

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 Docket No. 04-0733-cv

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

9 Plaintiff-Appellee,

10 - v -

11 LOGISTEC USA INC. and SCOTT BARLOW,

12 Defendants-Third-Party-Plaintiffs-Appellants,

13 SHERWOOD LUMBER CORP.,

14 Third-Party-Defendant.

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

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

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

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

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

14   SACK, Circuit Judge:

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

1 § 1447(d), which would bar both reconsideration by the district  
2 court of its remand order and our review of such a remand order  
3 after it has become effective, does not apply, and d) the  
4 district court should have granted the motion for reconsideration  
5 and denied the motion for remand because the plaintiff waived his  
6 section 1441(b) objection to removal by making the objection  
7 after the time limit imposed by section 1447(c) had expired.

### 8 **BACKGROUND**

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

20 On June 25, 2003, the defendants filed a notice of  
21 removal of the Connecticut state-court litigation in the United  
22 States District Court for the District of Connecticut  
23 (Christopher F. Droney, Judge). They asserted that Ryckman had  
24 been a citizen of the State of Washington at the time of his  
25 death and that his estate was therefore deemed to be a citizen of  
26 Washington under 28 U.S.C. § 1331(c) (2), that Logistec was a

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

16 More than thirty days later, on July 30, 2003, the  
17 plaintiff filed a motion in the district court objecting to  
18 defendants' removal notice. He contended that removal was  
19 forbidden by 28 U.S.C. §1441(b), which provides that an action  
20 is not removable if brought in the home forum of any defendant.  
21 See Pl.'s Objection Defs.' Notice Removal ¶¶ 8-9. Both Barlow  
22 and, for these purposes, Logistec, see 28 U.S.C. § 1332(c)(1),  
23 were citizens of the State of Connecticut, the forum state. See  
24 Pl.'s Objection Defs.' Notice Removal ¶ 9. The district court  
25 construed the plaintiff's motion as a motion to remand, and, on  
26 October 14, 2003, granted it and ordered that the case be

1 remanded to state court. See Shapiro v. Logistec USA Inc., No.  
2 3:03cv1123(CFD) (D. Conn. Oct. 14, 2003) (margin order).

3 On October 27, 2003, the defendants filed a motion for  
4 reconsideration of the remand order. On November 12, 2003, while  
5 that motion was pending, the defendants filed a notice of appeal  
6 of the remand order. The following day, while the  
7 reconsideration motion and notice of appeal were pending, the  
8 clerk of the district court sent certified copies of the docket  
9 sheet and order of remand to the state court.<sup>1</sup> On November 21,  
10 2003, the state court acknowledged receipt of the file.

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

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<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 order denying their motion for reconsideration to their appeal  
2 from the order of remand.

### 3 **DISCUSSION**

#### 4 I. Jurisdiction to Review Remand Orders

5 As a threshold matter, we must determine whether we  
6 have jurisdiction to hear this appeal. Concluding that we do, we  
7 then address the district court's jurisdiction to review its own  
8 remand order on a motion for reconsideration.

#### 9 A. Statutory Framework

10 1. Removal and Remand Procedures. Title 28, United  
11 States Code, section 1441 sets forth the general federal  
12 statutory provision governing removals from state to federal  
13 court. It provides that a defendant may remove to federal court  
14 "any civil action brought in a State court of which the district  
15 courts of the United States have original jurisdiction." Id.  
16 § 1441(a). Section 1441(b) provides, however, that an action is  
17 not removable if the district court's original jurisdiction is  
18 based on diversity of citizenship and any of the defendants "is a  
19 citizen of the State in which such action is brought." Id.  
20 § 1441(b).

21 Once a case has been removed to federal court, a party  
22 may move to remand the case to state court. Section 1447(c)  
23 provides that "[a] motion to remand the case on the basis of any  
24 defect other than lack of subject matter jurisdiction must be  
25 made within 30 days after the filing of the notice of removal."  
26 Id. § 1447(c). Section 1447(c) further states that "[i]f at any

1 time before final judgment it appears that the district court  
2 lacks subject matter jurisdiction, the case shall be remanded."  
3 Id. Section 1447(c) also provides that "[a] certified copy of  
4 the order of remand shall be mailed by the clerk to the clerk of  
5 the State court. The State court may thereupon proceed with such  
6 case." Id.

## 7 2. Authority to Review Remand Orders

### 8 **a. Appellate Jurisdiction**

9 Section 1447(d) provides that "[a]n order remanding a  
10 case to the State court from which it was removed is not  
11 reviewable on appeal or otherwise." Id. § 1447(d). Congress's  
12 purpose in thus limiting the ability of federal courts to review  
13 orders remanding cases to state court was "to prevent delay in  
14 the trial of remanded cases by protracted litigation of  
15 jurisdictional issues." Thermtron Prods., Inc. v. Hermansdorfer,  
16 423 U.S. 336, 351 (1976). But "[s]ection 1447(d) is not  
17 dispositive of the reviewability of remand orders in and of  
18 itself. That section and § 1447(c) must be construed  
19 together . . ." Id. at 345. "This means that only remand  
20 orders issued under § 1447(c) and invoking the grounds specified  
21 therein . . . are immune from review under § 1447(d)." Id. at  
22 346; accord Quackenbush v. Allstate Ins. Co., 517 U.S. 706,  
23 711-12 (1996). Such remand orders are non-reviewable even if  
24 erroneous. See Thermtron, 423 U.S. at 351; accord Volvo of Am.  
25 Corp. v. Schwarzer, 429 U.S. 1331, 1332-33 (1976) (Rehnquist, J.,  
26 Circuit Justice). Thus, "[a]s long as a district court's remand

1 is based on a timely raised defect [other than subject matter  
2 jurisdiction] or on lack of subject-matter jurisdiction [whenever  
3 made] -- the grounds for remand recognized by § 1447(c) -- a  
4 court of appeals lacks jurisdiction to entertain an appeal of the  
5 remand order under § 1447(d)." Things Remembered, Inc. v.  
6 Petrarca, 516 U.S. 124, 127-28 (1995).

7 It is a question of law whether the district court  
8 based its remand order on a section 1447(c) ground. We address  
9 the question by looking to the grounds upon which the court  
10 purported to base its decision. Thus, in Carvel v. Thomas &  
11 Agnes Carvel Foundation, 188 F.3d 83 (2d Cir. 1999), we  
12 considered a remand order that the district court purported to  
13 base upon the rule set forth in Princess Lida of Thurn & Taxis v.  
14 Thompson, 305 U.S. 456, 457 (1939) (concluding that "the exercise  
15 of jurisdiction by a state court over the administration of a  
16 trust deprives a federal court of jurisdiction of a later suit  
17 involving the same subject matter"). Although in remanding the  
18 claims at issue "the district court explicitly stated that it  
19 lacked jurisdiction over the[m]," we concluded that the statement  
20 was not dispositive. Carvel, 188 F.3d at 85. Rather, we  
21 decided, Princess Lida "states a . . . prudential doctrine of  
22 abstention" and not a "rule of subject matter jurisdiction." Id.  
23 at 85. We concluded that the remand was therefore based on  
24 abstention, not on a timely raised "defect" or subject matter  
25 jurisdiction, and thus was not based on a section 1447(c) ground.

1 Id. at 86. We held that section 1447(d) therefore did not  
2 prohibit our review of the remand order. Id.

3 Similarly, in Pierpoint, we decided that the district  
4 court had not based its remand order on the absence of subject  
5 matter jurisdiction even though it had explicitly stated that the  
6 case did not arise "'under the "Constitution, treaties or laws of  
7 the United States" for the purposes of 28 U.S.C. § 1441(b).'" 94  
8 F.3d at 816 (quoting Pierpoint v. Barnes, 892 F. Supp. 60, 61 (D.  
9 Conn. 1995)). We found it "hard to believe that the [district]  
10 court would question federal subject matter jurisdiction . . .  
11 since the statute [in question] explicitly grants original  
12 subject matter jurisdiction to the federal courts." Id. We  
13 concluded that "the [district] court's holding likely rested  
14 [instead] on its conclusion that [the] claims 'arise exclusively  
15 in admiralty' and therefore are not removable." Id. We  
16 determined that this ground constituted a "defect in removal  
17 proceedings" within the meaning of section 1447(c). Id. at  
18 818-19. Because the ground had been timely raised, section  
19 1447(d) barred us from reviewing the remand order as we thus  
20 construed it. Id. at 819; see also Spielman v. Merrill Lynch,  
21 Pierce, Fenner & Smith, Inc., 332 F.3d 116, 127 (2d Cir. 2003)  
22 (interpreting remand order as giving "an alternative, and not  
23 incorrect, way of stating that subject matter jurisdiction . . .  
24 is lacking" and concluding that, "[a]ccordingly, the remand order  
25 issued in such a case is not reviewable on appeal"); Hamilton v.  
26 Aetna Life & Cas. Co., 5 F.3d 642, 644 (2d Cir. 1993) (per

1 curiam) (holding that we would construe a remand order as "a  
2 ruling that the removal was procedurally improper, not that the  
3 action was one over which the court had no subject matter  
4 jurisdiction," because the district court did not appear to  
5 premise the remand on the jurisdictional points raised by the  
6 defendant).

7 Of course, the district court's statements regarding  
8 the basis for its remand order will ordinarily be highly  
9 persuasive. But we are ultimately bound by the substance of what  
10 the district court did -- not what it said -- when it remanded  
11 the case. In rare cases, such as in Carvel, we may therefore  
12 conclude that the basis for the remand was not a section 1447(c)  
13 ground even though the district court made statements that seem  
14 to suggest otherwise. If we determine that the remand was made  
15 on the basis of a section 1447(c) ground, then section 1447(d)  
16 bars our review. Conversely, if we conclude that the remand was  
17 not based on a section 1447(c) ground, then section 1447(d) does  
18 not deprive us of the ability to entertain the appeal.

19 **b. Motions for Reconsideration in the**  
20 **District Court**

21 The Ninth Circuit has observed that "[r]emand orders  
22 based on section 1447(c) are unreviewable on 'appeal or  
23 otherwise.' This language has been universally construed to  
24 preclude not only appellate review but also reconsideration by  
25 the district court." Seedman v. United States Dist. Court for  
26 Cent. Dist. of Cal., 837 F.2d 413, 414 (9th Cir. 1988) (per

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

19 **c. Certifying the Remand Order and**  
20 **Terminating Federal Jurisdiction**  
21

22 Section 1447(d) establishes that once a section 1447(c)  
23 remand order has been mailed to the state court pursuant to that  
24 section, federal jurisdiction is at an end. Section 1447(c),  
25 however, "is not self-executing." Arnold v. Garlock, Inc., 278  
26 F.3d 426, 437 (5th Cir. 2001). "This provision creates legal  
27 significance in the mailing of a certified copy of the remand

1 order in terms of determining the time at which the district  
2 court is divested of jurisdiction." Id. at 438. Thus, section  
3 1447(d) divests the district court of jurisdiction upon mailing  
4 of a remand order based on section 1447(c) grounds to state  
5 court. See id.; Seedman, 837 F.2d at 414 ("Once a district court  
6 certifies a remand order to state court [on section 1447(c)  
7 grounds] it is divested of jurisdiction and can take no further  
8 action on the case."). But if the remand is not on section  
9 1447(c) grounds, and therefore section 1447(d) does not apply,  
10 then the mailing of the remand order to the state court does not  
11 strip the federal court of jurisdiction. See Hudson United Bank  
12 v. LiTenda Mortgage Corp., 142 F.3d 151, 159 (3d Cir. 1998).

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

14 The district court construed the plaintiff's motion  
15 objecting to the removal as a motion to remand the case to state  
16 court. See Shapiro v. Logistec USA Inc., No. 3:03cv1123(CFD) (D.  
17 Conn. Oct. 14, 2003) (margin order) ("The motion to remand is  
18 GRANTED."). The objection was filed on July 30, 2003, more than  
19 thirty days after June 25, 2003, the date on which the defendants  
20 had filed their notice of removal. In granting the motion to  
21 remand, the district court wrote:

22 Title 28 U.S.C. § 1441(b) provides that  
23 defendants may remove civil actions to  
24 federal court in actions in which the federal  
25 courts would have original jurisdiction based  
26 on diversity of citizenship, "provided that  
27 no defendant[] 'is a citizen of the state in  
28 which such action is brought.'" Caterpillar,  
29 Inc. v. Lewis, 519 U.S. 61, 69 (1996)  
30 (quoting 28 U.S.C. § 1441(b)). See also

1 Handelsman v. Bedford Village Assoc[s]. Ltd.  
2 P'ship, 213 F.3d 48, 50 [n.2 (2d Cir. 2000)  
3 ("Because [defendant] was a citizen of New  
4 York [where the action was brought], he was  
5 not entitled to remove to federal court.").  
6 Here, defendant Scott Barlow is a resident of  
7 Connecticut, the state in which the action  
8 was brought. Therefore, removal based on  
9 diversity of citizenship was not proper. The  
10 clerk is directed to remand this case to the  
11 Connecticut Superior Court.

12 Id. (last two alterations in original).

13 Clearly, the district court based the remand on section  
14 1441(b)'s provision that a case is not removable if it is brought  
15 in a defendant's home forum. The critical question then is  
16 whether that statutory rule is a section 1447(c) ground for  
17 removal, i.e., that the ground was either 1) a defect other than  
18 subject matter jurisdiction raised in a motion filed "within 30  
19 days after the filing of the notice of removal"; or 2) a lack of  
20 subject matter jurisdiction. If it is either, then review of the  
21 remand order is forbidden by section 1447(d).

22 It is undisputed that the plaintiff did not file the  
23 objection to removal within thirty days of the date on which  
24 defendants filed their notice of removal and that the district  
25 court was aware of the dates on which the notice of removal and  
26 the objection thereto were filed. We therefore conclude that the  
27 district court did not base the remand order on the first section  
28 1447(c) ground inasmuch as the filing of the objection, which was  
29 construed as a motion to remand, was not timely. See Hamilton, 5  
30 F.3d at 644.

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

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<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, 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

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

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

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

## 16 II. Review of the Remand Order on the Merits

### 17 A. Whether to Review by Appeal or Mandamus

18 In Thermtron, the Supreme Court concluded that "an  
19 order remanding a removed action does not represent a final

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"[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 judgment reviewable by appeal." 423 U.S. at 352-53. Rather, it  
2 stated, "'[t]he remedy in such a case is by mandamus to compel  
3 action, and not by writ of error to review what has been done.'" Id.  
4 at 353 (quoting R.R. Co. v. Wiswall, 90 U.S. (23 Wall.) 507,  
5 508 (1875) (alteration in original)). In Quackenbush, the  
6 Supreme Court "disavow[ed]" its Thermtron holding in that regard.  
7 517 U.S. at 715. The Court reasoned that a remand order  
8 "conclusively determines an issue that is separate from the  
9 merits, namely, the question whether the federal court should  
10 decline to exercise its jurisdiction." Id. at 714. According to  
11 the Court, "When a district court remands a case to a state  
12 court, the district court disassociates itself from the case  
13 entirely, retaining nothing of the matter on the federal court's  
14 docket." Id. The Court concluded that remand orders are  
15 "indistinguishable from the stay order . . . found to be  
16 appealable in Moses H. Cone" "as a 'final decision' under [28  
17 U.S.C.] § 1291 because it put the litigants 'effectively out of  
18 court.'" Id. at 713-14 (quoting Moses H. Cone Mem. Hosp. v.  
19 Mercury Constr. Corp., 460 U.S. 1, 11 n.11 (1983)). The Court  
20 therefore concluded that the remand order was appealable under  
21 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  
24 appeal rather than by mandamus. See Farmland Nat'l Beef Packing  
25 Co., L.P. v. Stone Container Corp. (In re Stone Container Corp.),  
26 360 F.3d 1216, 1219-20 (10th Cir. 2004) (order); Nelson v.

1 Medtronic Inc. (In re FMC Corp. Packaging Sys. Div.), 208 F.3d  
2 445, 449 (3d Cir. 2000); Long v. Bando Mfg. of Am., Inc., 201  
3 F.3d 754, 758 n.3 (6th Cir. 2000); Benson v. SI Handling Sys.,  
4 Inc., 188 F.3d 780, 782 (7th Cir. 1999); Ariail Drug Co. v.  
5 Recomm Int'l Display, Inc., 122 F.3d 930, 933 (11th Cir. 1997);  
6 Eastus v. Blue Bell Creameries, L.P., 97 F.3d 100, 103-04 (5th  
7 Cir. 1996); Gaming Corp. of Am. v. Dorsey & Whitney, 88 F.3d 536,  
8 542 (8th Cir. 1996). But see Borneman v. United States, 213 F.3d  
9 819, 826 (4th Cir. 2000), cert. denied, 531 U.S. 1070 (2001).  
10 Compare id. ("[W]e have authority to review [remand] rulings  
11 either as appealable decisions under 28 U.S.C. § 1291 or on  
12 petition for a writ of mandamus." (citing Quackenbush, 517 U.S.  
13 at 714; Thermtron, 423 U.S. at 351)) with Stone Container Corp.,  
14 360 F.3d at 1219-20 ("The [Fourth Circuit] did not explain how  
15 both an appeal and mandamus can be available . . . when the  
16 Supreme Court has repeatedly held that mandamus is not a  
17 substitute for an appeal and that mandamus is not available when  
18 there is an 'adequate alternative means' for petitioners to  
19 obtain the relief they seek." (citations omitted)). Thus, we  
20 review the district court's remand order by direct appeal because  
21 our ability to entertain the appeal is not barred here by section  
22 1447(d).

### 23 B. Review of the Instant Remand and Reconsideration Orders

24 Under section 1447(c), "[a] motion to remand the case  
25 on the basis of any defect other than lack of subject matter  
26 jurisdiction must be made within 30 days after the filing of the

1 notice of removal." In this case, as we have seen, the motion to  
2 remand was not made within that period and, inasmuch as it was  
3 based on the in-state citizenship of the defendants under section  
4 1441(b), it did not go to the district court's subject matter  
5 jurisdiction. The plaintiff therefore waived the section 1441(b)  
6 objection when he failed to file his motion to remand within the  
7 statutorily prescribed time period. "Given the passage of more  
8 than 30 days without a challenge, the court lacked authority  
9 under § 1447(c) to remand the action on that ground." Hamilton,  
10 5 F.3d at 644. The district court therefore erred in remanding  
11 the case to state court and in denying the motion for  
12 reconsideration.

### 13 **CONCLUSION**

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