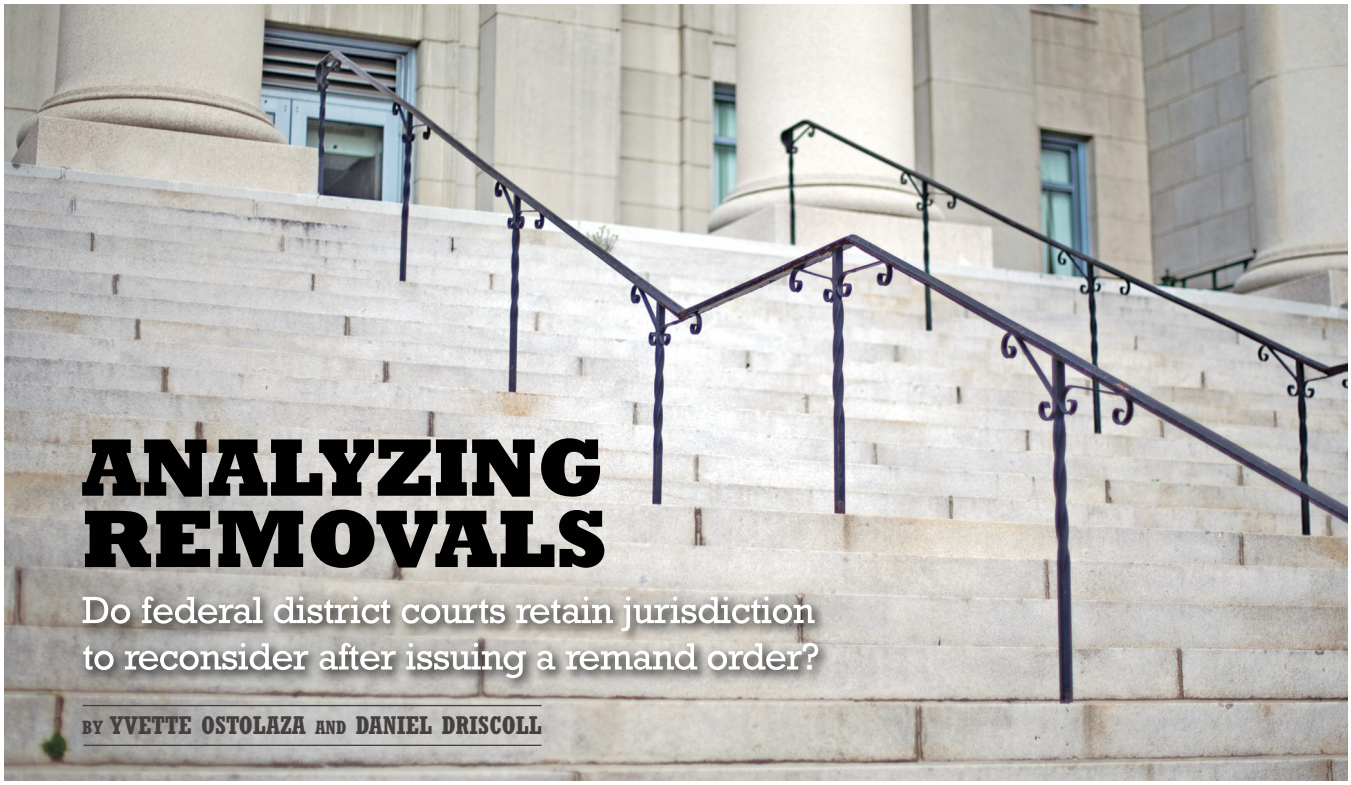

ANALYZING REMOVALS

Do federal district courts retain jurisdiction to reconsider after issuing a remand order?

BY YVETTE OSTOLAZA AND DANIEL DRISCOLL

Removal to federal court can be a hotly contested procedural step during litigation as clients sometimes prefer federal court for a variety of procedural and legal reasons. Given the potential advantages, defendants frequently seek to remove civil lawsuits filed in state court to a federal forum. Still, it is by now axiomatic that federal courts "possess only that power authorized by Constitution and statute," and generally presume "that a cause lies outside this limited jurisdiction."[1] Given these well-established limitations, district courts scrutinize removal applications closely and do not hesitate to remand actions lacking the requisite jurisdictional hook. Moreover, the federal remand statute, 28 U.S.C. § 1447, limits the ability to appeal a potentially unfavorable remand order—a notably harsh approach in light of the outsized role forum considerations play in shaping the course of subsequent litigation. While conventional wisdom suggests a district court's decision to remand an action is virtually unchallengeable, uncertainty remains over whether a district court can reconsider a remand pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. In certain circumstances, therefore, quickly filing a motion for reconsideration could allow a second chance at securing a place in federal court following an initial rejection.

While 28 U.S.C. § 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," directly precluding appellate review of remand orders falling within its purview, the statute does not address the issue of reconsideration by the district court. Still, courts that have considered the question have generally concluded that Section 1447(d) applies equally to district courts, effectively barring reconsideration of remand orders.[2]

Authority is divided, however, over whether the provisions of Section 1447(d) are triggered by the entry of the remand order or by the district court clerk actually mailing a certified copy of the order to the state court.[3] The U.S. Court of Appeals for the 5th Circuit has generally adopted the latter position and held that "[t]he federal court is completely divested of jurisdiction once it mails a certified copy of the [remand] order to the clerk of the state court."[4] Still, this issue has yet to be conclusively determined, and counsel seeking reconsideration of a remand order has, at the least, a colorable basis to argue that until a certified copy of the remand order has been provided to the clerk of the state court, the district court retains a jurisdictional basis to reconsider its order.

Moreover, putting this jurisdictional issue aside, Section 1447(d) does not apply to actions removed "pursuant to section 1442 or 1443 of this title." Section 1442 applies generally to the removal of suits against federal officers or agencies, *see* 28 U.S.C. § 1442, and Section 1443 applies to the removal of civil rights cases.[5] Additionally, Section 1447(d) only applies when the remand order is based on one of the criteria specified in Section 1447(c), i.e., "lack of subject matter jurisdiction or defects in removal procedure."[6] That is, Section 1447(d)'s "bar on reviewability is not applicable where the district court remands a case on grounds other than those authorized by § 1447(c)."[7] Accordingly, given the relatively narrow reach of Section 1447(d), the statute may not even apply to exclude reconsideration in the first instance.

While litigants commonly assume that a district court's decision to remand an action to state court is virtually unchallengeable, a careful examination of Section 1447(d) in conjunction with the jurisdictional limits of federal court reveals that a remand decision is not as inviolable as it might first appear. Indeed, Section 1447(d)'s reach is surpris-

ingly narrow as the bar it imposes on review applies only to particular categories of cases and to remand orders based on particular grounds. To the extent that a remand order is not based on a specified category, or the litigation falls into an exempt class of cases, Section 1447(d) will likely not apply and the district court's order is properly subject to both direct appeal and to reconsideration. Additionally, uncertainty persists among the circuits regarding the precise moment that a district court loses jurisdiction over the remanded proceeding. It remains, at the least, arguable that an alert litigant could request reconsideration before the district court is divested of jurisdiction and the restraints of Section 1447(d) are triggered in the first instance. While the doctrinal contours of this area of law continue to evolve, litigants should carefully evaluate the strategic options available to them at every stage of the case. An initially unfavorable decision might not be as forbidding as it first appears. **TBJ**

Notes

1. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).
2. *See, e.g., Browning v. Navarro*, 743 F.2d 1069, 1078 (5th Cir. 1984) (explaining that "[e]ven a federal court, persuaded that it has issued an erroneous remand order, cannot vacate the order once entered"); *Helmer v. Weaver*, 123 F. Supp. 2d 1010, 1011 (E.D. La. 2000) (explaining that "the Court's ability to reconsider is limited to discretionary remand orders, not orders based upon lack of subject matter jurisdiction") (quotation omitted).
3. *See Agostini v. Piper Aircraft Corp.*, 729 F.3d 350, 355-56 (3d Cir. 2013) (noting that Section 1447(d) is not triggered until a jurisdiction transferring event occurs, i.e., "the mailing of a certified copy of the remand order to state court"); *Vogel v. U.S. Office Prods. Co.*, 258 F.3d 509, 519 (6th Cir. 2001) (noting that "[i]n dicta, we have recognized that . . . certification generally divests federal courts of jurisdiction"); *Seedman v. U.S. Dist. Ct. for Cent. Dist. of Cal.*, 837 F.2d 413, 414 (9th Cir. 1988) (explaining that "[o]nce a district court certifies a remand order to state court it is divested of jurisdiction and can take no further action in the case"); *Fed. Deposit Ins. Corp. v. Santiago Plaza*, 598 F.2d 634, 636 (1st Cir. 1979) (construing Section 1447(d) to "prohibit even a motion for reconsideration once the state court has resumed jurisdiction"). *But see In re Lowe*, 102 F.3d 731, 736 (4th Cir. 1996) (holding that "a federal court loses jurisdiction over a case as soon as its order to remand the case is entered . . . it cannot reconsider its ruling even if the district court clerk fails to mail to the state court a certified copy of the remand order"); *In re Loudermilch*, 158 F.3d 1143, 1146-47 (11th Cir. 1998) (concluding that district court exceeded its power by reconsidering its order to remand pursuant to Section 1447(d); *Aetna U.S. Healthcare Inc. v. Hoechst Aktiengesellschaft*, 67 F. Supp. 2d 1242, 1244-45 (D. Kan. 1999) (following *In re Lowe* to conclude that district courts lack jurisdiction to reconsider a remand order following entry).
4. *Browning*, 743 F.2d at 1078; *see Bank of Am., N. Am. v. Johnson*, 2006 WL 2981190, at *1 (S.D. Tex. Oct. 16, 2006) (explaining that, as a general rule, "a federal court is completely divested of jurisdiction once it mails a certified copy of the remand order to the clerk of the state court"); *see also In re Allied-Signal, Inc.*, 919 F.2d 277, 281 (5th Cir. 1990) (explaining that Section 1447(d) "precludes any review of the remand order, either by the district or appellate court").
5. *See* 28 U.S.C. § 1443.
6. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 711-12 (1996).
7. *In re Shell Oil Co.*, 932 F.2d 1523, 1525 (5th Cir. 1991).

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