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REMOVAL AND REMAND: CAN I APPEAL THAT?

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The Basics: 28 U.S.C. § 1447(d)

An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise . . . .

The Basics: 28 U.S.C. § 1452(b)

The court to which such claim or cause of action is removed [based on bankruptcy jurisdiction] may remand such claim or cause of action on any equitable ground. An order entered under this subsection remanding a claim or cause of action, or a decision to not remand, is not reviewable by appeal or otherwise *by the court of appeals* . . . or *by the Supreme Court* of the United States . . . .

The Basics: 28 U.S.C. § 1452(b)

Both § 1452(b) and § 1447(d) apply in bankruptcy removals and remands.

> *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127-29 (1995) ("There is no reason §§ 1447(d) and 1452 cannot comfortably coexist in the bankruptcy context. We must, therefore, give effect to both.")

1447(d) Means What It Says

- "Review is unavailable no matter how plain the legal error in ordering the remand." *Briscoe v. Bell*, 432 U.S. 404, 413-14 (1977)
- Remand order cannot be reviewed even by the SCOTUS on appeal or certiorari from final judgment in state court. *E.g., Metropolitan Cas. Ins. Co. v. Stevens*, 312 U.S. 563, 568 (1941)
- A district court can't reconsider its own remand order, mostly. . . .

Rabbit Trail #1: District Court "Review"

- District court loses power to reconsider once remand is effectuated. *Agostini v. Piper Aircraft Corp.*, 729 F.3d 350, 355-56 (3d Cir. 2013)
- 1447(d) bars district court from reconsidering remand upon issuance of remand order. *E.g.*, *New Orleans Public Service, Inc. v. Majoue*, 802 F.2d 166, 168 (5th Cir. 1986); *In re Lowe*, 102 F.3d 731, 734 (4th Cir. 1996)
- District court ***can*** review bankruptcy court remand orders under § 1452(b). *E.g., Cajun Constructors, Inc.*, 2013 U.S. Dist. LEXIS 1209 (M.D. La. Jan. 3, 2013); *In re D'Angelo*, 479 B.R. 649, 655-56 (E.D. Pa. 2012)

The Basics: 28 U.S.C. § 1447(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 1442 or 1443 of this title shall be reviewable by appeal or otherwise.

Statutory Exceptions

- 28 U.S.C. § 1443 - Civil rights claims (specified in § 1447(d))
- 28 U.S.C. § 1442 - Federal agencies and officers (specified in § 1447(d))
- 12 U.S.C. § 1819(b)(2)(C) - FDIC cases
- 28 U.S.C. § 1453(c) - CAFA (accelerated schedule)
- 25 U.S.C. § 487(d) – foreclosure of tribal lands; USA can appeal remand order

Statutory Exceptions

SCOTUS finds implied exception in Westfall Act, 28 U.S.C. § 2679(d)(2), in *Osborn v. Haley*, 549 U.S. 225 (2007)

But *not* in

FSIA, *Powerex Corp. v. Reliant Energy Servs.*, 551 U.S. 224 (2007)

SLUSA, *Kircher v. Putnam Funds Trust*, 547 U.S. 633 (2006)

§ 1447(d) Coextensive with § 1447(c)

Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336 (1976):

- "Section 1447(d) is not dispositive of the reviewability of remand orders in and of itself. That section and § 1447(c) must be construed together . . . ."
- "This means that only remand orders issued under § 1447(c) and invoking the grounds specified there—that removal was improvident and without jurisdiction—are immune from review under § 1447(d)."

§ 1447(d) Coextensive with § 1447(c)

28 U.S.C. § 1447(c):

"A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." (current version)

§ 1447(d) Coextensive with § 1447(c)

Amendment of § 1447(c) may expand the prohibitions on review of § 1447(d).

E.g., Ernewayn v. Home Depot U.S.A., Inc., 727 F.3d 369 (5th Cir. 2013)

- Section 1445(c) prohibits removal of actions based on workmen's compensation laws.
- Remand of workmen's compensation case based on § 1445(c) removal "defect" cannot be reviewed, even if jurisdiction exists.

§ 1447(d) Coextensive with § 1447(c)

So, for example, § 1447(d) does not bar review of remand orders based on –

Abstention – *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996)

Declining supplemental jurisdiction – *Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 556 U.S. 635 (2009)

Rabbit Trail #2: District Court Mischaracterizes the Basis for its Remand Order

Kircher v. Putnam Funds Trust, 547 U.S. 633 (2006)

- District court remanded case removed under SLUSA "for lack of jurisdiction."
- SCOTUS wondered "if it is permissible to look beyond the court's own label," but did so, finding the district court correctly characterized its order.
- Scalia (concurring) argued going behind the district court's characterization was itself prohibited.
- A year later in *Powerex*, Scalia gets his way, mostly: If a district court purports to remand for lack of jurisdiction, review "should be limited to confirming that that characterization was colorable."

Mandamus or Appeal?

- The SCOTUS held in *Thermtron* that, where § 1447(d) stands as no bar to review, mandamus is the appropriate vehicle to seek such review. 423 U.S. at 352-53 ("Absent statutory prohibitions, when a remand order is challenged by a petition for mandamus . . ., 'the power of the court to issue the mandamus would be undoubted.'").

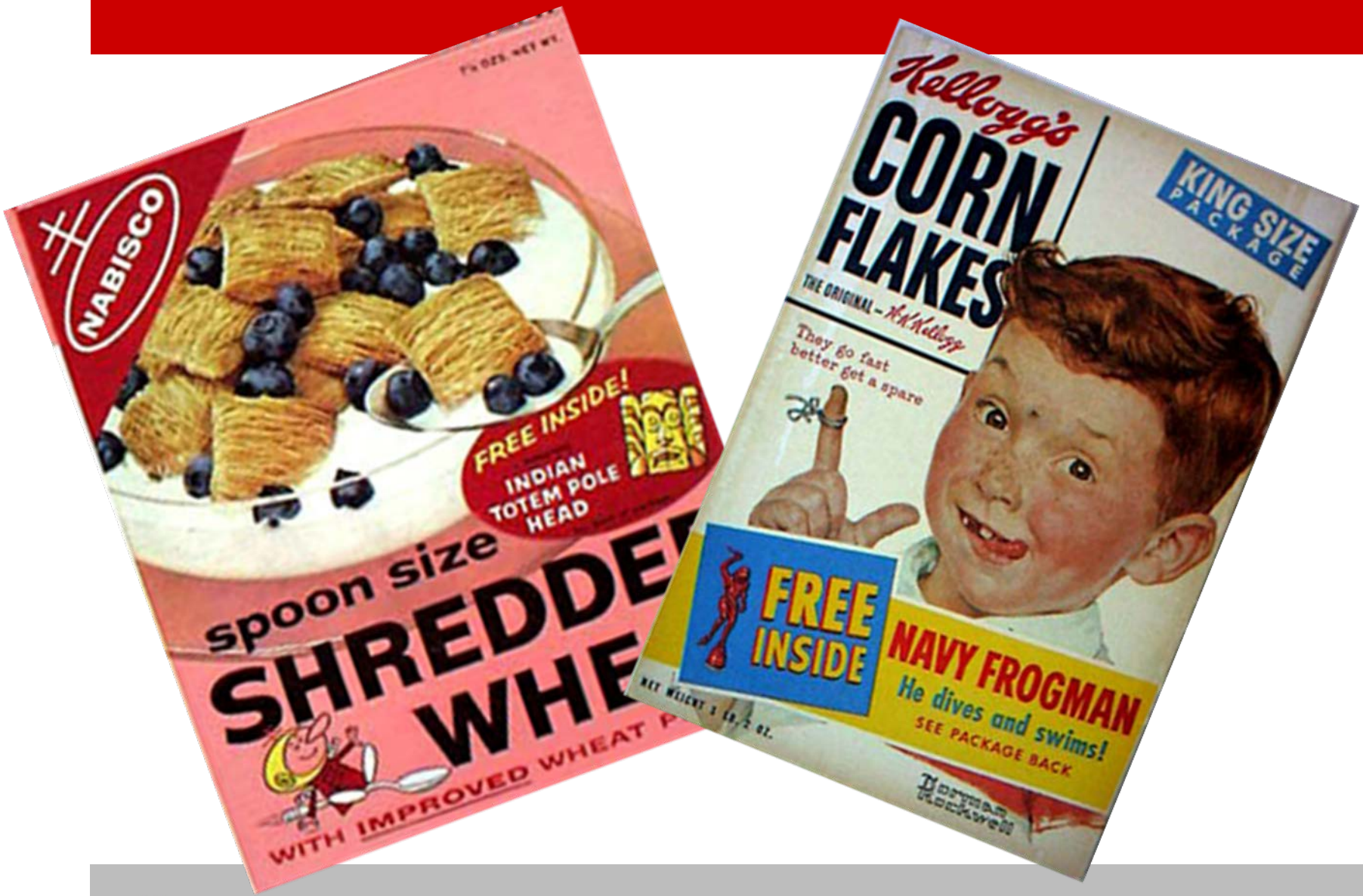
- But 20 years later, it changed its mind, "disavow[ed]" that aspect of *Thermtron,* and held an order of remand immediately appealable as a final judgment under 28 U.S.C. § 1291. *Quackenbush*, 517 U.S. at 713-15 ("[I]t puts the litigants . . . 'effectively out of court'" and is the "practical equivalent of an order dismissing the case.").

Review of Orders Denying Remand

- No review of order denying remand in bankruptcy under § 1452(b):
  "An order entered under this subsection remanding a claim or cause of action, *or a decision to not remand*, is not reviewable . . . ."
- Non-bankruptcy: review on appeal after final judgment. *E.g., Chicago, Rock Island & Pacific RR v. Stude*, 346 U.S. 574, 577-78 (2004); C.A. Wright, *et al.*, FED. PRAC. & PROC. § 3914.11 (1992 & 2013 supp.)

Review of Orders Denying Remand

- Mandamus review of jurisdictional remand orders unlikely, because of adequate remedy on appeal from final judgment. *In re Crystal Power Co.*, 641 F.3d 82, 83-86 (5th Cir. 2011)
- Possible mandamus review of non-jurisdictional remand orders, because of no adequate remedy on appeal. *In re Beazley Ins. Co.*, 2009 U.S. App. LEXIS 29463 (5th Cir. May 4, 2009) (relying on *In re Volkswagen of America, Inc.*, 545 F.3d 304 (5th Cir. 2008)(en banc))
- Possible certified interlocutory appeal, 28 U.S.C. § 1292(b).



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Partial Remands and Review of Collateral Orders

28 U.S.C. § 1367 – Supplemental Jurisdiction:

(c) The district courts may decline to exercise supplemental jurisdiction over a claim . . . if –

1) the claim raises a novel or complex issue of State law,
2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
3) the district court has dismissed all claims over which it has original jurisdiction, or
4) in exceptional circumstances, there are other reasons for declining jurisdiction.

Partial Remands and Review of Collateral Orders

"[P]art of a case may be remanded after the federal court has decided another part . . . . *Genuinely intractable dilemmas* appear as soon as a case is thus separated into parts to be resolved in federal court and other parts to be resolved in state court. . . ."

Wright, *supra*, § 3914.11.

Partial Remands and Review of Collateral Orders

"Every answer is bad, and it is very difficult to guess which is least bad. No system that includes removal and the prospect of partial remand can achieve a satisfactory accommodation between the need for prompt trial and the ordinary opportunities for appeal that have shaped the entire court system. As unattractive as the present muddle is, we may be forced to live with it."

Wright, *supra*, § 3914.11

Partial Remands and Review of Collateral Orders

City of Waco v. United States Fidelity & Guaranty Co., 293 U.S. 140 (1934)

- In a single decree, district court dismissed one claim and party, eliminating basis for federal jurisdiction, and remanded.
- Petitioner appealed dismissal, not remand, arguing it was "contrary to the law of Texas."
- SCOTUS allowed appeal, because the dismissal preceded the remand "in logic and in fact" and was "conclusive" upon the petitioner.

Partial Remands and Review of Collateral Orders

Morris v. TE Marine Corp., 344 F.3d 439 (5th Cir. 2003) (relying on *City of Waco* and *First Nat'l Bank v. Genina Marine Servs., Inc.*, 136 F.3d 391 (5th Cir. 1998))

- ". . . this case reads like a nightmarish civil procedure exam."
- Holds pre-remand substantive rulings on summary judgment, etc., can and must be appealed to the federal appellate court within 30 days after remand order.

Partial Remands and Review of Collateral Orders

(*TE Marine*, cont'd)

- "[O]rder to remand was a final decision that allowed review of that part of the case which the district court decided" prior to remand.
- Prior substantive orders are "separable" from remand order, preceding it "in logic and in fact" under *City of Waco*.
- And they are "conclusive" because they "will have the preclusive effect of being functionally unreviewable in state court." They are "substantive" rather than "jurisdictional."

Partial Remands and Review of Collateral Orders

(*TE Marine*, cont'd)

- "[I]t is absurd to suppose that the proper forum . . . to appeal a federal district court's summary judgment order is the Louisiana *state* appellate court."
- "[R]eview on appeal in the state court system would be 'grossly unsatisfactory' as it would 'force a state court into the unfamiliar and dubious enterprise of reviewing a federal trial court.'" *Harmston v. City & Cnty. of San Francisco*, 627 F.3d 1273, 1277-79 (9th Cir. 2010)

Partial Remands and Review of Collateral Orders

"[T]he federal judicial system is built on the premise that district court rulings on the merits are appealable as a matter of right, and that the appeal should go to a federal court. Appeal upon completion of the federal proceedings [when remand is ordered] is the only answer available in the present system."

Wright, *supra*, § 3914.11

Partial Remands and Review of Collateral Orders

A "two-step" consideration?

Must pre-remand orders not only (1) meet the "separable" criteria of *City of Waco*, but also (2) "be independently reviewable by means of devices like the collateral order doctrine"?

> *Arnold v. State Farm Fire & Cas. Co.*, 277 F.3d 772, 776 (5th Cir. 2001); *Doleac v. Michalson*, 264 F.3d 470, 478 (5th Cir. 2001)

Partial Remands and Review of Collateral Orders

Regan v. Starcraft Marine LLC, 524 F.3d 627, 630-33 (5th Cir. 2008):

"Instead of using *Cohen*'s collateral order analysis, this Court [has] found that 'under *City of Waco* and its progeny, we have jurisdiction to review the district court's dismissal' of third-party claims against a federal entity, when the order of dismissal was contained in the same judgment but analytically preceded the remand order. By referring to *City of Waco* and not to the later *Cohen* decision that first mentioned the collateral order doctrine, this Court may have been making a clear choice of not using that doctrine."

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SUPREME COURT CLARIFIES OPINION IN DEFAMATION CASE

Neely v. Wilson
Texas Supreme Court, No. 11-0228 (January 31, 2014)
Guzman (opinion)

Jesse Shumway

In June 2013, we reported that the Supreme Court in *Neely v. Wilson* reversed summary judgment for media defendants and held that a rebroadcast of defamatory statements made by others is itself defamatory. Previous post here. The defendants moved for rehearing, and in their briefing construed the Court's original opinion (as we did) to mean that a substantial-truth defense in this context requires proof that the third-party statements were themselves true, not merely proof that the defendant accurately reported the allegations. In a corrected opinion, the Court rejected this characterization of its opinion, stating in a new footnote that it actually "leave [s] open the question of whether a broadcast whose gist is merely that allegations were made is substantially true if the allegations were accurately repeated." The footnote explains that, whether or not accurate reporting of third-party allegations is shielded, summary judgment was improper in this case because there was a fact

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