A New Solution to an Old Problem: Section 1447(d) and Appellate Review of Remand Orders

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James E. Pfander, Collateral Review of Remand Orders: Reasserting the Supervisory Role of the Supreme Court, 159 **U. Pa. L. Rev.** 493 (2011).

It may not be the most headline-grabbing issue on the Supreme Court's docket. But it has occupied more of the Court's attention during the past half-decade than abortion, affirmative action, the Commerce Clause, or the Second Amendment. It is 28 U.S.C § 1447(d)'s command that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." This apparent ban on appellate review has generated an awkward line of cases, beginning with Thermtron Products v. Hermansdorfer in the 1970s, which struggle to determine when § 1447(d) "means what it says." In the Court's most recent decisions on the issue, several Justices have penned separate opinions voicing their frustration with current doctrine. Enter Jim Pfander and his recent article *Collateral Review of Remand Orders: Reasserting the Supervisory Role of the Supreme Court*. Pfander expertly diagnoses what is wrong with the jurisprudence surrounding § 1447(d) and, more importantly, offers a new solution to this long-standing puzzle.

Here is the crux of the dilemma: the text of § 1447(d) forbids appellate review of a district court order remanding a case to state court. Period. Full stop. No exceptions. In *Thermtron*, however, the Court circumvented this ban on review by reading § 1447(d) as applying *only* to remands based on grounds specified in § 1447(c). The *Thermtron* exception is hard to justify as an interpretive matter given the text of § 1447(d). Perhaps more troublingly, it is functionally misguided. It means that § 1447(d) *does* forbid an appeal if the remand is based on a lack of federal subject-matter jurisdiction—a ground that is specified in § 1447(c)—even though the scope of federal subject-matter jurisdiction can be a very significant issue, both for the parties to a particular case and for our judicial system as a whole. Yet *Thermtron* permits review for issues of far less significance and impact—such as a district court's discretionary decision whether to remand state law claims after all federal claims have been resolved—because such remands are not governed by § 1447(c). The problem has been compounded, as Pfander points out, by the Supreme Court's holding in Quackenbush v. Allstate that a remand order was a "final decision" for purposes of 28 U.S.C. § 1291. While *Thermtron* contemplated that remand orders qualifying for its judicially-created exception to § 1447(d) would still have to meet the heightened showing required for a writ of mandamus, *Quackenbush* has been read to make such orders appealable as of right.

Here is Pfander's solution. Section 1447(d) would be enforced, without exception, to prevent direct appellate review of all district court remand orders. But § 1447(d) would not prevent the Supreme Court from "exercising powers of supervisory oversight conferred in the All Writs Act." (P. 499.) Therefore, notwithstanding § 1447(d), a party may petition the Supreme Court for leave to file an "original" writ of mandamus or prohibition challenging a district court's order remanding a case to state court.

There is much to be said for Pfander's proposal. It avoids the current doctrine's paradoxical result that appellate review is *required* in cases where the district court's decision (in Justice Breyer's words) "is unlikely to be wrong and where a wrong decision is unlikely to work serious harm," yet review is *forbidden* "where that decision may well be wrong and where a wrong decision could work considerable

harm." Under Pfander's approach, the Supreme Court could focus on those remand orders for which review is most pressing, based on "the significance of the error and the importance of its correction." (P. 515.)

The biggest textual obstacle to Pfander's solution is § 1447(d)'s command that a remand order "is not reviewable on appeal *or otherwise*" (emphasis added). Arguably, the Supreme Court's use of an original writ would be an example of "otherwise" reviewing a remand order, and so would be equally foreclosed by § 1447(d). But Pfander has compelling responses to this objection. Decisions as old as Ex parte Yerger (1868) and as recent as Felker v. Turpin (1996) reflect a presumption against implied statutory repeals of the Supreme Court's supervisory authority. Pfander also provides a thorough historical discussion confirming that "the restriction in § 1447(d) was aimed at review conducted by the intermediate courts of appeals and did not affect the Supreme Court's all-writs authority." (P. 522.)

Commentators have long suggested that the ideal solution to all this would be to amend § 1447(d)—either by legislation or by federal rulemaking—to codify a more sensible approach to review of remand orders. But wishing it has not made it so. Thus, this remains an issue for the Supreme Court to confront in the next round of § 1447(d) cases. To that end, Pfander's article is a must-read not only for civil procedure and federal courts scholars, but for practitioners as well. For litigants wishing to block an appeal of a remand order that would currently qualify for a *Thermtron*-inspired exception to § 1447(d), Pfander's critique of current doctrine is likely to find a receptive ear with Justices who are skeptical of such exceptions and may finally be ready to change course. For litigants seeking to challenge a remand order for which § 1447(d) still means what it says, Pfander provides the roadmap for invoking the Supreme Court's supervisory authority via an original writ.

What will happen next is anybody's guess. Until we get there, members of the academy, the bar, and the judiciary should give Pfander's proposal a very serious look.

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