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Stephen V. Rible

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COMMENTS

FEDERAL COURTS: REVIEW OF THE REMAND ORDER

STEPHEN V. RIBLE

For ninety years, an order issued by a federal district judge remanding a case which had been removed from a state to a federal court was not subject to appellate review.¹ This general prohibition has been eased recently, and under appropriate circumstances remand orders have been challenged by a petition for mandamus.² The correct manner to determine whether these prescribed circumstances exist, so that mandamus will lie, remains a controversial issue.³

Judicial interpretations of the nonreview statute reveal two conflicting policy arguments. On one hand, limiting appellate jurisdiction effectuates the policy of avoiding undue delay. Review of remand orders could become a device for substantially delaying justice and interfering with states' rights where removal was improper.⁴ On the other hand, the need for supervision of lower federal courts justifies some interruption and delay.⁵ Although time-consuming appeals may prejudice a party's right to a speedy trial, greater injustice may result from denying an injured party redress for an abuse of discretion.⁶ In analyzing the conflicting policies one must examine the problems arising from an absolute prohibition of review, the judicial attempts to ameliorate the harshness of such a restriction, and the possibility of statutory amendment to effectively balance the opposing concerns.

REMOVAL AS A JURISDICTIONAL DOCTRINE

A fundamental principle which binds the federal judicial system is that

1. *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 356 (1976) (Rehnquist, J., dissenting); 28 U.S.C. § 1447(d) (1970) provides, "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise"

2. *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 352 (1976).

3. An attempt by the Fifth Circuit to expand this avenue of appeal was reversed by the Supreme Court. *Gravitt v. Southwestern Bell Tel. Co.*, ___ U.S. ___, ___, 97 S. Ct. 1439, 1440, 52 L. Ed. 2d 1, 3 (1977) (per curiam), *rev'g sub nom. In re Southwestern Bell Tel. Co.*, 535 F.2d 859 (5th Cir. 1976).

4. *E.g.*, *United States v. Rice*, 327 U.S. 742, 751-52 (1946); *Chandler v. O'Bryan*, 445 F.2d 1045, 1057 (10th Cir. 1971), *cert. denied*, 405 U.S. 964 (1972); *Appalachian Volunteers, Inc. v. Clark*, 432 F.2d 530, 533 (6th Cir. 1970), *cert. denied*, 401 U.S. 939 (1971).

5. *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 354-55 (1976) (Rehnquist, J., dissenting).

6. *See id.* at 351.

its courts have limited jurisdiction.⁷ They have authority to hear only those cases outlined by legislative enactment pursuant to article III of the Constitution.⁸ Although not specifically mentioned in the Constitution, statutory provision for the removal of cases from state to federal courts has existed since the enactment of the Judiciary Act of 1789.⁹ The constitutionality of removal jurisdiction has been firmly established.¹⁰

Section 1441(a) of title 28 provides that any civil action brought in a state forum may be removed to a district court of the United States if the action might have commenced originally in the federal system.¹¹ This original jurisdiction requirement is normally met by showing the parties' diverse citizenship or that the case substantially involves a federal question.¹² Exceptions to these criteria appear in various statutes maintaining special grounds for allowance of removal,¹³ while other actions have been specifically designated as nonremovable.¹⁴ All removal provisions are subject to certain procedural restrictions.¹⁵

7. *E.g.*, *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 213 (1971) (states' rights violated unless federal courts confine their jurisdiction within precise limits of federal statutes); *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 376 (1940); *Jorden v. Metropolitan Utils. Dist.*, 498 F.2d 514, 516 (8th Cir. 1974).

8. U.S. CONST. art. III, § 1 states in part: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." See generally C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 3522, at 44 (1975).

9. Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 79-80 (current version at 28 U.S.C. § 1441 (1970)). See generally Symposium, *Exercise of Federal Court Jurisdiction Not "Specifically" Conferred*, 5 ST. MARY'S L.J. 489, 496 (1973).

10. *E.g.*, *Tennessee v. Davis*, 100 U.S. 257, 265 (1879); *Kithcart v. Metropolitan Life Ins. Co.*, 150 F.2d 997, 1001 (8th Cir.), *cert. denied*, 326 U.S. 777 (1945); *Texas Employer's Ins. Ass'n v. Felt*, 150 F.2d 227, 233-34 (5th Cir. 1945); see *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 366 F. Supp. 51 (D.D.C. 1973), where the court said "[w]hen it comes to jurisdiction of the federal courts, truly, to paraphrase the scripture, the Congress giveth and the Congress taketh away." *Id.* at 55.

11. Subject to statutory exception, 28 U.S.C. § 1441(a) (1970), provides that "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 . . . to the district court . . ."

12. Federal district courts have original jurisdiction if the matter in controversy exceeds \$10,000 and it "arises under the Constitution, laws, or treaties of the United States" or it is between parties of diverse citizenship. *Id.* §§ 1331, 1332.

13. 12 U.S.C. § 632 (1970) (federal regulation of international banking); 28 U.S.C. § 1441(c) (1970) (nonremovable claims may be removed if joined with a removable claim, depending upon court discretion); *id.* § 1442 (suits against federal officers); *id.* § 1442(a) (suits against members of the armed forces); *id.* § 1444 (foreclosure actions against the United States). Numerous federal statutes depart from the \$10,000 requirement as to jurisdictional amount. See C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 3701, at 356 (1976).

14. 28 U.S.C. § 1445 (1970) (suits against railroads, common carriers, and those arising under the workmen's compensation laws).

15. *Id.* § 1446.

Federal jurisdiction in removal proceedings is derivative in nature. An action must have commenced in a state court having subject-matter jurisdiction before it may be removed to the federal forum.¹⁶ Only the defendant may invoke removal jurisdiction;¹⁷ a limitation on his right is that the grounds for removal must derive from the plaintiff's complaint,¹⁸ and matters pleaded in defense are immaterial.¹⁹ The record is typically evaluated at the time removal is sought since jurisdiction over a properly removed case may not be defeated by later developments in the suit.²⁰

IMPROPERLY REMOVED CAUSE

Improper removal may result from a defect in procedure, or from an inability to meet statutory requirements.²¹ Where the ground claimed to justify removal is diversity of citizenship, a lack of complete diversity or a failure to satisfy the jurisdictional amount would prove fatal to the defendant's petition.²² Where the ground claimed to justify removal is based on section 1331 of title 28,²³ the absence of a federal question in the complaint or an insufficient jurisdictional amount would preclude transfer.²⁴ In the event the plaintiff does not promptly object, procedural defects may be waived.²⁵ Of course, defects relating to the federal court's subject matter

16. *E.g.*, *Freeman v. Bee Mach. Co.*, 319 U.S. 448, 449 (1943); *Lambert Run Coal Co. v. Baltimore & O.R.R.*, 258 U.S. 377, 382 (1922); *Gleason v. United States*, 458 F.2d 171, 173-74 (3d Cir. 1972). As a practical matter, removal of proceedings ancillary to an action pending in a state court is usually denied. *Federal Sav. & Loan Ins. Corp. v. Quinn*, 419 F.2d 1014, 1018 (7th Cir. 1969); *see Reynolds v. Reynolds*, 309 F.2d 395, 395 (5th Cir. 1962); 1A MOORE'S FEDERAL PRACTICE ¶ o. 157 [3], at 44-51 (2d ed. 1974).

17. *E.g.*, *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 104-05 (1941); *Conner v. Slazinger*, 457 F.2d 1241, 1242-43 (3d Cir. 1972); *Ristuccia v. Adams*, 406 F.2d 1257, 1258 (9th Cir.), *cert. denied*, 396 U.S. 1 (1969).

18. *E.g.*, *Pullman Co. v. Jenkins*, 305 U.S. 534, 537 (1939); *Nunn v. Feltinton*, 294 F.2d 450, 453 (5th Cir. 1961), *cert. denied*, 369 U.S. 817 (1962); *Glaziers Local 1928 v. Florida Glass & Mirror, Inc.*, 409 F. Supp. 225, 227 (M.D. Fla. 1976).

19. *Arkansas v. Kansas & Tex. Coal Co.*, 183 U.S. 185, 188 (1901); *Seneca Nursing Home v. Kansas State Bd. of Social Welfare*, 490 F.2d 1324, 1328 (10th Cir. 1974); *Cabe v. Pennwalt Corp.*, 372 F. Supp. 780, 783 (W.D.N.C. 1974) (counterclaim will not be considered).

20. *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 292 (1938); *Hatridge v. Aetna Cas. & Sur. Co.*, 415 F.2d 809, 814 (8th Cir. 1969); *Alexander v. Lancaster*, 330 F. Supp. 341, 343 (W.D. La. 1971).

21. Comment, *Removal of Causes: The Dilemma of the Improperly Removed Cause*, 27 OKLA. L. REV. 99, 99-100 (1974). *See generally* 28 U.S.C. § 1446 (1970).

22. The requirements for federal original jurisdiction concerning diversity cases are set out in 28 U.S.C. § 1332 (1970). Section 1441(b) provides for removal of such cases from state courts. *Id.* § 1441(b).

23. *Id.* § 1331.

24. Section 1331 sets out the criteria for federal original jurisdiction concerning federal questions. *Id.* § 1331. Section 1441(b) allows for removal of such cases from state courts. *Id.* § 1441(b).

25. *See Grubbs v. General Elec. Credit Corp.*, 405 U.S. 699, 702 (1972); *McLeod v. Cities Serv. Gas Co.*, 233 F.2d 242, 244 (10th Cir. 1956) (petition not filed within statutory period);

jurisdiction may not be waived and may be raised at any time.²⁶

The removal statutes express a congressional policy of restricting the right to remove.²⁷ These provisions have been strictly construed,²⁸ and numerous decisions have held that all doubts as to whether removal was proper should be resolved in favor of remanding the suit back to state court.²⁹

Critics of the federal judicial system propose to further restrict the right to remove by severely limiting diversity jurisdiction.³⁰ They emphasize that the historical basis for this removal ground, prejudice or local influence, has been substantially diminished.³¹ By requiring the litigant to meet an additional criterion of showing local prejudice, diversity jurisdiction could be invoked only when necessary. Also, subjecting the movant to a more onerous burden of proof would lighten the congested federal docket and reduce the possibility of judicial error.³²

CONSEQUENCES OF IMPROPER REMOVAL

The federal district court to which a case has been removed is under a duty to examine, *sua sponte*, the propriety of the removal.³³ Unlike a dismissal order generally delivered by a court upon a finding of no jurisdiction, remand is the only appropriate disposition of improperly removed cases.³⁴ Congress has explicitly stated that "the district court shall remand

Parks v. Montgomery Ward & Co., 198 F.2d 772, 774 (10th Cir. 1952); *Traylor v. Black, Sivalls & Bryson, Inc.*, 189 F.2d 213, 214 (8th Cir. 1951).

26. *American Fire & Cas. Co. v. Finn*, 341 U.S. 6, 17-18 (1951); *Fennell v. John Hancock Mut. Life Ins. Co.*, 177 F.2d 737, 738 (5th Cir. 1949).

27. *Horton v. Liberty Mut. Ins. Co.*, 367 U.S. 348, 361 (1961) (Clark, J., dissenting); *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941); *La Chemise Lacoste v. Alligator Co.*, 506 F.2d 339, 344 (3d Cir. 1974), *cert. denied*, 421 U.S. 937 (1975); *see American Home Assurance Co. v. Insular Underwriters Corp.*, 494 F.2d 317, 319 (1st Cir. 1974).

28. *E.g.*, *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108 (1941); *Bradley v. Maryland Cas. Co.*, 382 F.2d 415, 419 (8th Cir. 1967); *Hoyt v. Sears, Roebuck & Co.*, 130 F.2d 636, 637 (9th Cir.), *cert. denied*, 317 U.S. 687 (1942).

29. *E.g.*, *Greenshields v. Warren Petroleum Corp.*, 248 F.2d 61, 65 (10th Cir.), *cert. denied*, 355 U.S. 907 (1957); *Fernandez v. Reynolds Metals Co.*, 384 F. Supp. 1281, 1283 (S.D. Tex. 1974); *Dane v. Southwestern Bell Tel. Co.*, 352 F. Supp. 257, 258 (W.D. Okla. 1972).

30. *Hearings Before the Comm'n on Revision of the Federal Court Appellate System (First Phase) pursuant to Pub. L. No. 92-489 [86 Stat. 807 (1972)]* at 428 (1973) (statement of Lawrence J. Franck); *see Davis, Removal of Cases from State to Federal Courts*, 11 LAW NOTES 11 (1975).

31. *See* authorities cited note 30 *supra*.

32. *See Hearings Before the Comm'n on Revision of the Federal Court Appellate System (First Phase) pursuant to Pub. L. No. 92-489 [86 Stat. 807 (1972)]* at 428 (1973) (statement of Lawrence J. Franck).

33. *E.g.*, *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 184 (1936); *Girard v. Kimbell Milling Co.*, 116 F.2d 999, 1000 (5th Cir. 1941); *Nixon v. O'Callaghan*, 392 F. Supp. 1081, 1084 (S.D.N.Y. 1975).

34. 28 U.S.C. § 1447(c) (1970). An exception exists where the state court had no subject

the case," where the judge concludes it was removed "improvidently and without jurisdiction."³⁵

The duty to remand is squarely upon the shoulders of the district judge and his decision is "not reviewable on appeal or otherwise."³⁶ The congressional purpose in barring review is to prevent the additional delay that would result from allowing appellate consideration of remand orders.³⁷ Apparently, the necessity of returning the case to state court as rapidly as possible outweighs the need for appellate supervision over the lower federal courts regarding their adjudication of removal proceedings. As a result, the district judge has been established as final arbiter of the remand order, despite the possibility of error in his decision.³⁸

The principle of nonreview pertains strictly to the district court's remand order; other closely related areas are beyond the statute's narrow scope. A refusal to remand may be appealed following a final decision on the merits.³⁹ If the court of appeals determines upon appeal that the case should have been remanded to the state court, its action may be reviewed by the Supreme Court.⁴⁰ Furthermore, judicial measures taken by the district court prior to remand may be reconsidered when they would prejudice a party's rights if left undisturbed.⁴¹ Finally, the removal of a previously remanded case would not be considered a review of the previous remand order, provided the pleadings contain a new ground of removal based on conditions which have changed significantly.⁴²

matter jurisdiction. See C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3739, at 755 (1976).

35. 28 U.S.C. § 1447(c) (1970).

36. *Id.* § 1447(d).

37. *United States v. Rice*, 327 U.S. 742, 751-52 (1946); *Chandler v. O'Bryan*, 445 F.2d 1045, 1057 (10th Cir. 1971), *cert. denied*, 405 U.S. 964 (1972); *Appalachian Volunteers, Inc. v. Clark*, 432 F.2d 530, 533 (6th Cir. 1970), *cert. denied*, 401 U.S. 939 (1971).

38. See *Volvo Corp. v. Schwarzer*, ___ U.S. ___, ___, 97 S. Ct. 284, 285 n.3, 50 L. Ed. 2d 273, 275 n.3 (1976) (Rehnquist, Circuit Justice, 1976); *Robertson v. Ball*, 534 F.2d 63, 65 n.4 (5th Cir. 1976); *Midland Mortgage Co. v. Winner*, 532 F.2d 1342, 1344 (10th Cir. 1976).

39. *Chicago, R.I. & P.R.R. v. Stude*, 346 U.S. 574, 578 (1954); see *La Chemise Lacoste v. Alligator Co.*, 506 F.2d 339, 341-42 (3d Cir. 1974), *cert. denied*, 421 U.S. 937 (1975); *Wilkins v. American Export-Isbrandtsen Lines, Inc.*, 401 F.2d 151, 151 (2d Cir. 1968); Annot., 21 A.L.R.2d 760, 761 (1952). Conceding that appeal following final judgment may cause undue delay, some circuit courts allow interlocutory appeals to be instituted if certified under 28 U.S.C. § 1292(b) (1970), "or as an adjunct to a judgment entered pursuant to" FED. R. CIV. P. 54(b). See C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3740, at 768-69 (1976).

40. See *Willingham v. Morgan*, 395 U.S. 402, 404 (1969) (reversal of erroneously ordered remand order); *Aetna Cas. & Sur. Co. v. Flowers*, 330 U.S. 464, 467 (1947); *Gay v. Ruff*, 292 U.S. 25, 30 (1934).

41. *Waco v. United States Fidelity & Guar. Co.*, 293 U.S. 140, 143-44 (1934); *Kerbow v. Kerbow*, 421 F. Supp. 1253, 1260 (N.D. Tex. 1976). For example, dismissal of a third party complaint was held reviewable despite the fact that dismissal resulted in remand to the state court. *Southeast Mortgage Co. v. Mullins*, 514 F.2d 747, 749 (5th Cir. 1975).

42. *O'Bryan v. Chandler*, 496 F.2d 403, 410 (10th Cir. 1974); *Smith v. Student Non-*

BROAD SCOPE OF THE REVIEW PROHIBITION

In 1875 Congress provided for review of remand orders by the Supreme Court on writ of error or appeal.⁴³ The Judiciary Act of 1887, however, repealed the previous law, explicitly stating that no appeal or writ of error would be allowed from the decision of the circuit court to remand.⁴⁴ Except for the word "district" being substituted for "circuit," this restriction was later included in sections 71 and 80 of title 28.⁴⁵ In 1948, 28 U.S.C. § 1447 was enacted to provide for remand orders, but omitted the prohibition against appellate review.⁴⁶ Correcting this omission, the predecessor of the current section 1447(d) was promulgated in 1949.⁴⁷

Judicial interpretations have upheld the statutory intention that remand orders be final.⁴⁸ Once the decision has been received by the state court, even the issuing federal forum may not vacate its order.⁴⁹ Furthermore, the state judge retaining the case may not rule on the propriety of the federal decision.⁵⁰ The only assured method of reviewing remand orders was established in 1964. Through statutory amendment of section 1447(d), Congress allowed direct appeal from an order remanding cases removed pursuant to section 1443, the civil rights statute.⁵¹ Since the exception has been narrowly defined, it may be utilized in relatively few instances.⁵² With

Violent Coordinating Comm., 421 F.2d 522, 523-24 (5th Cir. 1969); *Kulbeth v. Woolnought*, 324 F. Supp. 908, 910-11 (S.D. Tex. 1971).

43. Judiciary Act of 1875, ch. 137, § 5, 18(3) Stat. 472 (current version at 28 U.S.C. § 1447(d) (1970)). Prior to 1875, remand orders were not appealable due to their interlocutory nature. *Thermtom Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 346 (1976); see *Railroad Co. v. Wiswall*, 90 U.S. (23 Wall.) 507, 508 (1874); Annot. 114 A.L.R. 1476, 1476-77 (1938).

44. Judiciary Act of 1887, ch. 373, § 2, 24 Stat. 553 (current version at 28 U.S.C. § 1447 (1970)).

45. Judiciary Act of 1911, ch. 231, § 28, 36(1) Stat. 1095 (current version at 28 U.S.C. § 1447 (1970)).

46. Act of June 25, 1948, ch. 646, § 1447, 62(1) Stat. 939 (current version at 28 U.S.C. § 1447 (1970)).

47. Act of May 24, 1949, ch. 139, § 4121(84)(d), 63(1) Stat. 102 (current version at 28 U.S.C. § 1447 (1970)).

48. See, e.g., *Southeast Mortgage Co. v. Mullins*, 514 F.2d 747, 749 (5th Cir. 1975); *American Home Assurance Co. v. Insular Underwriters Corp.*, 494 F.2d 317, 319 (1st Cir. 1974); *Commonwealth ex. rel. Gittman v. Gittman*, 451 F.2d 155, 157 (3d Cir. 1971).

49. *In re La Providencia Dev. Corp.*, 406 F.2d 251, 252-53 (1st Cir. 1969); *Yarbrough v. Blake*, 212 F. Supp. 133, 145-47 (W.D. Ark. 1962); 28 U.S.C. § 1447(c) (1970) (requires remanding court to mail certified copy of remand order to state court).

50. *Metropolitan Cas. Ins. Co. v. Stevens*, 312 U.S. 563, 568 (1941); *Missouri Pac. Ry. v. Fitzgerald*, 160 U.S. 556, 582 (1896); *Schueren v. Querner Truck Lines, Inc.*, 159 N.E.2d 835, 838 (Ill. App. Ct. 1959).

51. Section 1447(d) prohibits review of remand orders, except that cases "removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise." 28 U.S.C. § 1447(d) (1970). Minor statutory exceptions allow the United States to appeal remand orders arising out of cases dealing with Indian land. 25 U.S.C. § 487(d) (1970); *id.* §§ 610c, 642(b), 670 (Supp. IV 1974).

52. See *City of Greenwood v. Peacock*, 384 U.S. 808, 827-28 (1966); *Georgia v. Rachel*,

respect to other litigation, the general prohibition has prevailed. The absence of jurisdictional authority to review remand orders has precluded stay orders,⁵³ declaratory judgments,⁵⁴ interlocutory appeals,⁵⁵ and, until recently, writs of mandamus.⁵⁶

EROSION OF NONREVIEWABILITY

The expansive authority of the nonreview statute remained unquestioned until the Supreme Court decision in *Thermtron Products, Inc. v. Hermansdorfer*.⁵⁷ In *Thermtron* the suit had been properly removed from the state court on the ground of diversity of citizenship and there were no jurisdictional objections to removal.⁵⁸ While recognizing the litigant's right to a federal forum, the district judge chose to remand the case on the ground that no time was available in the "foreseeable future" to adjudicate the matter.⁵⁹ The Supreme Court set aside the order, stating that the judge was without jurisdiction to remand merely on the grounds of a busy federal docket.⁶⁰ The majority justified this limitation on the district court's discretion and based its own jurisdiction to review a remand order through a novel interpretation of section 1447.⁶¹ The Court considered the original predecessor to section 1447, which provided that "improperly removed" cases should be remanded and appeals from the order of the court "so

384 U.S. 780, 800 (1966); *Florida-Vanderbilt Dev. Corp. v. Matthews*, 454 F.2d 194, 195 (5th Cir.), *cert. denied*, 409 U.S. 861 (1972).

53. *In re Rosenthal-Block China Corp.*, 278 F.2d 713, 714 (2d Cir. 1960); *Poore v. Ohio*, 243 F. Supp. 777, 780 (W.D. Ohio 1965), *aff'd on other grounds sub nom. Townsend v. Ohio*, 366 F.2d 33 (6th Cir. 1966); *Irving Subway Grating Co. v. Silverman*, 117 F. Supp. 671, 681 (E.D.N.Y. 1953).

54. *Delavigne v. Delavigne*, 530 F.2d 598, 601 (4th Cir. 1976); *Chandler v. O'Bryan*, 445 F.2d 1045, 1057 (10th Cir. 1971), *cert. denied*, 405 U.S. 964 (1972); *H.J. Heinz Co. v. Owens*, 189 F.2d 505, 508 (9th Cir. 1951), *cert. denied*, 342 U.S. 905 (1952).

55. *In re Rosenthal-Block China Corp.*, 278 F.2d 713, 714 (2d Cir. 1960); *In re Bear River Drainage Dist.*, 267 F.2d 849, 851 (10th Cir. 1959).

56. Remand orders were not subject to a writ of mandamus in the past. *United States v. Rice*, 327 U.S. 742, 751 (1946); *Employers Reinsurance Corp. v. Bryant*, 299 U.S. 374, 380 (1937); *Sullivan v. Simons*, 337 F.2d 239 (4th Cir. 1964). In 1976, the Supreme Court held that mandamus would lie to allow review of a remand order based on improper grounds. *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 352 (1976).

57. 423 U.S. 336 (1976).

58. *Id.* at 337.

59. *Id.* at 339.

60. *Id.* at 344; *accord*, *Lincoln Assocs. v. Great Am. Mortgage Investors*, 415 F. Supp. 351, 353 (N.D. Tex. 1976); *Morgan v. Ranger Ins. Co.*, 413 F. Supp. 678, 679 (M.D. Fla. 1976); *Griffin v. Hooper-Holmes Bureau, Inc.*, 413 F. Supp. 107, 108 (M.D. Fla. 1976); *see* 45 U. CIN. L. REV. 288, 292 (1976).

61. *See Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 345-46 (1976) (construing 28 U.S.C. § 1447 (1970)). Judicial discretion under section 1447 should be contrasted with that under the doctrine of abstention. For a general discussion of abstention, *see* 1 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 64 (1960).

remanding" would be prohibited.⁶² It reasoned that a case was "so remanded" and consequently unreviewable only if the suit had been improperly removed.⁶³ Applying that rationale to the present section 1447, it followed that only those remand orders which invoke the ground that the suit was "removed improvidently and without jurisdiction" would be immune from review.⁶⁴ This point of view was a significant departure from past interpretations which confirmed the absolute prohibition against review of remand orders.⁶⁵ Also, the holding was contrary to the established policy of strictly construing removal statutes in favor of finding removal improper.⁶⁶

The dissenting opinion criticized the majority's assertion that the construction of prior statutes should have direct bearing on the proper application of the present section 1447.⁶⁷ The majority relied heavily on the theory that "so remanding" limited the otherwise universal prohibition against review of remand orders, but no such phrase exists in the current statute. Considering this change, the dissent argued that Congress intended a universal prohibition as an integral part of its overall attempt to streamline the previous scheme of removal.⁶⁸

In the wake of *Thermtron*, recent circuit court decisions have further clarified the meaning of the words "removed improvidently and without jurisdiction." Although the phrase is set out in the conjunctive,⁶⁹ the trial judge need not find both improvident removal and lack of jurisdiction. A finding of either would be sufficient to justify remand.⁷⁰ For example, a district court may remand a suit, as having been improvidently removed, on the basis of the removing party's failure to meet time limitations, even though the defect has been deemed nonjurisdictional.⁷¹ This development conforms to the policy of construing section 1447 to favor remand.

62. Judiciary Act of 1887, ch. 373, § 2, 24 Stat. 553 (current version at 28 U.S.C. § 1447 (1970)).

63. *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 348 (1976) (construing Judiciary Act of 1887).

64. *Id.* at 346 (construing 28 U.S.C. § 1447 (1970)).

65. See *Metropolitan Cas. Ins. Co. v. Stevens*, 312 U.S. 563, 568 (1941); *Southeast Mortgage Co. v. Mullins*, 514 F.2d 747, 749 (5th Cir. 1975); *American Home Assurance Co. v. Insular Underwriters Corp.*, 494 F.2d 317, 319 (1st Cir. 1974).

66. See cases cited notes 28-29 *supra*.

67. See *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 359 (1976) (Rehnquist, J., dissenting).

68. *Id.* at 359-60 (Rehnquist, J., dissenting).

69. 28 U.S.C. § 1447(c) (1970).

70. *Robertson v. Ball*, 534 F.2d 63, 65 n.2 (5th Cir. 1976); see *Griffin v. Hooper-Holmes Bureau, Inc.*, 413 F. Supp. 107, 108 (M.D. Fla. 1976).

71. *London v. United States Fire Ins. Co.*, 531 F.2d 257, 259 (5th Cir. 1976) (failed to file necessary petition for removal within 30-day time limit); *Robertson v. Ball*, 534 F.2d 63, 65 n.2 (5th Cir. 1976).

Mandamus To Correct Abuse of Discretion

Since the district judge in *Thermtron* remanded the case on grounds not authorized by statute, he had no jurisdiction to issue such an order. More specifically, if jurisdiction is vested in the federal courts, neither a crowded docket nor the possibility of a more expeditious resolution of the case in the state court may deprive the litigants of a federal forum.⁷² The practical consequences of denying movants a federal forum simply because they removed the case to a court with a congested docket must also be considered. Few would be able to predict the outcome of removed proceedings and such uncertainty could prove detrimental to the federal judicial system.⁷³

The discretionary abuse by the district judge in *Thermtron* required correction by an appropriate method of review. Mandamus had previously been used in similar situations as an aid to appellate jurisdiction.⁷⁴ Consequently, the Court in *Thermtron* held that mandamus would be the proper manner of seeking redress when a suit has been remanded on grounds other than those provided by statute.⁷⁵

Invocation of Proper Grounds Precludes Review

The majority in *Thermtron* declared that only remand orders issued pursuant to section 1447(c) and "invoking the grounds specified therein . . . are immune from review . . ."⁷⁶ To avoid undermining the purpose of the review prohibition, however, *Thermtron* emphasized that a trial judge need only *purport* to remand a case on the ground that it was "removed improvidently and without jurisdiction."⁷⁷ As a result, an express invocation of section 1447(c) by a remanding judge would leave no

72. *Thermtron Prods. Inc. v. Hermansdorfer*, 423 U.S. 336, 344 (1976); *accord*, *Lincoln Assocs. v. Great Am. Mortgage Investors*, 415 F. Supp. 351, 353 (N.D. Tex. 1976); *see* *Glaziers Local 1928 v. Florida Glass & Mirror, Inc.*, 409 F. Supp. 225, 226 (M.D. Fla. 1976).

73. *Cf. Ashman, Alfini & Shapiro, Federal Abstention: New Perspectives on its Current Vitality*, 46 Miss. L.J. 629, 652 (1975) (consequences of allowing abstention on grounds of a busy docket).

74. *See Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 382 (1953); *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943); *Ex parte Republic of Peru*, 318 U.S. 578, 584 (1943).

75. *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 352 (1976); *Midland Mortgage Co. v. Winner*, 532 F.2d 1342, 1344 (10th Cir. 1976) (*dicta*); *accord*, *London v. United States Fire Ins. Co.*, 531 F.2d 257, 259 (5th Cir. 1976). *See also Griffin v. Hooper-Holmes Bureau, Inc.*, 413 F. Supp. 107, 108 (M.D. Fla. 1976). A petition for mandamus is filed in the appellate court by the moving party. The court of appeals then reviews the decision of the district judge. If necessary, a writ of mandamus is issued requiring the district court to entertain the action. *See Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 353 (1976).

76. *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 346 (1976).

77. *Id.* at 351-52; *accord*, *Volvo Corp. v. Schwarzer*, ___ U.S. ___, ___, 97 S. Ct. 284, 285, 50 L. Ed. 2d 273, 275 (1976) (Rehnquist, Circuit Justice); *Robertson v. Ball*, 534 F.2d 63, 65 (5th Cir. 1976); *Midland Mortgage Co. v. Winner*, 532 F.2d 1342, 1344 (10th Cir. 1976).

jurisdictional power to review the merits of the remand order, despite the possibility of erroneous reasoning.⁷⁸

Although a district judge presently may issue an order to remand without supplying a reason,⁷⁹ it seems that an explanation for invoking section 1447(c) should be required. This would avoid the possibility of numerous mandamus proceedings asserting that the remand order was based on improper grounds. This additional requirement would be only a stop-gap measure, however, for the real problem lies in whether the district judge should be able to immunize his remand order simply by statements made proforma in the order. An incident could arise where the judge bases his remand order on statutory grounds, while the record demonstrates such a conclusion to be absurd.⁸⁰ Examination into the merits of the order would seem necessary in this instance, yet such an examination would lead to numerous time-consuming appeals.

The Complexities of the Thermtron Principle

The dissent in *Thermtron* warned that the principle espoused by the majority might lead to investigation into the merits of the remand order. This is precisely what occurred in *In re Southwestern Bell Telephone Co.*⁸¹ In that case a remand order had been issued on the ground that the corporate defendant was judicially estopped from asserting complete diversity of citizenship.⁸² Unlike the open indifference to section 1447(c) displayed by the trial judge in *Thermtron*,⁸³ this district court remanded the case because the action was improperly removed.⁸⁴ This action resulted in a mandamus proceeding in which the Court of Appeals for the Fifth Circuit examined and consequently vacated the remand order, stating that the doctrine of judicial estoppel could not be used as a basis for finding impro-

78. *Robertson v. Ball*, 534 F.2d 63, 65 (5th Cir. 1976); *Midland Mortgage Co. v. Winner*, 532 F.2d 1342, 1344 (10th Cir. 1976).

79. *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 357 (1976) (Rehnquist, J., dissenting).

80. *Id.* at 357.

81. 542 F.2d 297, 298 (5th Cir. 1976) (en banc), *rev'd sub nom.* *Gravitt v. Southwestern Bell Tel. Co.*, ___ U.S. ___, 97 S. Ct. 1439, 52 L. Ed. 2d 1 (1977) (per curiam).

82. *In re Southwestern Bell Tel. Co.*, 535 F.2d 859, 860 (5th Cir. 1976), *rev'd sub nom.* *Gravitt v. Southwestern Bell Tel. Co.*, ___ U.S. ___, 97 S. Ct. 1439, 52 L. Ed. 2d 1 (1977) (per curiam).

83. *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 361 (1976) (Rehnquist, J., dissenting). The district judge's actions were reported to the Circuit Council for the Sixth Circuit, which has supervisory powers over the district courts. *Id.* at 361 n.*.

84. *Gravitt v. Southwestern Bell Tel. Co.*, 416 F. Supp. 830, 832 (W.D. Tex. 1976) (remand order), *vacated*, 535 F.2d 859 (5th Cir.), *rev'd per curiam*, ___ U.S. ___, 97 S. Ct. 1439, 52 L. Ed. 2d 1 (1977). The district judge stated: "Accordingly, it is ORDERED . . . that this action was improperly removed, and that . . . motion to remand . . . is . . . GRANTED." 416 F. Supp. at 832.

per removal.⁸⁵ On rehearing the court reiterated that the district judge's proposition of law was erroneous.⁸⁶

The basic issue in *Southwestern Bell* was whether the district court's action was an erroneous application of section 1447(c) or a remand order not based on that statute. The former was nonreviewable while the latter was open to appellate consideration.⁸⁷ The court of appeals reasoned that by not dealing with jurisdictional facts, the district judge remanded the case on grounds other than improvident removal or removal without jurisdiction.⁸⁸ Finding that the remand was based on improper grounds, the court then held that the order was subject to a writ of mandamus.⁸⁹

At almost the same time, a similar case arising from the Ninth Circuit reached an opposite conclusion.⁹⁰ In *Volvo Corp. v. Schwarzer*,⁹¹ the district judge had made an improper analysis as to the requirements for jurisdictional amount.⁹² On a motion to stay, Mr. Justice Rehnquist held that review was presumptively barred since the district judge had purported to remand the case pursuant to the appropriate federal statute.⁹³ He stated that review by mandamus of an allegedly erroneous application of section 1447(c) would be "contrary to the clear language of *Thermtron*."⁹⁴

The *Volvo* decision proved to be indicative of the manner in which the Supreme Court was to deal with *Southwestern Bell*. In a per curiam decision, the Court reversed the holding of the Fifth Circuit.⁹⁵ The court of appeals had vacated the remand order because the district judge had erroneously concluded that he was without jurisdiction.⁹⁶ Since the remand

85. *In re Southwestern Bell Tel. Co.*, 535 F.2d 859, 860-61 (5th Cir. 1976), *rev'd sub nom.* Gravitt v. Southwestern Bell Tel. Co., ___ U.S. ___, 97 S. Ct. 1439, 52 L. Ed. 2d 1 (1977) (per curiam).

86. *In re Southwestern Bell Tel. Co.*, 542 F.2d 297, 298 (5th Cir. 1976) (en banc), *rev'd sub nom.* Gravitt v. Southwestern Bell Tel. Co., ___ U.S. ___, 97 S. Ct. 1439, 52 L. Ed. 2d 1 (1977) (per curiam).

87. *In re Southwestern Bell Tel. Co.*, 535 F.2d 859, 860-61 (5th Cir. 1976), *rev'd sub nom.* Gravitt v. Southwestern Bell Tel. Co., ___ U.S. ___, 97 S. Ct. 1439, 52 L. Ed. 2d 1 (1977) (per curiam).

88. *Id.* at 860-61. Similar to the district judge in *Thermtron* who erred by basing a remand order on grounds plainly irrelevant to a finding of complete diversity, the district judge in *Southwestern Bell*, by ignoring actual citizenship, issued his remand order on grounds other than those provided in § 1447(c). *Id.* at 860-61.

89. *Id.* at 860.

90. *Volvo Corp. v. Schwarzer*, ___ U.S. ___, 97 S. Ct. 284, 50 L. Ed. 2d 273 (1976) (Rehnquist, Circuit Justice) (stay denied).

91. *Id.* at ___, 97 S. Ct. at 284, 50 L. Ed. 2d at 273.

92. *Id.* at ___, 97 S. Ct. at 285, 50 L. Ed. 2d at 275.

93. Justice Rehnquist was acting individually on a motion to stay and not as spokesman for the Ninth Circuit or the Supreme Court. *Id.* at ___, 97 S. Ct. at 285, 50 L. Ed. 2d at 275.

94. *Id.* at ___, 97 S. Ct. at 285, 50 L. Ed. 2d at 275.

95. Gravitt v. Southwestern Bell Tel. Co., ___ U.S. ___, ___, 97 S. Ct. 1439, 1440, 52 L. Ed. 2d 1, 3 (1977) (per curiam).

96. *Id.* at ___, 97 S. Ct. at 1440, 52 L. Ed. 2d at 3.

order reflected merely an erroneous application of section 1447(c), the Court held it unreviewable by mandamus or otherwise.⁹⁷

The Supreme Court refrained from detailing the basis of its decision, stating simply that the *Southwestern Bell* remand order had been "plainly within the bounds of 1447(c)."⁹⁸ The fact that section 1447(c) remands were not subject to review was reiterated,⁹⁹ but guidelines for identifying a remand order based on improper grounds were not established. More importantly, the Supreme Court failed to explain the method it used to investigate the order.¹⁰⁰ If the Court examined the merits of the district judge's interpretation to determine that his action was pursuant to the appropriate federal statute, then potential delay from invoking appellate jurisdiction remains.¹⁰¹ This delay results from the difficulty in distinguishing between the mere correction of a remand order that was based on improper grounds and the statutorily forbidden review of an erroneous interpretation of section 1447(c) grounds.¹⁰² Each new situation will pave the way for numerous dilatory and time-consuming appeals questioning the propriety of the district court's decision,¹⁰³ resulting in a procedure directly in conflict with the express intent of Congress.

Even though uncertainty should be alleviated if the Supreme Court's investigation consisted entirely of a cursory examination from the face of the remand order,¹⁰⁴ another problem will probably arise. Apparently, a remand order which so much as mentions "improper removal" will be precluded from review.¹⁰⁵ Even mandamus would not lie to prevent a judge

97. *Id.* at ____, 97 S. Ct. at 1440, 52 L. Ed. 2d at 3.

98. *Id.* at ____, 97 S. Ct. at 1440, 52 L. Ed. 2d at 3. The Court summarily distinguished the facts in the present case from those in *Thermtron*. While the *Thermtron* remand order had been based "on grounds wholly different from those upon which 1447(c) permits remand," the *Southwestern Bell* remand order had been "plainly within the bounds of 1447(c)." *Id.* at ____, 97 S. Ct. at 1440, 52 L. Ed. 2d at 3.

99. *Id.* at ____, 97 S. Ct. at 1440, 52 L. Ed. 2d at 3.

100. *See id.* at ____, 97 S. Ct. at 1440, 52 L. Ed. 2d at 3.

101. *See Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 357 (1976) (Rehnquist, J., dissenting).

102. *See id.* at 357 (Rehnquist, J., dissenting). The erroneous en banc decision of the Court of Appeals for the Fifth Circuit illustrates the uncertainty which causes delay. *Gravitt v. Southwestern Bell Tel. Co.*, __ U.S. ____, ____, 97 S. Ct. 1439, 1440, 52 L. Ed. 2d 1, 3 (1977) (per curiam), *rev'g sub nom. In re Southwestern Bell Tel Co.*, 535 F.2d 859 (5th. Cir. 1976).

103. *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 357 (1976) (Rehnquist, J., dissenting). The original suit in *Southwestern Bell* was filed on November 15, 1974. *Gravitt v. Southwestern Bell Tel. Co.*, 396 F. Supp. 948, 949 (W.D. Tex. 1975) (motion to remand denied). The Supreme Court decision was approximately two and one-half years later. *See Gravitt v. Southwestern Bell Tel. Co.*, __ U.S. ____, ____, 97 S. Ct. 1439, 1440, 52 L. Ed. 2d 1, 3 (1977) (per curiam).

104. *See Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 356 (1976) (Rehnquist, J., dissenting).

105. The only reference the district judge made to section 1447(c) in his remand order

from remanding for reasons completely irrelevant to 1447(c) grounds, as long as his order recites "improper removal."¹⁰⁶ The ineffectiveness of precluding review by evaluating only the face of a remand order seems clear. If the district judge in *Thermtron*, who remanded because of a crowded docket, had simply stated in the order that the case had been "improperly removed," his action would have been nonreviewable under the apparent logic of the per curiam decision in *Southwestern Bell*.¹⁰⁷ The purpose of mandamus is to correct discretionary abuse.¹⁰⁸ If such abuse may be precluded from review simply by masking the remand order as being pursuant to "improper removal," the avenue of appeal opened in *Thermtron* becomes virtually nonexistent.

CURATIVE AMENDMENTS

Congress has illustrated its ability to protect against judicial abuses of removal rights when necessary. In civil rights cases it has allowed an avenue of appeal by amending the nonreview statute.¹⁰⁹ Broadening this amendment to permit review of remand orders in all types of cases would eliminate the potential for discretionary abuse. The realities of substantial delay and a greatly increased federal docket, however, render unfeasible an amendment allowing unrestricted review.¹¹⁰

The American Law Institute has proposed an alternative method of revising the present statute. Permissive appeal to the court of appeals would be the exclusive method of reviewing remand orders dealing with non-civil rights cases.¹¹¹ The appeal-as-of-right¹¹² exception in regard to civil rights litigation would remain.¹¹³ The Institute's method of permissive

was that the case had been "improperly removed." See *Gravitt v. Southwestern Bell Tel. Co.*, ___ U.S. ___, ___, 97 S. Ct. 1439, 1440, 52 L. Ed. 2d 1, 3 (1977) (per curiam).

106. See *id.* at ___, 97 S. Ct. at 1440, 52 L. Ed. 2d at 3. An express invocation of section 1447(c) leaves no jurisdictional power to review the remand order. *Robertson v. Ball*, 534 F.2d 63, 65 (5th Cir. 1976); *Midland Mortgage Co. v. Winner*, 532 F.2d 1342, 1344 (10th Cir. 1976).

107. See *Gravitt v. Southwestern Bell Tel. Co.*, ___ U.S. ___, ___, 97 S. Ct. 1439, 1440, 52 L. Ed. 2d 1, 3 (1977) (per curiam); *c.f.* *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 351-52 (1976) (judge need only purport to remand on section 1447(c) grounds).

108. See *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 352 (1976); *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 381-82 (1953).

109. 28 U.S.C. § 1443 (1970); see *id.* § 1447(d).

110. See *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336 (1976).

111. See ALI, *STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS*, 364-65, 417-18 (1969).

112. "Appeal as of right" represents the principle that once jurisdiction vests in the federal system the judge generally has no discretion to refuse to hear the case. *Hearings Before the Comm'n on Revision of the Federal Court Appellate System (First Phase) Pursuant to Pub. L. No. 92-489, [86 Stat. 807 (1972)]* at 429 (1973) (statement of Lawrence J. Franck); see *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 345 n.9 (1976); *Lincoln Assocs. v. Great Am. Mortgage Investors*, 415 F. Supp. 351, 353 (N.D. Tex. 1976).

113. ALI, *STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS*, 364 (1969).

appeal would require the authorization of both the district and the appellate court.¹¹⁴ Review would be authorized only when the appellant has presented a substantial question concerning the right to a federal forum and "sufficient ground for difference of opinion."¹¹⁵ Such restrictions would ensure that proceedings in state courts would not be delayed pending resolution of frivolous appeals.¹¹⁶ There is a potential danger in this proposed statute, however, because the district judge could refuse to grant a meritorious appeal. The proposed amendment thus fails to address the problem of district court discretionary abuse, while it increases the burden of the federal docket.

Any amendment which opens an avenue of appeal to protect against discretionary abuse in remand orders would advance the right to remove. Congress has clearly demonstrated its intent to restrict removal rights in an effort to reduce docket congestion.¹¹⁷ Consequently, the decisive trend indicates that an amendment to section 1447 allowing review of remand orders is unlikely.

CONCLUSION

In order to avoid undue delay from appellate proceedings and an overburdened federal docket, Congress has prohibited review of remand orders. A universal prohibition, however, eliminates supervision of the lower federal courts. *Thermtron* noted the importance of providing some supervision, but the Fifth Circuit's erroneous decision in *Southwestern Bell* illustrated the indefinite boundaries concerning review of remand orders pursuant to a petition for mandamus. The Supreme Court ruling in *Southwestern Bell* may result in an elimination of mandamus as an effective method of appealing remand orders based on improper grounds. Since the holding does not detail guidelines for determining when a remand order is not based on improper grounds, the ultimate effect of the decision remains in doubt. Certainly, review of remand orders by mandamus will continue to be a source of legal controversy.

114. *Id.* at 417.

115. *Id.* at 417.

116. *Id.* at 418.

117. See *Horton v. Liberty Mut. Ins. Co.*, 367 U.S. 348, 350-52 (1961). In 1958, Congress raised the jurisdictional amount from \$3,000 to \$10,000 in diversity and federal question cases. *Id.* at 351.