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Ninth Circuit Resolution Proposing Repeal of 28 U.S.C. § 1447(d)

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COMMITTEE AGENDA ITEM VI

NINTH CIRCUIT PROPOSAL TO REPEAL 28 U.S.C. §1447(d)

DOCKET NO. 15

TO: Committee on Federal-State Jurisdiction,
Judicial Conference of the United States

FROM: Hon. Roger J. Miner

SUBJECT: Ninth Circuit Resolution Proposing Repeal of
28 U.S.C. § 1447(d)

RECOMMENDATION: Reject Ninth Circuit Proposal

Report

The only information furnished to me regarding this agenda item is that the Ninth Circuit has proposed the repeal of 28 U.S.C. § 1447(d), dealing with the non-appealability of remand orders. I am given to believe that the Committee's predecessor considered the issue a few years ago and, according to our Chairman, "concluded that to allow appeals of remand orders would be unworkable and bad policy." A copy of the resolution was not forwarded to me, and I therefore am unable to explain why the Ninth Circuit favors repeal.

Section 1447(d) provides that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise," except for civil rights cases removed pursuant to 28 U.S.C. § 1443. The Supreme Court has limited this restriction on review of remand orders by holding that "only remand orders issued under § 1447(c) and invoking the grounds specified therein -- that removal was improvident and without jurisdiction -- are immune from review under § 1447(d)."

Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336, 346

(1976). In Thermtron, the district court remanded a properly removed diversity case because of its "crowded docket," and the Supreme Court held that mandamus was a proper remedy to correct the error. The Court found "no indication whatsoever that Congress intended to extend the prohibition against review to reach remand orders entered on grounds not provided by the statute." Id. at 350. Review of a remand order therefore is available, except in the case of an order issued pursuant to § 1447(c). See, e.g., Karl Koch Erecting Co. v. New York Convention Center Dev. Corp., 838 F.2d 656, 658 (2d Cir. 1988) (remand order based on district court's interpretation of forum selection clause reviewable on appeal).

The statutory prohibition on review of remand orders granted in cases removed from state courts improvidently and without jurisdiction has appeared in many incarnations over the years, dating back to the Act of March 3, 1887, 24 Stat. 552. Thermtron traces the statutory history, 423 U.S. at 346-50, and succinctly states the rationale for the present provision:

There is no doubt that in order to prevent delay in the trial of remanded cases by protracted litigation of jurisdictional issues, United States v. Rice, 327 U. S., at 751, Congress immunized from all forms of appellate review any remand order issued on the grounds specified in § 1447(c), whether or not that order might be deemed erroneous by an appellate court.

Id. at 351.

Over a long period of time, Congressional policy has been clear -- to permit actions to proceed in state courts after § 1447(c) remand without the usual delays occasioned by appeals, whether or not the district court determination was right or wrong. See Robertson v. Ball, 534 F.2d 63, 66 n.5 (5th Cir. 1976). The policy is a sound one, advancing notions of comity, federalism and confidence in our dual court structure. See generally Miner, The Tensions of a Dual Court System and Some Prescriptions for Relief, 51 Alb. L. Rev. 151 (1987). If by reason of erroneous remand, "Federal questions arise in causes pending in the state courts, those courts are perfectly competent to decide them." Missouri Pac. Ry. Co. v. Fitzgerald, 160 U.S. 556, 583 (1896). After remand, federal issues "must be litigated in the state courts, and thence through the appropriate appellate channels, ultimately to the Supreme Court if necessary." Chandler v. O'Bryan, 445 F.2d 1045, 1057 (10th Cir. 1971), cert. denied, 405 U.S. 964 (1972).

Finally, note should be taken of an observation made by the Supreme Court regarding the purposes of one of the predecessors of § 1447(d): "The general object of the act is to contract the jurisdiction of the federal courts." Employers Reinsurance Corp. v. Bryant, 299 U.S. 374, 380 (1937). In these days of constant expansion of federal jurisdiction, with consequent geometric increase in the federal caseload, the Chief Justice of the United

States urgently is seeking ways and means to cut back on federal jurisdiction. See Marcotte, Rehnquist: Cut Jurisdiction, ABA Journal, Apr. 1989, at 22. It seems strange that federal judges would seek to repeal, rather than preserve, a statutory provision that works well, serves a beneficent purpose, recognizes the equality of our system of parallel judicial processes and reduces the workload as well. Section 1447(d) should be cherished and preserved rather than condemned and repealed.

March 31, 1989