supreme Court's tolerance for efforts to evade the barrier to review in Section 1447(d).

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