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REVIEWABILITY OF REMAND ORDERS: STRIKING THE BALANCE IN FAVOR OF EQUALITY RATHER THAN JUDICIAL EXPEDIENCY

Jerome I. Braun*

I. THE ISSUE

A federal district court order denying remand to state court is reviewable on appeal. An order granting remand (with limited exceptions) is not. Can this distinction be rationalized or justified? The thrust of this article is that it cannot.

II. AN OVERVIEW

The Constitution does not explicitly provide defendants with an absolute right to remove state court actions to federal district court. Nonetheless, such a right has been recognized by Congress since the enactment of the original Judiciary Act in 1789.¹ This statutory right of removal is the mechanism by which federal district courts exercise the original jurisdiction granted to them under Article III of the Constitution.²

In spite of the obvious importance of the right to a federal forum in certain cases, by enacting 28 U.S.C. § 1447(d) (hereinafter "section 1447(d)"), Congress has severely circumscribed the ability of defendants to establish that jurisdiction properly lies in federal district court. Denying any review of orders remanding removed ac-

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Although the views expressed here are solely those of the author, this Article is an outgrowth of a resolution proposed by the author and adopted by the judge and lawyer attendees at the 1988 Judicial Conference for the Ninth Judicial Circuit. The resolution was referred to the United States Judicial Conference, who, based on the recommendation of the Committee on Federal-State Court Judiciary, disapproved it.

The author is indebted to and appreciative of the efforts of Richard Van Duzer and Ronald J. Shingler who labored diligently on this project. Without their able assistance, this Article would not have come to fruition.

1. Judiciary Act, ch. 20, § 12, 1 Stat. 79-80 (1789) (current version at 28 U.S.C. § 1441 (1988)).

2. See generally *Chicago & Nw. Ry. Co. v. Whitton*, 80 U.S. 271, 272 (1872).

tions to state court effectively sabotages the mechanism and frustrates important federal policy.

There is a paucity of legislative history or expression of congressional intent respecting the public policy supposedly furthered by the interdiction of section 1447(d). It has been judicially declared, however, that its purpose is self-evident and clear: to prevent prolonged litigation concerning jurisdictional questions from unnecessarily interrupting and delaying the progress of a lawsuit.³ Clearly articulated or not, this ascribed congressional concern for judicial efficiency and expediency creates a needless and unfair judicial imbalance.

Although the avoidance of *unnecessary* delay is always a legitimate legislative and judicial concern, that concern must be balanced against the interests that are sacrificed when review of remand orders is completely precluded. The interest sacrificed by Congress' "no review" policy is access to a federal forum in cases where Article III establishes original jurisdiction in the federal judicial system. Whatever may be said about the merits of diversity jurisdiction,⁴ where removal is based upon the arguable presence of a federal question, non-reviewability of remand orders compels defendants to suffer the possibility of adverse judgments by state court judges less familiar with federal law. This problem is compounded by the fact that defendants have virtually no access to a federal forum in which to challenge such judgments.⁵

The thesis here is that the policy underlying this principle of

3. In *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 351 (1976), the United States Supreme Court noted: "There is no doubt that in order to prevent delay in the trial of remanded cases by protracted litigation of jurisdictional issues . . . Congress immunized from all forms of appellate review any remand order issued on the grounds specified in § 1447(c) . . ." (citations omitted).

4. This Article does not address the continuing diversity jurisdiction controversy except to the extent that it may explain hostility towards removal of diversity cases and the *a fortiori* antagonism towards appellate review of orders remanding such cases to state court. For the latest word on this subject, see FEDERAL COURTS STUDY COMMITTEE, TENTATIVE RECOMMENDATIONS FOR PUBLIC COMMENT (1989). (This committee, appointed by United States Supreme Court Chief Justice William Rehnquist, suggested that further restrictions on ordinary diversity jurisdiction are necessary.) Similarly, this Article acknowledges but does not address what Judge Spencer Williams has characterized as "an unarticulated bias against the 'expansion' of removal jurisdiction . . . [that is not] grounded in logic [or] commonsense." *Motor Vehicle Casualty Co. v. Russian River County Sanitation Dist.*, 538 F. Supp. 88, 492 (N.D. Cal. 1981).

5. The only federal recourse defendants have is a petition for writ of certiorari to the United States Supreme Court. The statistical improbability of such review, however, is well known. For example, according to the Clerk's Office of the United States Supreme Court, of the 5,268 petitions that were filed in 1987, only three percent were granted.

non-reviewability—judicial expediency—is secondary to the more compelling concern that federal district courts fully exercise the jurisdiction granted to them by the Constitution and by Congress. This is particularly true in cases where the jurisdiction of federal district courts is founded upon the presence of a question “arising under” federal law. In order to ensure that this concern is addressed, section 1447(d) should, at the very least, be amended to permit expeditious review of remand orders in federal question cases. Statistical evidence indicates⁶ that such an amendment would only slightly affect judicial efficiency and expediency. Additionally, this amendment would afford removing litigants with a federal forum in which to present federal questions, and permit federal district courts more fully to exercise the jurisdiction granted to them by the Constitution and by Congress.

III. THE CURRENT STATUTORY SCHEME

The right of defendants to remove certain actions from state court to federal district court has been recognized by Congress continuously since 1789. Orders remanding such actions, however, did not become reviewable until 1875 when Congress specifically provided for the review of remand orders by a writ of error or appeal.⁷ Twelve years later, in 1887, Congress reversed course, explicitly stating that no appeal or writ of error would be allowed from decisions remanding cases to state court.⁸ The state of the law concerning the reviewability of remand orders remained unchanged until 1948, when the original version of 28 U.S.C. § 1447 was enacted.⁹

6. See *infra* notes 50-51 and accompanying text.

7. Judiciary Act, ch. 137, § 5, 18(3) Stat. 472 (1875) (current version at 28 U.S.C. § 1447(d) (1988)). Section 5 of the Judiciary Act of 1875 provided, in relevant part: “[T]he order of [a circuit court of the United States] . . . remanding [a] cause to the State court shall be reviewable by the Supreme Court on writ of error or appeal, as the case may be.”

8. Judiciary Act, ch. 373, § 2, 24 Stat. 553 (1887) (current version at 28 U.S.C. § 1447 (1988)). Section 2 of the Judiciary Act of 1887 provided that if a circuit court decided that a cause was improperly removed and, therefore, remanded the cause back to the state court, “such remand shall be immediately carried into execution, and no appeal or writ of error . . . shall be allowed.”

9. The current version of 28 U.S.C. § 1447 (1988) provides in its entirety:

- (a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.
- (b) It may require the petitioner to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.
- (c) A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under

As originally drafted, section 1447 provided for remand of cases from federal district court to state court, but did not contain a provision prohibiting review of such orders.¹⁰ One year later, Congress added subsection (d) to section 1447. Section 1447(d) currently provides:

*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 [pertaining to removal of civil rights cases] shall be reviewable by appeal or otherwise.*¹¹

Pursuant to section 1447(d), with one limited exception,¹² orders remanding cases to state court and depriving defendants of a federal forum in which to litigate federal questions are unreviewable *even if clearly erroneous*.¹³ Therefore, by enacting section 1447(d), Congress expressly granted federal district courts virtually non-reviewable power, presumably in the interests of judicial economy and efficiency, to deprive defendants of their statutory right to have federal district courts adjudicate federal questions.

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. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(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.

(e) If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.

10. 1A J. MOORE & B. RINGLE, *MOORE'S FEDERAL PRACTICE* 0.169 [2.-1] (2d ed. 1987) [hereinafter *MOORE'S FEDERAL PRACTICE*].

11. 28 U.S.C. § 1447(d) (1988) (emphasis added).

12. Section 1447(d) expressly excepts cases removed pursuant to 28 U.S.C. § 1443 (1948) from its "no review" rule. Section 1443 generally allows a defendant to remove cases in which state action has denied him or her "equal civil rights." For a thorough discussion of this exception, see Markowski, *Remand Order Review After Thermtron Products*, 4 U. ILL. L.F. 1086, 1095-99 (1977).

13. See Herrmann, *Thermtron Revisited: When and How Federal Trial Court Remand Orders are Reviewable*, 19 ARIZ. ST. L.J. 395, 405 & n.48 (1987). The reviewability of remand orders is also discussed in Rible, *Federal Courts: Review of the Remand Order*, 9 ST. MARY'S L.J. 274 (1970); Myers, *Federal Appellate Review of Remand Orders: Expansion or Eradication?*, 48 MISS. L.J. 741 (1977); Markowski, *supra* note 12; *MOORE'S FEDERAL PRACTICE*, *supra* note 10, 0.169 *et seq.*; 14 A. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE* 3739 *et seq.* (2d ed. 1985).

IV. THERMTRON: A TOOTHLESS EXCEPTION TO THE "NO REVIEW" RULE OF SECTION 1447(d)

In *Thermtron Products, Inc. v. Hermansdorfer*,¹⁴ the United States Supreme Court created a very narrow judicial exception to section 1447(d)'s sweeping prohibition against review of remand orders. In *Thermtron*, two Kentucky residents filed suit in a Kentucky state court against Thermtron Products, Inc., an Indiana corporation, for damages arising out of an automobile accident. Asserting that the federal district court had original diversity jurisdiction over the case, Thermtron Products petitioned the United States District Court for the Eastern District of Kentucky for removal pursuant to 28 U.S.C. § 1441.¹⁵ The federal district court subsequently remanded the case on the basis that its docket was overcrowded, that other cases had priority on available trial time, and that the plaintiffs' right of redress would be severely impaired if the case were permitted to stay in federal court.¹⁶ Thermtron Products then filed a petition for an alternative writ of mandamus or prohibition in the United States Court of Appeals for the Sixth Circuit, asserting that the federal district court had no authority to remand the case on such grounds.¹⁷ The Sixth Circuit denied Thermtron Product's petition for two reasons: (1) the federal district court had jurisdiction to enter the order of remand; and 2) the Sixth Circuit had no jurisdiction to review that order or to issue mandamus because of the broad prohibition against review of remand orders set forth in section 1447(d).¹⁸

Justice White, writing for five members of the Court, reversed.¹⁹ The majority said sections 1447(c) and (d), when read together, require that federal district courts remand cases for one of the two reasons specifically enumerated in section 1447(c).²⁰ Unless a remand order is expressly issued on the basis of one of those two reasons, section 1447(d)'s prohibition against review of remand orders is inapplicable.²¹ The Court noted that the federal district court judge in *Thermtron* did not expressly assert that it was remanding the case to Kentucky state court pursuant to section 1447(c) or that the case was "improvidently removed" or the federal district court

14. 423 U.S. 336, 337 (1976).

15. *Id.* at 338.

16. *Id.* at 340-41.

17. *Id.* at 341.

18. *Id.* at 341-42.

19. *Id.* at 345.

20. *Id.* at 345-46.

21. *Id.* at 345.

was "without jurisdiction."²² Accordingly, the Court held that section 1447(d) did not apply.²³ If, however, the trial court had simply uttered the shibboleth of section 1447(c) and purported to remand the case on such grounds, its order would have been totally immune from challenge by appeal, mandamus or otherwise.²⁴ This ritualistic reliance on boilerplate statutory language elevates form over substance and, in effect, renders *Thermtron's* exception virtually toothless.²⁵

V. THE "NO REVIEW" RULE OF SECTION 1447(d) HAS LED TO CLEARLY UNFAIR AND ERRONEOUS DECISIONS IN THE LOWER FEDERAL COURTS

Section 1447(d)'s blanket prohibition on reviewability of remand orders has led to some egregious decisions in the lower federal courts which are difficult to reconcile with any sense of even-handed justice.²⁶ The Ninth Circuit, for example, has rigidly applied section 1447(d) to deny review of virtually all remand orders even where those orders have been clearly erroneous. A fairly recent example of the sometimes startling effect of section 1447(d)'s "no review" rule is *Seedman v. U.S. District Court for the Central District of California*.²⁷ The plaintiff in *Seedman* filed a complaint in state court, al-

22. *Id.* The terms "improvidently removed" and "without jurisdiction" were in the then-existing version of section 1447(c), which, in its entirety, provided:

If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case.

For the current language of section 1447, see *supra* note 9.

23. *Thermtron*, 423 U.S. at 345.

24. *Id.* at 345-46.

25. See Herrmann, *supra* note 13, at 409-10 ("Because *Thermtron* was read to insulate remand orders from review either if they were based on grounds set out in section 1447(c) or if they simply invoked the language of that section, lower courts declined to review remand orders that invoked the 'magic words' of Section 1447(c).") (emphasis in original). See also Myers, *supra* note 13, at 754 ("The courts have generally declined to review remand orders which do not fall within the narrow legalisms of *Thermtron*."). In an exhaustive analysis of *Thermtron*, the Court in *Rothner v. City of Chicago*, 879 F.2d 1402 (7th Cir. 1989) held reviewable a remand order based on a waiver of the right to remove. The Court made clear that if the magic words of section 1447(c)—"improvidently removed" or "without jurisdiction"—had been used, the remand order would have been non-reviewable.

26. See generally Myers, *supra* note 13, at 745-50. These types of decisions "clarify the indispensable need for appellate review of remand orders in all litigation and provide a compelling argument for amendment of the removal statutes to explicitly provide for such redress." Myers, *supra* note 13, at 745.

27. 837 F.2d 413 (9th Cir. 1988); *But see* *Air-Shields, Inc. v. Fullam*, 891 F.2d 63, 65-

leging federal RICO violations against multiple defendants.²⁸ The defendants subsequently petitioned for removal to federal district court.²⁹ The district court *sua sponte* remanded the case to state court on the grounds that the removal petition was untimely.³⁰ After the district court's remand order had been certified to the state court, the defendants filed a second removal petition, asserting that the original remand order was based on a clerical error.³¹ Plaintiff then moved to remand the case to state court for a second time. The district court denied the motion and vacated its earlier remand order, concluding that the first remand order had been based on a clerical error.³²

After the district court denied the plaintiff's second remand motion, the plaintiff petitioned the Ninth Circuit for mandamus on the ground that the district court had been without jurisdiction to reconsider its original remand order.³³ The Ninth Circuit agreed, holding that so long as a remand order is purportedly based on section 1447(c), neither an appellate court nor the district court that issued the order has the power to vacate or correct it.³⁴

The result in *Seedman* is disturbing. A case over which a federal district court clearly had original federal question jurisdiction (and which, in fact, had been properly removed) was remanded to state court.³⁵ The defendants in *Seedman*, therefore, were forced to litigate a substantial federal question in state court even though they were clearly entitled to have that question adjudicated by the federal district court under 28 U.S.C. § 1441. While there are, and may always be, wrongs without remedies, the result in *Seedman* is difficult to reconcile with any notion of procedural fairness.

VI. THE INHERENT INCONSISTENCIES OF SECTION 1447(d)

In addition to resulting in unfair and erroneous decisions, sec-

66 (3d Cir. 1989). In *Air-Shields*, the Third Circuit reviewed a district court order remanding the case to state court under the 1982 version of section 1447(c), rather than the recently amended 1988 version. In order to justify its decision to review the district court's order and avoid what clearly was an erroneous and unjust ruling, the Third Circuit relied upon a refreshingly liberal reading of *Thermtron's* exception to section 1447(d)'s "no review" rule.

28. *Seedman*, 837 F.2d at 413.

29. *Id.*

30. *Id.*

31. *Id.* at 414.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

tion 1447(d) itself is inherently inconsistent. It expressly prohibits review of orders *granting* motions to remand, but by clear implication permits review of orders *denying* remand.³⁶ There is no logical reason for making this rather arbitrary distinction. In fact, unless the judicial system is willing to concede that a plaintiff's right to the forum of its choice is more vital or important than a defendant's right to a federal forum in which to litigate substantial federal questions, a conclusion that this Article expressly rejects, the distinction made by section 1447(d) makes no sense.³⁷

Indeed, in reality, permitting review of an order denying remand can result in even more serious delay, interruption and duplication of effort than permitting review of an order granting remand.³⁸ For example, in *La Chemise LaCoste v. Alligator Co., Inc.*,³⁹ the Third Circuit ruled, after a complete trial on the merits in federal district court, that the district court had improperly denied the plaintiff's remand motion.⁴⁰ For that reason, the Third Circuit vacated the district court judgment, remanded the case to the district court, and ordered the district court to remand the case to the state court.⁴¹ The state court, therefore, was required to relitigate the entire matter.

In addition to being inherently inconsistent, the inflexibility of section 1447(d)'s "no review" rule has inspired lower federal courts to fashion further judicial exceptions to its sweeping prohibition. These exceptions, which technically are mechanisms of avoidance, have led to irrational inconsistencies. For example, the Ninth Circuit has developed two additional exceptions to section 1447(d)'s "no review" rule. First, the Ninth Circuit has held that section 1447(d) does not preclude review of remand orders which are premised on a "substantive decision on the merits apart from any jurisdictional de-

36. See *supra* note 9. See also *Capital Bancshares, Inc. v. North Am. Guar. Ins. Co.*, 433 F.2d 279, 283 (5th Cir. 1970).

37. See *Boys Mkts., Inc. v. Retail Clerks Union Local 770*, 398 U.S. 235, 246 n.13 (1970) (noting that federal question removal jurisdiction intended to provide a federal forum for protection of federal rights and to encourage the development of expertise by the federal courts in the interpretation of federal law).

38. If a district court refuses to remand a case to state court, that decision is reviewable, absent certification under 28 U.S.C. § 1292 (1982), only on appeal from a final judgment. See, e.g., *Sheeran v. General Elec. Co.*, 593 F.2d 93, 97 & n.6 (9th Cir. 1979), *cert. denied*, 444 U.S. 868 (1979). See also *Aaron v. National Union Fire Ins. Co.*, 876 F.2d 1157, 1158, 1160 (5th Cir. 1989).

39. 506 F.2d 339 (3d Cir. 1974).

40. *Id.* at 346.

41. *Id.* at 347.

cision.”⁴² Second, the Ninth Circuit has determined that a decision remanding pendent state law claims to state courts is also reviewable because it is a matter of discretion rather than a matter governed by section 1447(c).⁴³

By creating these two exceptions, the Ninth Circuit has ameliorated some of the one-sidedness of section 1447(d)'s “no review” rule. Consequently, it has clearly contravened both the explicit language of the statute and the stated public policy underlying the rule. The Ninth Circuit has apparently created these exceptions in an effort to bring some judicial balance, however modest, to the current statutory scheme by effectively narrowing section 1447(d)'s severe proscription. Indeed, although the Ninth Circuit has posited no pragmatic rationale for why these exceptions should not fall within the harsh ambit of section 1447(d)'s “no review” rule,⁴⁴ one could

42. See *Schmitt v. Insurance Co. of N. Am.*, 845 F.2d 1546, 1550 (9th Cir. 1988); *Clorox Co. v. U.S. District Court*, 779 F.2d 517, 520 (9th Cir. 1985); *Pelleport Invs., Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 276 (9th Cir. 1984). See also *Regis Assocs. v. Rank Hotels (Management) Ltd.*, 894 F.2d 193, 194-95 (6th Cir. 1990); *Kolibash v. Committee on Legal Ethics of W. Va. Bar*, 872 F.2d 571 (4th Cir. 1989); *Peabody v. Maud Vancortland Hill Schroll Trust*, 89 D.A.R. 1175 (9th Cir. 1989) (holding that notwithstanding section 1447(d), a remand order which also imposed sanctions for frivolous removal required some examination of the merits of the removal and the remand). See generally *Herrmann, Reviewing the Unreviewable*, 6 CAL. LAW. 75 (1986).

Although this exception presumably was crafted to soften rather than accentuate the harshness of section 1447(d)'s “no review” rule, the Ninth Circuit has interpreted the exception rather narrowly and, in doing so, has raised a somewhat troubling *res judicata* question: “Does a federal district court, in the course of deciding whether Congress has completely preempted a select group of state law claims, render a “substantial decision on the merits apart from any jurisdictional issue” that falls within the exception?”

Two different Ninth Circuit appellate panels have recently addressed this question. In *Hansen v. Blue Cross*, No. 88-5910 (9th Cir. Oct. 2, 1989) (LEXIS, States library, Cal. file), the panel acknowledged that the district court's decision might effectively preclude the defendant from raising preemption as an affirmative defense in state court. The Hansen court held, however, that the state court “must determine the propriety of extending *res judicata* effect to [the] district court's . . . decision” in light of the fact “that [the district court's decision], by statute, is immune from appellate review even if clearly wrong.” *Id.* If the state court decides that the district court's decision should be given *res judicata* effect, so be it. In such a case, section 1447(d) would preclude the defendant from seeking appellate review of a decision on the merits of an affirmative defense.

In *Whitman v. Raley's Inc.*, 886 F.2d 1177 (9th Cir. 1989), the court simply defined this troubling *res judicata* issue away. According to the *Whitman* court, the “jurisdictional issue of whether ‘complete preemption’ exists is very different from the substantive inquiry of whether a ‘preemption defense’ may be established.” Because the issues were not identical, the appellate court concluded that the district court's ruling concerning “complete preemption,” “[had] no preclusive effect on the state court's consideration of the substantive preemption defense.”

43. *Schmitt*, 845 F.2d at 1550 (citing *Pelleport*, 741 F.2d at 276). Cf. *Rothner v. City of Chicago*, 879 F.2d 1402 (7th Cir. 1989).

44. Although technically speaking, one can argue that under the current statutory scheme only “strictly jurisdictional” remand orders are non-reviewable and, therefore, that

argue that these exceptions implicitly suggest and support the need for procedural change. Surely a defendant's right to litigate *substantial federal questions* in a federal forum is equally, if not more important than that same defendant's right to litigate *pendent state law claims* in such a forum.⁴⁵

On the other hand, a rational and practical reason arguably does exist for distinguishing between cases in which the original jurisdiction of a federal district court is based on diversity of citizenship, rather than the presence of a federal question. First, it is highly unlikely that a federal district court will erroneously decide whether diversity of citizenship exists or whether the minimum amount in controversy requirement has been met.⁴⁶ Therefore, the need for review of remand orders based upon such determinations is likely to be insignificant.⁴⁷ Second, by permitting state court judges to decide federal questions, federal district courts frustrate, rather than facilitate, the formation of a uniform, interpretive body of federal law.⁴⁸ Accordingly, this Article proposes that section 1447(d) be amended to provide for expeditious review of remand orders only in federal question cases.⁴⁹

these exceptions are "jurisprudentially sound," see, e.g., Herrmann, *supra* note 42, such an argument misses the point. The point is that these exceptions nevertheless serve to undermine Congress' stated purpose in making remand orders non-reviewable and, therefore, should be treated no differently than "strictly jurisdictional" orders. It is not what the *Pelleport* court characterized as the "substantive decision on the merits" that is appealable. *Pelleport*, 741 F.2d at 276. It is the remand order itself.

45. *Pelleport*, 741 F.2d 273 (9th Cir. 1984).

46. See Herrmann, *supra* note 13, at 414 (noting that the presence or absence of diversity is a threshold question readily resolved by reference to a well-established body of law). See also *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804 (1986) (illustrating the complexity of deciding whether a particular case "arises under" federal law). But see Herrmann, *supra* note 13, at 414 (arguing that after *Merrell Dow*, the issue will be much simpler).

47. Congress recently amended 28 U.S.C. § 1332 (1988) and, in doing so, narrowed the bases of diversity jurisdiction. See Cirillo, *Judicial Improvements and Access to Justice Act: Significant Changes in the Laws Governing Removal, Diversity, and Operation of Federal Courts*, 11 CIV. LIT. REP. (CEB) 14, 16 (1989). Specifically, Congress: (1) increased the amount in controversy requirement from \$10,000 to \$50,000; (2) provided that citizenship in representative party cases shall be determined by reference to the represented party; and (3) provided that permanent resident aliens shall be treated as citizens of their state of domicile. *Id.*

48. See Markowski, *supra* note 12, at 1106, 1109 (stating that "nonreviewability of remand orders prevents the development of a body of uniformly applied law on removability" and "federal question jurisdiction facilitates the formation of a uniform body of interpretive law"). See also *supra* note 5.

49. The Author would not oppose a broader proposal making *all* remand orders reviewable. The need for review of federal question remand orders and the lack of any significant need for review of diversity remand orders, however, impels the not entirely logical but pragmatic distinction made here.

VII. PROVIDING FOR APPELLATE REVIEW OF REMAND ORDERS IN FEDERAL QUESTION CASES WILL NOT OVERBURDEN THE APPELLATE COURT SYSTEM

By amending section 1447(d) to permit review of remand orders in federal question cases, Congress would undoubtedly cause an increase in the caseload of federal appellate court judges. The critical question, however, is by how much? The most recent statistical evidence indicates that the resultant increase would be relatively insignificant in light of the importance of providing defendants with a federal forum in which to litigate substantial federal questions. According to the Statistical Analysis and Reports Division of the Administrative Office of the United States Courts,⁵⁰ in 1988 a total of 21,221 cases were removed from state courts to federal district courts in the twelve federal judicial circuits.⁵¹ Of those cases, approximately 3,106 (14.5%) were remanded to state court. Of the 3,106 cases that were remanded to state court, approximately 1,218 (39% of the 14.5% remanded) were originally removed based upon the alleged presence of a federal question.

Consequently, if section 1447(d) is amended to permit review of such cases by a customary three-judge panel, the workload of each active circuit court judge would increase by, at the very most, approximately twenty-four appeals per year. This projection assumes the worst case scenario in which *all* remand orders would be appealed and senior status judges would not share any of the increased appellate burden. If senior status judges shared the increased appellate burden equally, the number would decrease to approximately seventeen appeals per year. This relatively insignificant increase is not a disproportionate price to pay for the assurance that federal courts would decide all federal questions that are properly presented

50. The statistics reported in this Article were prepared with the help of the Statistical Analysis and Reports Division of the Administrative Office of the U.S. Courts. Although these statistics are not published by the Administrative Office in the form reported in this Article, the raw statistical data is available from the Author upon request.

51. The statistical evidence with respect to 1988 is not aberrational. In 1986, 17,776 cases were removed from state courts, 2,602 of which (14.8%) were eventually remanded. Of those 2,603, 931 (35.8%) were originally removed based upon the alleged presence of a federal question. Similarly, in 1987, 19,966 cases were removed from state courts, 2,874 of which (14.4%) were eventually remanded. Of those 2,874, 1,021 (35.5%) were originally removed based upon the alleged presence of a federal question. Had remand orders in federal question cases been reviewable in 1986 and 1987, the workload of appellate judges would have increased, on average, by approximately 19.4 and 21.3 cases per year respectively. Moreover, if senior status judges had shared the increased burden equally, those numbers would have decreased to 13.9 and 14.9 respectively. Finally, if section 1447(d) had permitted single-judge review, those numbers would have decreased even further to 6.5 and 7.1 respectively.

to them.⁵²

In the event that this relatively modest increase proves unacceptable, however, section 1447(d) can and should be amended to provide for single-judge review. Although such an amendment would conflict with Federal Rule of Appellate Procedure 27⁵³ and several similar local rules,⁵⁴ there is nothing in the Constitution that would prohibit the adoption of such a procedure. If a single judge, as opposed to a customary three-judge panel, were permitted to review federal question remand orders, the workload of active circuit court judges would increase by a maximum of approximately eight appeals per year rather than twenty-four. Moreover, permitting single-judge review of federal question remand orders would almost certainly decrease the time within which the review itself could be completed. Instead of requiring a consensus among three appellate court judges, the appeal could be decided more expediently by a single judge.

The following table, utilizing statistics from 1988, illustrates what the effect of such an amendment would be on each of the twelve judicial circuits, assuming that senior status judges *are not* required to carry any of the increased caseload resulting from the amendment.

52. The author is not insensitive to characterizing a workload increase as "insignificant." The streamlined procedures discussed at pages 91-93 of the text, however, may make this characterization more fair and accurate. While the author believes that the increase in appellate court workload resulting from reviewing federal question remand orders is "relatively insignificant," candor requires recognition of the fact that the subsequent reversal of federal question remand orders may further increase the workload of both the district and circuit courts. For example, if a case is remanded to state court, it is unlikely that it will later return to the federal court system. If the order of remand is reviewed and then reversed, however, the district court will hear the case and any appeal thereafter will be filed in the circuit court.

53. FED. R. APP. P. 27(c) provides:

In addition to the authority expressly conferred by these rules or by law, a single judge of a court of appeals may entertain and may grant or deny any request for relief which under these rules may properly be sought by motion, *except that a single judge may not dismiss or otherwise determine an appeal or other proceeding*, and except that a court of appeals may provide by order or rule that any motion or class of motions may be acted upon by the court. The action of a single judge may be reviewed by the court.

(emphasis added).

54. See, e.g., 2D CIR. R. 27(f); 5TH CIR. R. 27(2); 8TH CIR. R. 5(b).

Circuit	No. of Active Judges	Total Cases Removed	Total Cases Remanded	Total Cases Remanded (Federal Question)	Percentage of Cases Remanded (Federal Question)	Increased No. of Appeals Per Judge (Assuming Three-Judge Panel)	Increased No. of Appeals Per Judge (Assuming Single-Judge Review)
DC	11	72	7	4	57	1.9	.4
1st	6	556	52	17	33	8.5	2.8
2d	12	1,031	93	45	48	11.2	3.7
3d	12	1,635	224	87	39	21.7	7.2
4th	11	1,587	133	44	33	12.0	4.0
5th	15	4,085	545	179	33	35.8	11.9
6th	14	2,760	334	168	50	36.0	12.0
7th	11	1,141	146	58	40	15.8	5.3
8th	9	1,349	180	97	54	32.3	10.8
9th	25	3,688	977	390	40	46.8	15.6
10th	10	1,199	129	34	26	10.2	3.4
11th	12	2,118	286	95	33	23.7	7.9
Total	148	21,221	3,106	1,218	39.2	24.7	8.2

VIII. SUMMARY APPELLATE PROCEDURES CAN BE USED TO MINIMIZE DELAY

The additional burden placed on appellate court judges by the proposal made in this Article would be relatively slight in light of the benefits derived from review of federal question remand orders. Nevertheless, in order to reduce the resulting burden and to minimize the potential for abusive delay,⁵⁵ various summary appellate procedures could be employed.⁵⁶

For example, because review of remand orders generally will require resolution of a single discrete legal issue, both the time in which review of this nature must be sought and the length of the briefs that must be filed in support or opposition could be diminished appreciably.⁵⁷ Furthermore, the review itself could be accomplished

55. The delay inherent in the review process will in all likelihood be mitigated somewhat by the recent statutory amendments to the laws governing removal. *See* Cirillo, *supra* note 47, at 15-16 (motions to remand on the basis of a defect in removal must now be filed within 30 days after filing of the notice of removal, and removal of a case on diversity grounds must be made within one year after commencement of the action).

56. Summary procedures already exist in a number of circuits for the disposition of appeals that are frivolous or without merit. *See, e.g.*, 6TH CIR. R. 9; 10TH CIR. R. 8. The Ninth Circuit utilizes such procedures although they are not expressly formalized in court rules or procedures.

57. FED. R. APP. PRAC. 31(a) provides:

The appellant shall serve and file a brief within 40 days after the date on which the record is filed. The appellee shall serve and file a brief within 30 days after service of the brief of the appellant. The appellant may serve and file a reply brief within 14 days after service of the brief of the appellee, but, except for

without oral argument.⁵⁸ In addition, section 1447(d) could be amended to provide for mandatory monetary sanctions—including the payment of *actual* expenses, costs and attorneys' fees—in cases where the request for review “is not well-grounded in fact,” “warranted by existing law,” or “interposed for any improper purpose.”⁵⁹

good cause shown, a reply brief must be filed at least 3 days before argument. *If a court of appeals is prepared to consider cases on the merits promptly after briefs are filed and its practice is to do so, it may shorten the periods prescribed above for serving and filing briefs, either by rule for all cases or for classes of cases, or by order for specific cases.*

(emphasis added).

Pursuant to Federal Rules of Appellate Practice 31(a), circuit courts could enact rules decreasing the time within which the appellant must file its brief to 20 days, and the time within which the appellee must file its brief to 15 days. No reply brief should be permitted.

Similarly, Federal Rules of Appellate Practice 28(g) could be amended or rules could be enacted to limit the length of principal briefs to 20 pages, exclusive of pages containing the table of contents, tables of citations, and any addendum containing statutes, rules, and regulations.

58. Federal Rules of Appellate Practice 34(a) currently provides for oral argument in the majority of cases. Rule 34(a) specifically provides:

Oral argument shall be allowed in all cases unless pursuant to local rule a panel of three judges, after examination of the briefs and record, shall be unanimously of the opinion that oral argument is not needed. Any such local rule shall provide any party with an opportunity to file a statement setting forth the reasons why oral argument should be heard. A general statement of the criteria employed in the administration of such local rule shall be published in or with the rule and such criteria shall conform substantially to the following minimum standard:

Oral Argument will be allowed unless

- (1) the appeal is frivolous; or
- (2) the dispositive issue or set of issues has been recently authoritatively decided; or
- (3) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.

Federal Rules of Appellate Practice 34(a) must be amended either to prohibit oral argument in all remand order cases or permit courts of appeal to promulgate rules to that effect. Cf. FED. R. APP. PRAC. 1(a) (permitting courts of appeal to shorten briefing periods in particular cases).

That it is possible to expedite appellate review of remand orders is graphically illustrated in *Air-Shields, Inc. v. Fullam*, 891 F.2d 63 (3d Cir. 1989). In *Air-Shields*, defendant filed a petition for writ of mandamus on April 13, 1989, seeking an order directing the district court to vacate its remand order. In accordance with the Third Circuit's local rule 12(6), the Court of Appeals, without hearing oral argument, rendered its order to vacate the remand order on December 7, 1989—a mere eight months after the petition was filed. With tight briefing schedules the review could, no doubt, be compressed even more.

59. In other words, parties seeking review of remand orders should be subject to Rule 11 standards, but not necessarily Rule 11 sanctions. See Falconer & Herrmann, *Legislation Enacted in November Alters Law Governing Removal*, NAT'L L.J. 18 (1989) (noting the difference between Rule 11 sanctions and the sanctions provided for in the newly amended version of 28 U.S.C. § 1447(c)).

Finally, the appellate court, in its discretion, could permit further pretrial proceedings in the federal district court, including discovery, to continue during the pendency of the review.⁶⁰

IX. CONCLUSION

Avoidance of undue delay is a legitimate judicial and legislative concern. That concern, however, must be balanced against the interests sacrificed when appellate review of remand orders is denied: the interest of access to a federal forum in cases where Article III establishes original jurisdiction in the federal judicial system. Where removal jurisdiction is based upon the asserted presence of a federal question, non-reviewability of a remand order compels the defendant to suffer the possibility of an adverse judgment by a state court on the federal question.

The defendant, of course, has no recourse to a federal tribunal, other than filing a seldom granted petition for writ of certiorari in the United States Supreme Court. Commenting upon similar perils faced by litigants in circumstances where a federal district court incorrectly abstains from deciding issues presented to it, the Supreme Court noted in *England v. Louisiana State Board of Medical Examiners*⁶¹ that:

There are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal . . . claims can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims. Such a result would be at war with the unqualified terms in which Congress, pursuant to constitutional authorization, has conferred specific categories of jurisdiction upon the federal courts. . . .⁶²

The inconsistent and irrational results occasioned by application of section 1447(d)'s "no review" rule are similar to those occasioned by the now obsolete "derivative" jurisdiction rule created by the United States Supreme Court in *Lambert Run Coal Co. v. Baltimore & Ohio Railway Co.*⁶³ The *Lambert* rule of "derivative" juris-

60. Markowski, *supra* note 12, at 1110. See also AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 418 (1969).

61. 375 U.S. 411 (1964).

62. *Id.* at 415.

63. 258 U.S. 377 (1922). The *Lambert* rule of "derivative" jurisdiction provided that since removal jurisdiction is derived from the state court, if a state court lacked jurisdiction over a case, a federal court did not acquire jurisdiction upon removal even if it would have had jurisdiction had the suit originally been filed there. Accordingly, the district court could only

diction was repeatedly criticized for its inexplicable results. Judge Duniway pointedly observed:

[T]his is the kind of legal *tour de force* that most laymen cannot understand One would have thought that the purpose of removal . . . is to get the case . . . into the court that has jurisdiction, and to keep it in [that] court, so that it can be tried and a valid judgment can be entered.⁶⁴

Appellate review of remand orders in federal question cases would ensure that those cases which are properly removed to federal court stay there. The proposal made in this Article attempts to minimize the inevitable increase in appellate court caseload, and the potential for abusive, tactical delay on the part of removing parties. These goals can be achieved by making review of such remand orders as efficient and expeditious as possible while, at the same time, providing the removing litigant a limited, but important right to appellate review of remand orders in federal question cases.

dismiss the action. *Id.* at 382. The *Lambert* "derivative" jurisdiction rule was squarely overturned by Congress in 1986 with the enactment of 28 U.S.C. § 1441(e).

64. *Washington v. American League of Professional Baseball Clubs*, 460 F.2d 654, 658-59 (9th Cir. 1972) (emphasis in original).