

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 August Term, 2004

4 (Argued: September 15, 2004

Decided: June 20, 2005

5 Errata Filed: July 13, 2005)

6 Docket No. 04-0733-cv

7 -----  
8 MICHAEL D. SHAPIRO, Ancillary Administrator of the Estate of Michael  
9 Ryckman,

10 Plaintiff-Appellee,

11 - v -

12 LOGISTEC USA INC. and SCOTT BARLOW,

13 Defendants-Third-Party-Plaintiffs-Appellants,

14 SHERWOOD LUMBER CORP.,

15 Third-Party-Defendant.

16 -----  
17 Before: SACK, RAGGI, and HALL, Circuit Judges.

18 Plaintiff brought a wrongful death action in Connecticut  
19 Superior Court against the defendants. The defendants responded by  
20 filing a notice of removal to federal court on the basis of the  
21 court's diversity jurisdiction under 28 U.S.C. § 1332. The plaintiff  
22 untimely moved to remand the case to state court on the ground that  
23 the removal violated 28 U.S.C. § 1441(b). The United States District  
24 Court for the District of Connecticut (Christopher F. Droney, Judge)  
25 granted the remand motion and denied defendants' motion for  
26 reconsideration on the ground that 28 U.S.C. § 1447(d) prohibited the  
27 court from entertaining the motion.

1           The district court's order denying the defendants' motion  
2 for reconsideration is vacated; the court's order granting the  
3 plaintiff's motion to remand to state court is vacated; and the case  
4 is remanded to the district court with instructions for the court to  
5 deny the motion to remand and to conduct further proceedings.

6                           ROBERT T. RIMMER, The Reardon Law Firm, P.C.  
7                           (Robert I. Reardon, Jr., of counsel), New  
8                           London, CT, for Plaintiff-Appellee.

9                           PATRICK F. LENNON, Tisdale & Lennon LLC,  
10                          Southport, CT, for Defendants-Third-Party-  
11                          Plaintiffs-Appellants.

12   SACK, Circuit Judge:

13           We confront here the issues of 1) under what circumstances  
14 we may review a district court's order remanding a diversity action to  
15 state court, 2) when a district court may reconsider its own remand  
16 motion, and 3) when, if ever, a plaintiff will be deemed to have  
17 waived his objection to removal by filing his motion for remand after  
18 the statutory period for doing so has run. We conclude, inter alia,  
19 that a) the remand granted by the district court in this case was made  
20 pursuant to 28 U.S.C. § 1441(b), which prohibits a defendant from  
21 removing an action to federal court on the basis of diversity  
22 jurisdiction if any defendant "is a citizen of the State in which such  
23 action is brought," b) such a remand is not covered by 28 U.S.C.  
24 § 1447(c) because it is not based on lack of subject matter  
25 jurisdiction or some other defect timely raised, c) therefore, 28  
26 U.S.C. § 1447(d), which would bar both reconsideration by the district  
27 court of its remand order and our review of such a remand order after

1 it has become effective, does not apply, and d) the district court  
2 should have granted the motion for reconsideration and denied the  
3 motion for remand because the plaintiff waived his section 1441(b)  
4 objection to removal by making the objection after the time limit  
5 imposed by section 1447(c) had expired.

#### 6 **BACKGROUND**

7 On January 13, 2003, Michael Ryckman, a truck driver from  
8 the State of Washington, was fatally injured at defendant Logistec USA  
9 Inc.'s premises in New London, Connecticut when plywood being unloaded  
10 from his truck shifted and fell on him from a forklift operated by the  
11 defendant Scott Barlow, a Logistec employee. On June 6, 2003, the  
12 plaintiff Michael D. Shapiro, as ancillary administrator of Ryckman's  
13 estate, filed a complaint against the defendants in Connecticut  
14 Superior Court. In it, the plaintiff, alleging that Ryckman's death  
15 had been caused by the defendants' negligence or recklessness,  
16 asserted a claim for compensatory and punitive damages against them.  
17 He also sought attorneys' fees and costs.

18 On June 25, 2003, the defendants filed a notice of removal  
19 of the Connecticut state-court litigation in the United States  
20 District Court for the District of Connecticut (Christopher F. Droney,  
21 Judge). They asserted that Ryckman had been a citizen of the State of  
22 Washington at the time of his death and that his estate was therefore  
23 deemed to be a citizen of Washington under 28 U.S.C. § 1331(c)(2),  
24 that Logistec was a Delaware corporation with its principal place of  
25 business in the State of Connecticut, and that Barlow was a citizen of  
26 Connecticut. See Defs.' Notice Removal ¶¶ 1-4. They contended that

1 there was therefore complete diversity of citizenship among the  
2 parties under 28 U.S.C. § 1332(a). See id. ¶ 7. The defendants  
3 further alleged that the amount in controversy exceeded \$75,000. See  
4 id. They asserted that because the district court would thus have had  
5 diversity jurisdiction over the action under section 1332(a) had it  
6 originally been brought in that court, removal was proper under  
7 section 1441(a), which provides that any action brought in state court  
8 over which the district court would have had original jurisdiction may  
9 be removed to the district court "embracing the place where such  
10 action is pending," 28 U.S.C. § 1441(a). See Defs.' Notice Removal  
11 ¶ 10.

12 More than thirty days later, on July 30, 2003, the plaintiff  
13 filed a motion in the district court objecting to defendants' removal  
14 notice. He contended that removal was forbidden by 28 U.S.C.  
15 § 1441(b), which provides that an action is not removable if brought  
16 in the home forum of any defendant. See Pl.'s Objection Defs.' Notice  
17 Removal ¶¶ 8-9. Both Barlow and, for these purposes, Logistec, see 28  
18 U.S.C. § 1332(c)(1), were citizens of the State of Connecticut, the  
19 forum state. See Pl.'s Objection Defs.' Notice Removal ¶ 9. The  
20 district court construed the plaintiff's motion as a motion to remand,  
21 and, on October 14, 2003, granted it and ordered that the case be  
22 remanded to state court. See Shapiro v. Logistec USA Inc., No.  
23 3:03cv1123(CFD) (D. Conn. Oct. 14, 2003) (margin order).

24 On October 27, 2003, the defendants filed a motion for  
25 reconsideration of the remand order. On November 12, 2003, while that  
26 motion was pending, the defendants filed a notice of appeal of the

1 remand order. The following day, while the reconsideration motion and  
2 notice of appeal were pending, the clerk of the district court sent  
3 certified copies of the docket sheet and order of remand to the state  
4 court.<sup>1</sup> On November 21, 2003, the state court acknowledged receipt of  
5 the file.

6 On April 8, 2004, the district court denied the defendants'  
7 motion for reconsideration of the order of remand on the ground that  
8 the court lacked jurisdiction to reconsider its order under 28 U.S.C.  
9 § 1447(d), which provides that "[a]n order remanding a case to the  
10 State court from which it was removed is not reviewable on appeal or  
11 otherwise." Shapiro v. Logistec USA Inc., No. 3:03cv1123(CFD) (D.  
12 Conn. Apr. 8, 2004) (ruling on motion for reconsideration) (quoting 28  
13 U.S.C. § 1447(d)) (emphasis in the original). On April 22, 2004, the  
14 defendants filed an amended notice of appeal, which added an appeal  
15 from the order denying their motion for reconsideration to their  
16 appeal from the order of remand.

## 17 DISCUSSION

### 18 I. Jurisdiction to Review Remand Orders

19 As a threshold matter, we must determine whether we have  
20 jurisdiction to hear this appeal. Concluding that we do, we then

---

<sup>1</sup> Under Local Rule 83.7 of the District Court for the District of Connecticut, the certified order of remand should be sent to the state court only after the district court has disposed of the motion for reconsideration. The parties and the district court apparently paid no heed to the fact that the remand order had been certified to the state court, and the district court proceeded to adjudicate the pending motion.

1 address the district court's jurisdiction to review its own remand  
2 order on a motion for reconsideration.

3 A. Statutory Framework

4 1. Removal and Remand Procedures. Title 28, United States  
5 Code, section 1441 sets forth the general federal statutory provision  
6 governing removals from state to federal court. It provides that a  
7 defendant may remove to federal court "any civil action brought in a  
8 State court of which the district courts of the United States have  
9 original jurisdiction." Id. § 1441(a). Section 1441(b) provides,  
10 however, that an action is not removable if the district court's  
11 original jurisdiction is based on diversity of citizenship and any of  
12 the defendants "is a citizen of the State in which such action is  
13 brought." Id. § 1441(b).

14 Once a case has been removed to federal court, a party may  
15 move to remand the case to state court. Section 1447(c) provides that  
16 "[a] motion to remand the case on the basis of any defect other than  
17 lack of subject matter jurisdiction must be made within 30 days after  
18 the filing of the notice of removal." Id. § 1447(c). Section 1447(c)  
19 further states that "[i]f at any time before final judgment it appears  
20 that the district court lacks subject matter jurisdiction, the case  
21 shall be remanded." Id. Section 1447(c) also provides that "[a]  
22 certified copy of the order of remand shall be mailed by the clerk to  
23 the clerk of the State court. The State court may thereupon proceed  
24 with such case." Id.

25 2. Authority to Review Remand Orders

26 **a. Appellate Jurisdiction**

1           Section 1447(d) provides that "[a]n order remanding a case  
2 to the State court from which it was removed is not reviewable on  
3 appeal or otherwise." Id. § 1447(d). Congress's purpose in thus  
4 limiting the ability of federal courts to review orders remanding  
5 cases to state court was "to prevent delay in the trial of remanded  
6 cases by protracted litigation of jurisdictional issues." Thermtron  
7 Prods., Inc. v. Hermansdorfer, 423 U.S. 336, 351 (1976). But  
8 "[s]ection 1447(d) is not dispositive of the reviewability of remand  
9 orders in and of itself. That section and § 1447(c) must be construed  
10 together . . . ." Id. at 345. "This means that only remand orders  
11 issued under § 1447(c) and invoking the grounds specified  
12 therein . . . are immune from review under § 1447(d)." Id. at 346;  
13 accord Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 711-12 (1996).  
14 Such remand orders are non-reviewable even if erroneous. See  
15 Thermtron, 423 U.S. at 351; accord Volvo of Am. Corp. v. Schwarzer,  
16 429 U.S. 1331, 1332-33 (1976) (Rehnquist, J., Circuit Justice). Thus,  
17 "[a]s long as a district court's remand is based on a timely raised  
18 defect [other than subject matter jurisdiction] or on lack of  
19 subject-matter jurisdiction [whenever made] -- the grounds for remand  
20 recognized by § 1447(c) -- a court of appeals lacks jurisdiction to  
21 entertain an appeal of the remand order under § 1447(d)." Things  
22 Remembered, Inc. v. Petrarca, 516 U.S. 124, 127-28 (1995).

23           It is a question of law whether the district court based its  
24 remand order on a section 1447(c) ground. We address the question by  
25 looking to the grounds upon which the court purported to base its  
26 decision. Thus, in Carvel v. Thomas & Agnes Carvel Foundation, 188

1 F.3d 83 (2d Cir. 1999), we considered a remand order that the district  
2 court purported to base upon the rule set forth in Princess Lida of  
3 Thurn & Taxis v. Thompson, 305 U.S. 456, 457 (1939) (concluding that  
4 "the exercise of jurisdiction by a state court over the administration  
5 of a trust deprives a federal court of jurisdiction of a later suit  
6 involving the same subject matter"). Although in remanding the claims  
7 at issue "the district court explicitly stated that it lacked  
8 jurisdiction over the[m]," we concluded that the statement was not  
9 dispositive. Carvel, 188 F.3d at 85. Rather, we decided, Princess  
10 Lida "states a . . . prudential doctrine of abstention" and not a  
11 "rule of subject matter jurisdiction." Id. at 85. We concluded that  
12 the remand was therefore based on abstention, not on a timely raised  
13 "defect" or subject matter jurisdiction, and thus was not based on a  
14 section 1447(c) ground. Id. at 86. We held that section 1447(d)  
15 therefore did not prohibit our review of the remand order. Id.

16 Similarly, in Pierpoint v. Barnes, 94 F.3d 813 (2d Cir.  
17 1996), we decided that the district court had not based its remand  
18 order on the absence of subject matter jurisdiction even though it had  
19 explicitly stated that the case did not arise "'under the  
20 "Constitution, treaties or laws of the United States" for the purposes  
21 of 28 U.S.C. § 1441(b).'" Id. at 816 (quoting Pierpoint v. Barnes,  
22 892 F. Supp. 60, 61 (D. Conn. 1995)). We found it "hard to believe  
23 that the [district] court would question federal subject matter  
24 jurisdiction . . . since the statute [in question] explicitly grants  
25 original subject matter jurisdiction to the federal courts." Id. We  
26 concluded that "the [district] court's holding likely rested [instead]



1 on its conclusion that [the] claims 'arise exclusively in admiralty'  
2 and therefore are not removable." Id. We determined that this ground  
3 constituted a "defect in removal proceedings" within the meaning of  
4 section 1447(c). Id. at 818-19. Because the ground had been timely  
5 raised, section 1447(d) barred us from reviewing the remand order as  
6 we thus construed it. Id. at 819; see also Spielman v. Merrill Lynch,  
7 Pierce, Fenner & Smith, Inc., 332 F.3d 116, 127 (2d Cir. 2003)  
8 (interpreting remand order as giving "an alternative, and not  
9 incorrect, way of stating that subject matter jurisdiction . . . is  
10 lacking" and concluding that, "[a]ccordingly, the remand order issued  
11 in such a case is not reviewable on appeal"); Hamilton v. Aetna Life &  
12 Cas. Co., 5 F.3d 642, 644 (2d Cir. 1993) (per curiam) (holding that we  
13 would construe a remand order as "a ruling that the removal was  
14 procedurally improper, not that the action was one over which the  
15 court had no subject matter jurisdiction," because the district court  
16 did not appear to premise the remand on the jurisdictional points  
17 raised by the defendant).

18 Of course, a district court's statements regarding the basis  
19 for its remand order will ordinarily be highly persuasive. But we are  
20 ultimately bound by the substance of what the district court did --  
21 not what it said -- when it remanded the case. In rare cases, such as  
22 in Carvel, we may therefore conclude that the basis for the remand was  
23 not a section 1447(c) ground even though the district court made  
24 statements that seem to suggest otherwise. If we determine that the  
25 remand was made on the basis of a section 1447(c) ground, then section  
26 1447(d) bars our review. Conversely, if we conclude that the remand

1 was not based on a section 1447(c) ground, then section 1447(d) does  
2 not deprive us of the ability to entertain the appeal.

3 **b. Motions for Reconsideration in the**  
4 **District Court**

5 The Ninth Circuit has observed that "[r]emand orders based  
6 on section 1447(c) are unreviewable on 'appeal or otherwise.' This  
7 language has been universally construed to preclude not only appellate  
8 review but also reconsideration by the district court." Seedman v.  
9 United States Dist. Court for Cent. Dist. of Cal., 837 F.2d 413, 414  
10 (9th Cir. 1988) (per curiam) (quoting 28 U.S.C. § 1447(d) and citing  
11 New Orleans Pub. Serv., Inc. v. Majoue, 802 F.2d 166, 167 (5th Cir.  
12 1986) (per curiam); Pelleport Investors, Inc. v. Budco Quality  
13 Theatres, Inc., 741 F.2d 273, 279 n.3 (9th Cir. 1984); Three J Farms,  
14 Inc. v. Alton Box Bd. Co., 609 F.2d 112, 115 (4th Cir. 1979), cert.  
15 denied, 445 U.S. 911 (1980); Fed. Deposit Ins. Corp. v. Santiago  
16 Plaza, 598 F.2d 634, 636 (1st Cir. 1979) (per curiam)); see also  
17 Lalondriz v. USA Networks, Inc., 68 F. Supp. 2d 285, 286 (S.D.N.Y.  
18 1999) (stating that under section 1447(d) "a district court may not  
19 review [its remand order] on a motion for reconsideration"); cf. Trans  
20 Penn Wax Corp. v. McCandless, 50 F.3d 217, 226 (3d Cir. 1995) ("[O]ur  
21 precedent suggests a district court would lack jurisdiction to  
22 reconsider its order of remand once a certified copy of the remand  
23 order has been sent to the state court."). We agree with the district  
24 court here, and with our sister circuits, that the "or otherwise"  
25 language of section 1447(d) bars district courts from reconsidering  
26 orders remanding cases on section 1447(c) grounds.

1                                   **c.     Certifying the Remand Order and**  
2                                   **Terminating Federal Jurisdiction**  
3

4                   Section 1447(d) establishes that once a section 1447(c)  
5 remand order has been mailed to the state court pursuant to the latter  
6 section, federal jurisdiction is at an end. Section 1447(c), however,  
7 "is not self-executing." Arnold v. Garlock, Inc., 278 F.3d 426, 437  
8 (5th Cir. 2001). "This provision creates legal significance in the  
9 mailing of a certified copy of the remand order in terms of  
10 determining the time at which the district court is divested of  
11 jurisdiction." Id. at 438. Thus, section 1447(d) divests the  
12 district court of jurisdiction upon mailing of a remand order based on  
13 section 1447(c) grounds to state court. See id.; Seedman, 837 F.2d at  
14 414 ("Once a district court certifies a remand order to state court  
15 [on section 1447(c) grounds] it is divested of jurisdiction and can  
16 take no further action on the case."). But if the remand is not on  
17 section 1447(c) grounds, and therefore section 1447(d) does not apply,  
18 then the mailing of the remand order to the state court does not strip  
19 the federal court of jurisdiction. See Hudson United Bank v. LiTenda  
20 Mortgage Corp., 142 F.3d 151, 159 (3d Cir. 1998).

21 B. Application of the Statutory Provisions to the Instant Case

22                   The district court construed the plaintiff's motion  
23 objecting to the removal as a motion to remand the case to state  
24 court. See Shapiro v. Logistec USA Inc., No. 3:03cv1123(CFD) (D.  
25 Conn. Oct. 14, 2003) (margin order) ("The motion to remand is  
26 GRANTED."). The objection was filed on July 30, 2003, more than  
27 thirty days after June 25, 2003, the date on which the defendants had

1 filed their notice of removal. In granting the motion to remand, the  
2 district court wrote:

3 Title 28 U.S.C. § 1441(b) provides that defendants  
4 may remove civil actions to federal court in  
5 actions in which the federal courts would have  
6 original jurisdiction based on diversity of  
7 citizenship, "provided that no defendant[] 'is a  
8 citizen of the state in which such action is  
9 brought.'" Caterpillar, Inc. v. Lewis, 519 U.S.  
10 61, 69 (1996) (quoting 28 U.S.C. § 1441(b)). See  
11 also Handelsman v. Bedford Village Assoc[s]. Ltd.  
12 P'ship, 213 F.3d 48, 50 [n.2 (2d Cir. 2000)  
13 ("Because [defendant] was a citizen of New York  
14 [where the action was brought], he was not  
15 entitled to remove to federal court."). Here,  
16 defendant Scott Barlow is a resident of  
17 Connecticut, the state in which the action was  
18 brought. Therefore, removal based on diversity of  
19 citizenship was not proper. The clerk is directed  
20 to remand this case to the Connecticut Superior  
21 Court.

22 Id. (last two alterations in original).

23 Clearly, the district court based the remand on section  
24 1441(b)'s provision that a case is not removable if it is brought in a  
25 defendant's home forum. The critical question then is whether that  
26 statutory rule is a section 1447(c) ground for removal, i.e., whether  
27 the ground was either 1) a defect other than subject matter  
28 jurisdiction raised in a motion filed "within 30 days after the filing  
29 of the notice of removal"; or 2) a lack of subject matter  
30 jurisdiction. If it is either, then review of the remand order is  
31 forbidden by section 1447(d).

32 It is undisputed that the plaintiff did not file the  
33 objection to removal within thirty days of the date on which  
34 defendants filed their notice of removal and that the district court  
35 was aware of the dates on which the notice of removal and the

1 objection thereto were filed. We therefore conclude that the district  
2 court did not base the remand order on the first section 1447(c)  
3 ground inasmuch as the filing of the objection, which was construed as  
4 a motion to remand, was not timely. See Hamilton, 5 F.3d at 644.

5 Neither did the district court base the remand order on the  
6 second section 1447(c) ground. In Woodward v. D.H. Overmyer Co., 428  
7 F.2d 880 (2d Cir. 1970), we held that section 1441(b)'s rule against  
8 removal where a defendant is a citizen of the forum was a procedural  
9 rule and was not jurisdictional. Id. at 882-83 (stating that "[w]e  
10 are quite content to follow our distinguished predecessors" who held  
11 that "where only [section 1441(b)'s rule against removal from the home  
12 forum] was violated and the plaintiff made no timely request for  
13 remand, the situation could be considered to be as if the plaintiff  
14 had brought the action in the federal court and, if jurisdiction would  
15 have existed in that event, objection on the score of nonremovability  
16 would be deemed waived" and we would "uphold federal jurisdiction" in  
17 such a case); see also Handelsman v. Bedford Vill. Assocs. Ltd.  
18 P'ship, 213 F.3d 48, 50 n.2 (2d Cir. 2000) (concluding that although  
19 defendant was a citizen of the forum state and was therefore not  
20 entitled to remove the case under section 1441(b), "[plaintiff] waived  
21 his right to object to this procedural defect . . . by failing to  
22 raise the objection within 30 days of removal").<sup>2</sup> We adhere (as of

---

<sup>2</sup> Our sister circuits are largely in agreement. See Pacheco de Perez v. AT&T Co., 139 F.3d 1368, 1372 n.4 (11th Cir. 1998); Korea Exch. Bank v. Trackwise Sales Corp., 66 F.3d 46, 50 (3d Cir. 1995); In re Shell Oil Co., 932 F.2d 1518, 1523 (5th Cir. 1991), cert. denied sub nom. Acuna Castillo v. Shell Oil Co., 502 U.S. 1049 (1992); Farm Constr. Servs., Inc. v. Fudge,

1 course we must) to our rule that section 1441(b) is a rule of  
2 procedure and does not state a jurisdictional requirement.

3 The remand order at issue was thus not based on either of  
4 section 1447(c)'s two grounds. Section 1447(d) therefore does not  
5 apply and does not act to deprive us of the authority to review the  
6 district court's order of remand.

7 Because section 1447(d) does not apply, it also follows that  
8 the district court was mistaken in its determination that the remand  
9 order was not reviewable because of section 1447(d)'s "or otherwise"  
10 language. See Shapiro v. Logistec USA Inc., No. 3:03cv1123(CFD) (D.  
11 Conn. Apr. 8, 2004) (Ruling on Motion for Reconsideration) (quoting 28  
12 U.S.C. § 1447(d)). The transmission of the certified order of remand  
13 did not divest the district court of the ability to reconsider its  
14 order.

15 II. Review of the Remand Order on the Merits

16 A. Whether to Review by Appeal or Mandamus

---

831 F.2d 18, 22 (1st Cir. 1987) (per curiam); Plastic Moldings Corp. v. Park Sherman Co., 606 F.2d 117, 119 n.1 (6th Cir. 1979). The Eighth Circuit, however, has concluded that section 1441(b) states a jurisdictional bar. See Hurt v. Dow Chem. Co., 963 F.2d 1142, 1144-45 (8th Cir. 1992) (differentiating removal jurisdiction from original jurisdiction and concluding that "[d]efendants must come within the court's removal jurisdiction," the requirements of which are established by section 1441(b)); id. at 1145-46 (distinguishing the Supreme Court's statement in Grubbs v. General Electric Credit Corp., 405 U.S. 699, 702 (1972), that the issue on appeal "is not whether the case was properly removed, but whether the federal district court would have had original jurisdiction of the case had it been filed in that court," on the basis that the Grubbs plaintiffs did not object to removal whereas the plaintiffs in Hurt had objected, and stating in any event that jurisdiction is not "capable of being waived"). For the reasons stated in Woodward, 428 F.2d at 883, we disagree.

1           In Thermtron, the Supreme Court concluded that "an order  
2 remanding a removed action does not represent a final judgment  
3 reviewable by appeal." 423 U.S. at 352-53. Rather, it stated,  
4 "[t]he remedy in such a case is by mandamus to compel action, and not  
5 by writ of error to review what has been done." Id. at 353 (quoting  
6 R.R. Co. v. Wiswall, 90 U.S. (23 Wall.) 507, 508 (1875) (alteration in  
7 original)). In Quackenbush, the Supreme Court "disavow[ed]" its  
8 Thermtron holding in that regard. 517 U.S. at 715. The Court  
9 reasoned that a remand order "conclusively determines an issue that is  
10 separate from the merits, namely, the question whether the federal  
11 court should decline to exercise its jurisdiction." Id. at 714.  
12 According to the Court, "When a district court remands a case to a  
13 state court, the district court disassociates itself from the case  
14 entirely, retaining nothing of the matter on the federal court's  
15 docket." Id. The Court concluded that remand orders are  
16 "indistinguishable from the stay order . . . found to be appealable in  
17 Moses H. Cone" "as a 'final decision' under [28 U.S.C.] § 1291 because  
18 it put the litigants 'effectively out of court.'" Id. at 713-14  
19 (quoting Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S.  
20 1, 11 n.11 (1983)). The Court therefore concluded that the remand  
21 order was appealable under section 1291. Id. at 715.

22           We join the majority of our sister circuits in deciding  
23 that, following Quackenbush, the proper avenue for review is by appeal  
24 rather than by mandamus. See Farmland Nat'l Beef Packing Co., L.P. v.  
25 Stone Container Corp. (In re Stone Container Corp.), 360 F.3d 1216,  
26 1219-20 (10th Cir. 2004) (order); Nelson v. Medtronic Inc. (In re FMC

1 Corp. Packaging Sys. Div.), 208 F.3d 445, 449 (3d Cir. 2000); Long v.  
2 Bando Mfg. of Am., Inc., 201 F.3d 754, 758 n.3 (6th Cir. 2000); Benson  
3 v. SI Handling Sys., Inc., 188 F.3d 780, 782 (7th Cir. 1999); Ariail  
4 Drug Co. v. Recomm Int'l Display, Inc., 122 F.3d 930, 933 (11th Cir.  
5 1997); Eastus v. Blue Bell Creameries, L.P., 97 F.3d 100, 103-04 (5th  
6 Cir. 1996); Gaming Corp. of Am. v. Dorsey & Whitney, 88 F.3d 536, 542  
7 (8th Cir. 1996). But see Borneman v. United States, 213 F.3d 819, 826  
8 (4th Cir. 2000), cert. denied, 531 U.S. 1070 (2001). Compare id.  
9 ("[W]e have authority to review [remand] rulings either as appealable  
10 decisions under 28 U.S.C. § 1291 or on petition for a writ of  
11 mandamus." (citing Quackenbush, 517 U.S. at 714; Thermtron, 423 U.S.  
12 at 351)) with Stone Container Corp., 360 F.3d at 1219-20 ("The [Fourth  
13 Circuit] did not explain how both an appeal and mandamus can be  
14 available . . . when the Supreme Court has repeatedly held that  
15 mandamus is not a substitute for an appeal and that mandamus is not  
16 available when there is an 'adequate alternative means' for  
17 petitioners to obtain the relief they seek." (citations omitted)).  
18 Thus, we review the district court's remand order by direct appeal  
19 because our ability to entertain the appeal is not barred here by  
20 section 1447(d).

21 B. Review of the Instant Remand and Reconsideration Orders

22 Under section 1447(c), "[a] motion to remand the case on the  
23 basis of any defect other than lack of subject matter jurisdiction  
24 must be made within 30 days after the filing of the notice of  
25 removal." In this case, as we have seen, the motion to remand was not  
26 made within that period and, inasmuch as it was based on the in-state



1 citizenship of the defendants under section 1441(b), it did not go to  
2 the district court's subject matter jurisdiction. The plaintiff  
3 therefore waived the section 1441(b) objection when he failed to file  
4 his motion to remand within the statutorily prescribed time period.  
5 "Given the passage of more than 30 days without a challenge, the court  
6 lacked authority under § 1447(c) to remand the action on that ground."  
7 Hamilton, 5 F.3d at 644. The district court therefore erred in  
8 remanding the case to state court and in denying the motion for  
9 reconsideration.

#### 10 **CONCLUSION**

11 For the foregoing reasons, we vacate the district court's  
12 order denying defendants' motion for reconsideration and its order  
13 granting the plaintiff's motion to remand to state court, and we  
14 remand the case to the district court with instructions for the court  
15 to deny the motion to remand and to conduct such further proceedings  
16 consistent with this opinion as the court may deem warranted.