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David A. Furlow

Kelly W. Kelly

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REMOVAL AND REMAND: WHEN DOES A FEDERAL DISTRICT COURT LOSE JURISDICTION OVER A CASE REMANDED TO STATE COURT?

by

David A. Furlow* and Charles W. Kelly**

THE filing of a removal petition in federal court effects the removal of a state court civil lawsuit to a federal forum.¹ When a defendant files the appropriate removal pleadings,² federal jurisdiction immediately attaches, the statute places the state court's authority in a state of suspension, and the federal court possesses the power, but not the duty, to invalidate all state court proceedings that have taken place between the time that the defendant filed the removal petition in federal court and the time that the clerk filed a copy of the removal petition in state court.³ The federal court's

* B.A., J.D., University of Texas. Attorney at Law, Griggs & Harrison, Houston, Texas.

** B.A., J.D., University of Texas. Attorney at Law, Griggs & Harrison, Houston, Texas.

1. In this Article the term "federal remand statute" refers to the civil removal and remand aspects of 28 U.S.C. §§ 1446, 1447 (1982). This Article does not discuss the removal and remand of criminal cases, except as is necessary to compare and contrast the statutory procedures.

2. 28 U.S.C. § 1446(a), (d)-(e) (1982). The relevant statute, 28 U.S.C. § 1446(e), states that the delivery of written notice of the removal petition to adverse parties and the filing of a copy of the removal petition in the state court "shall effect the removal and the State court shall proceed no further unless and until the case is remanded." *Id.* § 1446(e).

Little question exists that federal jurisdiction attaches when a party files the removal petition in federal court. *See DeMoss v. Kelly Serv., Inc.*, 355 F. Supp. 1111, 1113 (D.P.R. 1972) (jurisdiction of federal court attaches when party files removal petition), *aff'd*, 493 F. 2d 1012 (1st Cir. 1974). In *Master Equip. Inc. v. Home Ins. Co.*, 342 F. Supp. 549, 552 (E.D. Pa. 1972), the court observed that filing a removal petition in the state court merely functioned as a notice of the superseding federal jurisdiction and, in the event of conflicting proceedings during the interlude before that filing, federal jurisdiction predominated. These facts indicate that federal jurisdiction attaches even before completion of the removal proceedings in state court. *Id.* *But see Beleos v. Life & Casualty Ins. Co.*, 161 F. Supp. 627, 628 (E.D.S.C. 1956) (until state court loses jurisdiction, federal court cannot acquire it). One of the purposes of this Article is to analyze the ensuing proceedings in order to determine if state jurisdiction resumes prior to the completion of remand proceedings in the federal court.

3. *See Hornung v. Master Tank & Welding Co.*, 151 F. Supp. 169, 172 (D.N.D. 1957), in which the court observed:

The state court acquired jurisdiction of the present action when the Summons and Complaint were duly served upon the defendants in accordance with the Nonresident Motorist Statute. That jurisdiction was active until the removal was finally effected by the filing of a copy of the Petition for Removal with the state court clerk. 28 U.S.C.A. § 1446(e). It then became passive or dormant,

assertion of removal jurisdiction places the state court's jurisdiction in a state of suspension until such time as the federal court remands the case to state court.⁴ If the court finds that it does have jurisdiction and that the case has been properly removed, or if the federal court dismisses the cause of action in response to a party's motions, then the removal operates to terminate the state court's jurisdiction.⁵ Any proceedings that occur in the state

pending disposition of the case in federal court. . . . Federal jurisdiction vested for all purposes when the Petition was filed in this court, the later notice thereof and the filing of a copy thereof in state court operating retroactively to "effect the removal" as of the date of filing the Petition in federal court. . . .

. . . The filing in state court functions as a notice of the superseding federal jurisdiction; and necessarily, in the event of conflicting proceedings during the interlude before that filing, the federal jurisdiction predominates.

Id. (footnotes omitted); see also *Shenandoah Chamber of Progress v. Frank Assocs.*, 95 F. Supp. 719, 720 (E.D. Pa. 1950) (even if state court holds default judgment, statute still allows removal to federal court if properly filed).

State courts sometimes have taken a conflicting position and suggested that the state court does not lose jurisdiction until someone actually serves the federal removal petition upon the court and the plaintiffs. See *Dorsey v. State*, 171 Ind. App. 408, 357 N.E.2d 280, 282 n.2 (1976) (state court retained jurisdiction since no written notice or filed copy of removal petition sent to state court or to plaintiff); *Schuchman v. State*, 250 Ind. 408, 236 N.E.2d 830, 833 (1968) (state court loses jurisdiction when service of removal made on state court and plaintiff).

A number of federal courts also have held that both the federal court and the state court retain active jurisdiction during the period of time between the filing of the removal petition in federal court and the filing of a copy in state court. These courts, however, have not discussed extensively the dominant jurisdiction of the federal court. See *Berberian v. Gibney*, 514 F.2d 790, 792-93 (1st Cir. 1975) (court held that both state and federal courts have jurisdiction until removal process completed, but did not discuss doctrine of dominant jurisdiction); *Windac Corp. v. Clarke*, 530 F. Supp. 812, 814 (D. Neb. 1982) (court discussed doctrine of dominant jurisdiction, but apparently did not apply it).

Some courts have gone even further in ignoring the dominant jurisdiction of federal courts. In *Delavigne v. Delavigne*, 402 F. Supp. 363 (D. Md. 1975), *aff'd*, 530 F.2d 598 (4th Cir. 1976), for example, the federal district court held that the filing with the state court of a notice of removal, rather than a copy of the petition itself, proved insufficient to divest the state court of jurisdiction. 402 F. Supp. at 365-66. The federal district court concluded that the state court actions that had occurred prior to the filing of a copy of the removal petition were not void, but presumptively valid. *Id.*; see also *McGoldrick v. ICS Sales & Leasing, Inc.*, 412 F. Supp. 268, 269-70 (E.D.N.Y. 1976) (sheriff's levy of property pursuant to state court's order valid, despite fact that defendant filed removal petition in federal court two days before sheriff acted); *Ramahi v. Hobart Corp.*, 47 Or. App. 607, 615 P.2d 348, 353 (1980) (state court continues to have jurisdiction until copy of petition for removal and notice filed in state court).

4. *Dauenhauer v. Superior Court*, 149 Cal. App. 2d 22, 24, 307 P.2d 724, 726 (1957); *State v. Lehman*, 203 Neb. 341, 278 N.W.2d 610, 615 (1979).

5. *Allstate Ins. Co. v. Superior Court*, 132 Cal. App. 3d 670, 675-76, 183 Cal. Rptr. 330, 333 (1982). As indicated above, the state court's jurisdiction will come to an end under either of two sets of circumstances. In the first instance, the state court loses jurisdiction if the federal court obtains jurisdiction as a result of a proper removal. *Id.* at 676, 183 Cal. Rptr. at 333; see *supra* notes 1-3 and accompanying text. Alternatively, the state court loses jurisdiction if the federal court determines that the state court never had jurisdiction over the lawsuit. For example, assume that a plaintiff files a securities fraud lawsuit in a state court, and sets forth a claim for recovery under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968 (1982 & Supp. 1987). One of two defendants removes the case to federal court claiming that the RICO count invokes federal jurisdiction. The other defendant files a motion to dismiss the RICO suit, because RICO jurisdiction is exclusively federal. See *Broadway v. San Antonio Shoe, Inc.*, 643 F. Supp. 584, 586 (S.D. Tex. 1986); *Kinsey v. Nestor Exploration Ltd.*—1981A, 604 F. Supp. 1365, 1371 (E.D. Wash. 1985). If the federal court agrees with the second defendant's argument that RICO jurisdiction is exclusively federal, then it must dismiss the entire lawsuit. Dismissal is necessary because the federal court's re-

court between the filing of a copy of the federal removal petition in the state court and the reinvestment of jurisdiction that occurs upon the remand of the case to the state court are void.⁶

In order to determine whether post-removal state court proceedings are void, a court must ascertain when a case is remanded, which is to establish when the federal court has returned the lawsuit to the exclusive jurisdiction of the state court. Few commentators have written about the reinvestment of state court jurisdiction during the remand process, presumably because the statutory procedure appears to be very simple. Despite the straightforward language of the statute, however, federal courts have reached contra-

removal jurisdiction is entirely derivative, and the federal courts thus could not have acquired jurisdiction from a state court that lacks jurisdiction. *Lambert Run Coal Co. v. Baltimore & Ohio R.R. Co.*, 258 U.S. 377, 382-83 (1922). The federal court cannot even remand the case to state court, but must dismiss it in its entirety. C. WRIGHT, *THE LAW OF FEDERAL COURTS* § 38, at 212 (1983). In this instance, however, the state court has lost jurisdiction of the case just as if the federal court had assumed jurisdiction over the matter.

6. In the event of conflicting proceedings during the interim, federal jurisdiction prevails over state jurisdiction, and many courts have held the actions of the state court to be a *coram non iudice* and absolutely void. *Steamship Co. v. Tugman*, 106 U.S. 118, 122 (1882). In *South Carolina v. Moore*, 447 F.2d 1067 (4th Cir. 1971), for example, Circuit Judge Clement Haynsworth observed that:

It is clear, however, that § 1446, in providing for the filing of the petition in the district court while promptly thereafter filing a copy in the state court and giving notice to adverse parties was designed to make the removal effective by the performance of those acts. The removal was no longer dependent upon any judicial act in any state or federal court. . . .

Since the adoption of § 1446, it has been uniformly held that the state court loses all jurisdiction to proceed immediately upon the filing of the petition in the federal court and a copy in the state court. Under these holdings any proceedings in the state court after the filing of the petition and prior to a federal remand order are absolutely void, despite subsequent determination that the removal petition was ineffective. This rule has been accepted by numerous scholarly commentators as a correct statement of existing law under § 1446.

Id. at 1073 (footnotes omitted); see also *Johnson v. Estelle*, 625 F.2d 75, 77 (5th Cir. 1980) (dismissal and remand of removal petition insufficient to reinstate jurisdiction in state court, while second petition remained in federal court); *United States v. Ohio*, 487 F.2d 936, 943 (Temp. Emer. Ct. App. 1973) (after removal, state court shall proceed no further unless remanded), *aff'd sub nom. Fry v. United States*, 421 U.S. 542 (1975); *Allman v. Hanley*, 302 F.2d 559, 562 (5th Cir. 1962) (upon compliance with § 1446, state court loses jurisdiction). The state court's jurisdiction is not restored unless and until the federal court remands the case. See *Lowe v. Jacobs*, 243 F.2d 432, 433 (5th Cir. 1957), *cert. denied*, 355 U.S. 842 (1957); *Styers v. Pico, Inc.*, 236 Ga. 258, 223 S.E.2d 656, 657 (1976); see also *Adair Pipeline Co. v. Pipeliners Local Union No. 798*, 203 F. Supp. 434, 437 (S.D. Tex. 1962) (when parties have met § 1446 removal requirements, state court can no longer proceed), *aff'd*, 325 F.2d 206, 206 (5th Cir. 1963).

Although the authorities generally agree, one court has indicated in dicta that a state court's post-removal actions may be valid, rather than void, if the federal court determines that the state court lacked jurisdiction over the removed case. *Styers v. Pico, Inc.*, 236 Ga. 258, 223 S.E.2d 656, 657 (1976). That dicta is clearly erroneous because it validates the actions of a state court that had chosen to ignore, and therefore undermine, a federal court's right to determine whether the jurisdiction that it was exercising pursuant to the removal statute should be withdrawn. A federal court and a state court should not seek to exercise simultaneous jurisdiction over a case. Courts can maintain orderly procedure only if they hold void any state court proceedings after the filing of the removal petition and prior to a federal remand order, regardless of a subsequent determination that the removal petition was ineffective. *South Carolina v. Moore*, 447 F.2d 1067, 1073 (4th Cir. 1971).

dictory conclusions about its proper construction.⁷

I. THE IMPORTANCE OF DETERMINING WHEN A STATE COURT RESUMES EXCLUSIVE JURISDICTION OVER A REMANDED CASE

The purpose of this Article is to examine the rationale of the reported decisions in which courts have determined when a state has regained jurisdiction of a previously removed case after it has been remanded. The authors have analyzed these issues in order to determine what circumstances signify that jurisdiction over the remanded lawsuit has passed to the state court. The Article begins by examining the existing case law.

In brief, federal courts have ruled that state courts are reinvested with jurisdiction after remand at three different times:

(1) immediately upon the oral order of the federal court to remand the case to the state court;⁸

(2) upon the federal court clerk's mailing of the federal remand order to the state court; and⁹

(3) upon the state court's receipt of the federal remand order.¹⁰ The distinctions may appear subtle, but they contain important consequences.

If the oral remand order immediately and irrevocably divests the federal court of jurisdiction, then the entry and mailing of that order constitute purely ministerial tasks, and the federal court is immediately without power to reconsider, and to modify or vacate, its earlier remand order, even if the district judge subsequently concludes that the federal court mistakenly decided to remand the case.¹¹ If the federal court retains the power to vacate its remand order at any time prior to the time that its clerk mails the order to a state court, then the party seeking removal may still have an opportunity to file and argue a motion to modify or vacate that remand order in the time that elapses between the entry of the order and its mailing. If the federal court maintains exclusive jurisdiction over the removed case until the state court's clerk actually receives a copy of that order, however, then the federal court is entitled to vacate or modify its order at any time before the state court's clerk receives the remand order and files it in the records of the court.¹²

The state court's reinvestment of jurisdiction clearly affects the rights of parties in the remanded state court proceeding. If, for example, a federal court's oral order of remand immediately and irrevocably divests the federal court of jurisdiction and reinvests the state court with jurisdiction, then all subsequent proceedings in the state court will be valid. If the remand statute requires the federal judge to sign a remand order and to direct the clerk to

7. See *infra* notes 15-92 and accompanying text.

8. See *infra* notes 15-46 and accompanying text.

9. See *infra* notes 47-92 and accompanying text.

10. See *infra* notes 93-99 and accompanying text.

11. See *Three J Farms, Inc. v. Alton Box Bd. Co.*, 609 F.2d 112, 115 (4th Cir. 1979), *cert. denied*, 445 U.S. 911 (1980); *Leslie v. Floyd Gas Co.*, 11 F. Supp. 401, 402 (E.D. Ky. 1935).

12. See *First Nat'l Bank v. Langford*, 570 F. Supp. 697, 698 (S.D. Fla. 1983).

mail a certified copy of that order to the state court in order to divest the federal court of jurisdiction, however, then any state court proceedings that occur between the federal judge's oral order of remand and the clerk's mailing of a certified copy of the remand order are void, because the state court has not yet regained jurisdiction. Thus, the resolution of when the remand order reinvests the state court with exclusive jurisdiction will determine whether proceedings in the remanded, state court lawsuit, including any judgments rendered therein, are valid or void.

II. THE LANGUAGE OF THE FEDERAL REMAND STATUTE

The statutory language for federal remand is straightforward and deceptively simple:

If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case.¹³

A literal reading of the statute suggests that the state court may not proceed with the case until its clerk has received a certified copy of the remand order from the federal court, which would expressly authorize the state court to proceed with the case. Most, but by no means all, courts therefore have concluded that the state court may not reconvene a trial or otherwise recommence proceedings until the federal court's clerk has mailed a certified copy of the remand order to the state court, or until the state court has actually received a certified copy of that state court order.¹⁴

III. FEDERAL DECISIONS INTERPRETING THE REMAND STATUTE

A. *Decisions Holding that the Federal Court Immediately and Irrevocably Loses Jurisdiction over a Removed Case as Soon as the Federal Judge Orders that the Removed Case Be Remanded*

In *Leslie v. Floyd Gas Co.*¹⁵ a federal district court ruled that its entry of an order of remand immediately reinvested the state court with exclusive jurisdiction over the removed civil lawsuit, even though no copy of that federal remand order had been filed in the state court.¹⁶ In other words, the act

13. 28 U.S.C. § 1447(c) (Supp. II 1985).

14. See *infra* notes 47-99 and accompanying text.

15. 11 F. Supp. 401 (E.D. Ky. 1935).

16. *Id.* at 402. The district court stated:

The general power of the court over its own judgments, orders, and decrees during the existence of the term at which they are first made is undeniable, and this general rule would be controlling here but for the statutory provision that "such remand shall be immediately carried into execution. . . ." When this court entered the order remanding the case on March 20, 1935, the state court, by operation of law, was immediately reinvested with jurisdiction. . . . It was the duty of the state court to immediately proceed to exercise jurisdiction over the cause as a pending action as though no removal had ever been attempted. . . .

. . . Whether a copy of the remanding order was filed in the state court and subsequent proceedings taken therein does not appear material, since the state

of ordering remand immediately and irrevocably deprived the federal district court of jurisdiction to further consider the merits of the case. The federal judge's oral order fully returned the case to the state court from which it arose.¹⁷ In this case the transfer of jurisdiction to the state court occurred at the moment the federal judge orally ordered the case remanded, and such transfer did not require the state court to receive a written copy of the remand order to proceed with the case.¹⁸ The state court therefore was empowered to render a final judgment without having first received a written copy of the remand order, and the federal court was without power to reconsider its decision to remand the case, even though it had not yet signed that order or sent it to the state court.

The case merits attention because other courts frequently cite it for the proposition that a federal court lacks any power to reconsider, modify, or vacate an order of remand.¹⁹ To reach the conclusions described above, the United States District Court for the Eastern District of Kentucky misconstrued language from a Supreme Court decision discussing the procedure for removal, and misapplied it to a case involving remand.²⁰ Nevertheless, a number of federal courts have relied upon the same rationale as expressed in *Floyd Gas Co.* in reaching the same conclusion that jurisdiction immediately

court was immediately reinvested with jurisdiction and had full authority to proceed with the case. A different construction of the statute might work great confusion as well as injurious delay in the preparation and trial of causes.

Id.

17. Thus, if the state court was in the middle of a trial at the time that a defendant filed a removal petition, the federal court's oral remand order would sufficiently return the parties to the status quo ante that had prevailed immediately prior to the filing of the removal petition in federal court, that is, to the middle of the trial. If the federal court's remand order really had the effect of making the removal proceedings a total nullity, then the state court would have the duty to reconvene the trial immediately, as though no removal had ever been attempted.

Id.

The potential for abuse appears obvious: a state court judge might attempt to punish the attorney who had originally removed the case to federal court by (1) telephoning the federal judge who had received the removal petition and requesting a sua sponte, federal order of remand, and (2) reconvening the trial without notifying the attorney who had filed the removal petition. The state court might thereafter proceed to trial without the removing defendant's counsel even being aware of the remand order, or of the reinvestment of jurisdiction in the state court.

The state court judge could then explain that the removing party's counsel had voluntarily abandoned the trial by leaving the court in order to engage in null proceedings in another court. Although this hypothetical case might appear far-fetched, it pales in comparison to the set of facts described in *Adair Pipeline Co. v. Pipeliners Local Union No. 798*, 203 F. Supp. 434 (S.D. Tex. 1962), *aff'd*, 325 F.2d 206 (5th Cir. 1963). In *Adair* a state court judge deliberately disregarded a copy of a removal petition that an attorney had served upon him, purportedly because a literal reading of the removal statute required the attorney to file the copy of the removal petition with the state court's clerk, rather than with the state court judge. 203 F. Supp. at 436.

18. *Floyd Gas Co.*, 11 F. Supp. at 402.

19. See *In re La Providencia Dev. Corp.*, 406 F.2d 251, 253 n.2 (1st Cir. 1969); *Smith v. Paul Revere Life Ins. Co.*, 391 F. Supp. 310, 312 (E.D. Tenn. 1974); *In re Great. Petrol. Corp.*, 16 F. Supp. 247, 251 (S.D. Cal. 1936); *Newell v. Harrison Eng'g & Constr. Corp.*, 149 Kan. 838, 89 P.2d 869, 871 (1939).

20. *Floyd Gas Co.*, 11 F. Supp. at 402 (citing *St. Paul & Chicago Ry. Co. v. Mclean*, 108 U.S. 212 (1883); *Baltimore & Ohio R.R. Co. v. Koontz*, 104 U.S. 5 (1881)).

reinvests in the state court upon oral remand.²¹

For example, a panel of the Fifth Circuit adopted the *Leslie* doctrine in 1933. In *City of Waco v. United States Fidelity & Guaranty Co.*²² the Fifth Circuit concluded that the remand order placed the case back in state court in the position from which it was removed, and ended all federal court actions in the case.²³ That Fifth Circuit ruling provides little or no precedential value, however, because Congress amended the federal remand statute a few years later; consequently, the *Waco* decision has never been cited in any subsequent opinion of the Fifth Circuit.

The Ninth Circuit also considered the immediacy and irrevocability of a federal remand order. In his dissent in *Bucy v. Nevada Construction Co.*²⁴ Judge Healy declared that,

[W]hen the court entered its order of November 27, 1939, "remanding the cause to the state court for lack of jurisdiction", no further order or action was contemplated or intended by the court to effectuate its purpose. I think the judicial function of the federal court is exhausted *and its authority terminated with the entry of the remand order. What thereafter remains to be done, if anything, is not a judicial act but the performance by the clerk of a purely ministerial function. . . .*

As used in the practice, the office of the certified copy is merely informative. . . . [I]ts filing with the state court is, I think, in no sense a prerequisite to the revesting of jurisdiction there. *If, an hour after a remanding order is entered, the state court were to proceed to judgement in the absence of the copy, upon informal advice of counsel or upon no advice at all, he would indeed be a hardy advocate who would contend that the proceedings so had were without jurisdiction.*²⁵

In Judge Healy's view the very act of uttering an oral order of remand and entering that order in the court's records constituted an act of law that immediately and irrevocably returned exclusive jurisdiction to the state court, regardless of whether the state court judge even knew that he had regained jurisdiction over the lawsuit. Once uttered, the remand order would become inviolate, and the return of the case to the state court would follow inexora-

21. See, e.g., *Merchant v. Mead-Morrison Mfg. Co.*, 11 F.2d 368, 369 (2d Cir. 1926) (proper practice is to send case immediately to court of proper jurisdiction); *Garrison v. Atlantic Life Ins. Co.*, 18 F. Supp. 469, 469 (E.D.S.C. 1937) (federal court's filing of remand order deprived court of jurisdiction to entertain petition for rehearing and to vacate remand order because whole case had been returned to state court); *Ausbrooks v. Western Union Tel. Co.*, 282 F. 733, 734 (M.D. Tenn. 1921) (federal remand order immediately reinvests state court with jurisdiction, regardless of filing of copy of order).

22. 67 F.2d 785 (5th Cir. 1933).

23. *Id.* at 786. The court stated that "the entry of the remanding order rendered the order appealed from ineffective for want of jurisdiction, made moot all further proceedings in the federal court, and left the cause to stand and continue in the state court as though it had not been removed." *Id.*

24. 125 F.2d 213, 218 (9th Cir. 1942) (Healy, J., dissenting). The majority held that, because the federal district court erroneously remanded the case to the state court, discovered the error, and vacated the remand before the plaintiff proceeded in state court and because the plaintiff subsequently acquiesced to the federal district court's jurisdiction, the federal district court correctly retained jurisdiction. *Id.* at 215-19.

25. *Id.* at 219 (emphasis added) (footnotes and citations omitted).

bly and automatically. Though only a dissent, Justice Healy's opinion serves to illustrate one approach to this remand issue.

At this point, one would be wise to consider the rationale of this viewpoint. The doctrine that a federal court's order of remand is both irrevocable and immediate appears to go too far. Healy's statement that the transfer of the case back to the state court would constitute nothing more than a ministerial act must mischaracterize the law. At the very least the characterization reduces to virtual insignificance the current language of 28 U.S.C. section 1447. The statute states that once the federal court clerk mails a certified copy of the remand order to the state court clerk, the state court may thereupon proceed with the case.²⁶ Even if one considers the filing of the remand order in the state court as primarily informative, such filing is not merely ministerial, for the filing represents the federal court's transfer and surrender of exclusive jurisdiction to the state court. When a party attempting to remove a case fails to file a copy of the removal petition in the state court, that failure to perform an informative action will invalidate the removal proceeding because the act of informing the state court that it no longer possesses jurisdiction to consider the merits of the case actually works to transfer jurisdiction of the case.²⁷ Likewise, the filing of a certified copy of the remand order in the state court informs that court, and the parties before it, of the transfer of exclusive jurisdiction back to that state court to decide the case.

The courts that decided the cases discussed above, with the important *Bucy* exception, did so using a pre-28 U.S.C. section 1447 version of the

26. 28 U.S.C. § 1447(c) (Supp. II 1985).

27. In an effort to be fair, a proponent of immediate and irrevocable divestment might respond by contending that the ministerial act of sending the actual remand order to state court more closely resembles the ministerial act of filing a copy of the federal removal petition in state court than the *jurisdictional* act of filing the removal petition in the federal court. A more fundamental analysis suggests that one cannot ever describe as merely ministerial an act that transfers the jurisdiction a court needs to decide a case. Even if one analogizes the filing of the remand order in state court to the filing of a copy of the removal petition in state court, describing the filing of the remand order as a purely ministerial act would be improper. Courts view requirements that a removing party file a bond in the federal court, promptly give written notice of the removal to opposing parties, and file a copy of the removal petition in state court as quickly as practicable as modal and formal steps. Thus, defects in those steps do not defeat federal jurisdiction and can be cured. See *Covington v. Indemnity Ins. Co.*, 251 F.2d 930, 932-33 (5th Cir.), *cert. denied*, 357 U.S. 921 (1958); *Hornung v. Master Tank & Welding Co.*, 151 F. Supp. 169, 171-72 (D.N.D. 1957). *But see* *Beleos v. Life & Casualty Ins. Co.*, 161 F. Supp. 627, 628-29 (E.D.S.C. 1956); *Cavanaugh v. Atchison, T. & S.F. Ry. Co.*, 103 F. Supp. 855, 855 (W.D. Mo. 1952). See generally *C. WRIGHT, supra* note 5, § 40, at 226-34 (describes removal procedure).

One must contrast the filing of a remand order that returns jurisdiction to the state court with the technicalities of removal, such as filing the requisite bond. The language of 28 U.S.C. § 1447(c) authorizes the state court to "thereupon proceed with such case" only *after* the federal court's clerk has mailed a certified copy of the remand order to the state court. 28 U.S.C. § 1447(c) (1982). Thus, Congress appears to have intended that either the federal court clerk's mailing or the state court clerk's receipt of that copy of the remand order act as a jurisdictional prerequisite to the state court's commencement of further proceedings in the case. In addition, the remand order informs the state court about the scope, as well as the existence, of the state court's jurisdiction. The scope of a particular remand order has become extremely important, due to the federal judiciary's increasingly frequent use of limited and conditional remands.

federal remand statute. The older version mandated that the parties involved immediately execute the federal court's order of remand.²⁸ The Supreme Court interpreted this congressional directive of immediate execution in *United States v. Rice*.²⁹ The Court ruled that the statutory prohibition, combined with the policy of refusing to interrupt litigation of the merits of removed causes to consider questions of jurisdiction of the district court,³⁰ precluded the federal appellate courts from reviewing an order of remand by mandamus or appeal.³¹

Congress substantially changed the older version in 1940.³² The 1940 amendments replaced the directive of immediately carrying the remand order into execution with a procedure for mailing a certified copy of the federal remand order to the state court clerk. Congress reformulated the remand statute again in 1948.³³ Congress then renumbered the statute during the recodification,³⁴ but did not change the statute's content. As a result of the change in the statutory language, all of the decisions interpreting the pre-1940 remand statute should have little or no bearing upon the proper construction of the present statute.

One commentator on federal procedural law drew a distinction between the old removal statute's immediate execution and the lack of that requirement in the post-1948 version.³⁵ Despite the substantial statutory changes that took place in 1940, many state courts today still hold that federal courts immediately and irrevocably lose jurisdiction over removed cases at the mo-

28. Judicial Code § 28 (1911), 28 U.S.C. § 71 (1940), originally enacted as Act of March 3, 1911, ch. 231, § 38, 36 Stat. 1094 (current version at 28 U.S.C. § 1447(c) (Supp. II 1985)). The pertinent part of the predecessor statute read:

Whenever any cause shall be removed from the state court into any district court of the United States, and the district court shall decide that the cause was improperly removed, and order the same to be *remanded* to the state court from whence it came, *such remand shall be immediately carried into execution*, and no appeal or writ of error from the decision of the district court so remanding such cause shall be allowed.

Id. (emphasis added).

29. 327 U.S. 742 (1946).

30. *Id.* at 751.

31. *Id.* at 752.

32. 28 U.S.C. § 71(e) (1940) (current version at 28 U.S.C. § 1447(c) (Supp. II 1985)). The 1940 amended version provided:

If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case.

Id.

33. Act of June 25, 1948, ch. 646, 62 Stat. 939 (codified at 28 U.S.C. § 1447 (Supp. II 1985)).

34. See 28 U.S.C. § 1447 (Supp. II 1985).

35. 1A J. MOORE & B. RINGLE, *Moore's Federal Practice*, ¶ 0.169[2.-1] (2d ed. 1987).

The commentator noted that:

[u]nder the *prior statute*, despite the strong language to the effect that when the district court orders the case remanded "such remand shall be immediately carried into execution," it was held that this did not instantly deprive the district court of jurisdiction. . . . This is true under the *present statute* since it does not command immediate execution of the remand order.

Id. (emphasis added).

ment that those federal district court judges order a remand of the case to state court.³⁶ In *Brown v. State Farm Mutual Automobile Insurance Co.*,³⁷ for example, the defendant in a state court action removed the lawsuit to a federal court, where he filed his original answer. Approximately three weeks later, the federal court signed the remand order stating that the case, having been removed to the federal court, was thereby remanded to the state court.³⁸ The federal court failed to immediately mail a copy of the remand order to the state court, and a copy of that order did not reach the state court until June 25, 1969, which was well after the state court had entered summary judgment against the defendant.

The Fort Worth court of civil appeals concluded that the federal judge signed the remand order, and that, therefore, the state trial court reacquired jurisdiction at that time and possessed jurisdiction when rendering summary judgment.³⁹ The precedential value of the *Brown v. State Farm Mutual Automobile Insurance Co.* decision remains minimal, however, because the court of civil appeals misconstrued the federal statute when it concluded that when the federal court remands the cause, the action "ipso facto terminates the jurisdiction of the Federal Court" and restores jurisdiction to the state court.⁴⁰ In the case the Fort Worth court of civil appeals cited three supporting cases, which courts had rendered in 1936, 1921, and 1883.⁴¹ All three of the supporting cases held that a federal court immediately and irrevocably loses jurisdiction over a remanded case once the federal court orders the remand of a case.⁴² Once the court orders remand, it does not even retain the jurisdiction necessary to modify or vacate that order.⁴³

The Fort Worth court of civil appeals erroneously failed to recognize that Congress had revised the federal removal and remand statute in 1940, four years after the most recent of the decisions upon which it had relied.⁴⁴ The three decisions that the court cited in support of its interpretation of the statute as it appeared prior to the 1940 amendments did not resemble the statute that the court interpreted in 1969. To summarize, those cases de-

36. *Brown v. State Farm Mut. Auto. Ins. Co.*, 449 S.W.2d 93 (Tex. Civ. App.—Fort Worth 1969, no writ); see also *Reimer v. Scott*, 666 S.W.2d 384, 385 (Tex. App.—Houston [14th Dist.] 1984, writ dismissed) (adopted *Brown* rationale and concluded that "[t]he order of remand terminates the jurisdiction of the federal court and immediately restores the jurisdiction of the state court").

37. 449 S.W.2d 93 (Tex. Civ. App.—Fort Worth 1969, no writ).

38. *Id.* at 95.

39. *Id.* at 96.

40. *Id.*

41. *Id.*

42. See, e.g., *St. Paul & Chicago Ry. Co. v. McLean*, 108 U.S. 212 (1883) (appellate court should not disturb remand order unless court below has improperly exercised its discretion); *Ausbrooks v. Western Union Tel. Co.*, 282 F. 733 (M.D. Tenn. 1921) (federal court has no power to vacate remand order); *United States Pipe & Foundry Co. v. City of Waco*, 100 S.W. 2d 1099 (Tex. Civ. App.—Waco 1936) (federal court instantly and irrevocably loses jurisdiction upon remand), *aff'd*, 130 Tex. 126, 108 S.W.2d 432 (1937).

43. *United States Pipe*, 100 S.W. 2d at 1111 (citing with approval *Ausbrooks v. Western Union Tel. Co.*, 282 F. 733, 734 (M.D. Tenn. 1921) (federal court has no power to vacate remand order)).

44. See *supra* note 32 and accompanying text.

cided before 1940 bear little relevance to current remand issues because they harkened back to a version of the remand statute that Congress repealed in 1940. As the case law discussed below indicates, most of the modern decisions hold that the federal court does not surrender jurisdiction until it mails the remand order to the state court, or, alternatively, until the state court's clerk actually receives the remand order.⁴⁵ The fact that the old approach lingers to this day indicates that the courts have failed to pay attention to the precise language of the federal remand statute.⁴⁶

B. Decisions Holding that the Federal Court Does Not Lose Jurisdiction over the Remanded Case Until the Federal Court's Clerk Places a Certified Copy of the Federal Remand Order in the Mail

Subsequent decisions have repudiated the logic of immediate and irrevocable jurisdictional divestment described above. In *Bucy v. Nevada Construction Co.*,⁴⁷ for example, the Ninth Circuit: rejected Justice Healy's approach, declaring that another court's reasoning contradicted the common law doctrine whereby courts possess inherent power to correct their own mistakes; nullified the statutes enacted for that purpose; and misapplied 28 U.S.C. section 71.⁴⁸ In *Bucy* the Ninth Circuit ruled that a federal district court retained jurisdiction to correct its order of remand if it acted before the remand order was executed, that is, prior to the filing of a certified copy of the order in state court.⁴⁹

The *Bucy* case demonstrates one of the reasons that would motivate a federal district court to vacate an oral remand order. The district court originally ordered remand because it determined that it lacked jurisdiction to adjudicate the removed lawsuit. The district judge ruled before he had

45. See *infra* notes 47-99 and accompanying text.

46. See *Reimer v. Scott*, 666 S.W.2d 384, 385 (Tex. App.—Houston [14th Dist.] 1984, writ dismissed w.o.j.) (stating rule of immediate jurisdiction divestment on remand); *Dorsey v. State*, 71 Ind. App. 408, 357 N.E.2d 280, 282-83 (1976) (state court resumes jurisdiction upon notification of remand). Some commentators might argue that the Fifth Circuit had adopted a modified form of this doctrine of immediate and irrevocable divestment of jurisdiction, based upon the Fifth Circuit's ruling in *Johnson v. Estelle*, 625 F.2d 75 (5th Cir. 1980). The *Johnson* case involved a defendant, a prison writ-writer, who filed two nearly identical petitions for removal in the four days prior to the commencement of his state court trial for burglary. The federal district court announced its remand order to the parties in the state court proceeding. The record did not show that someone actually had delivered a certified copy of the remand order to the state court. Nevertheless, Johnson proceeded to trial in the state court case without objecting to the state court's lack of jurisdiction. After his subsequent conviction, he filed a federal habeas corpus petition, claiming that the state court had violated his rights. Johnson did not raise the issue of the federal court's failure to comply with the literal requirements of 28 U.S.C. § 1447(c), although the Fifth Circuit considered that issue. *Johnson*, 625 F.2d at 77. The Fifth Circuit reversed another federal district court's grant of habeas corpus relief and decided the case on habeas corpus grounds, after concluding that Johnson had waived his right to complain of the noncompliance with the remand statute by participating in the state court trial without objection. *Id.*

47. 125 F.2d 213 (9th Cir. 1942).

48. *Id.* at 217 (citing *Travelers' Protective Ass'n v. Smith*, 71 F.2d 511, 513 (4th Cir. 1934) in which court implied that federal remand order was "executed by certificate [that is, by sending a certified copy] to the state court").

49. *Id.* at 217-18.

learned of a recent Supreme Court decision, which the Court had handed down five days prior to the district court's remand order.⁵⁰ When the district court learned that it was entitled to hear the case, pursuant to the new Supreme Court decision, the court vacated the remand order and denied the motion to remand. The trial court's order vacating remand followed the original remand order by four days.⁵¹ Circuit Judge Garrecht observed that the statute did not state that the remand order was self-executing.⁵² Since the federal court may act before the state clerk executes the remand order by filing a certified copy of the remand order in state court,⁵³ the court may grant a rehearing upon a showing of sufficient cause.⁵⁴ The Fifth Circuit adheres to the position enunciated in the *Bucy* decision,⁵⁵ and agrees with Judge Garrecht's opinion that a remand order is not self-executing.⁵⁶

Lower courts have repeatedly come to the same conclusion. In *Cook v. J.C. Penney Co.*⁵⁷ a federal district court ruled that it could reconsider its order to remand a case to state court, because the clerk of the federal court had failed to mail a certified copy of the remand order to state court.⁵⁸ The federal district court had ordered a case remanded on January 7, 1983, because the removal petition had failed to properly allege the existence of diversity jurisdiction. Although the court had already entered the order, the federal court's clerk made a mistake and failed to send a certified copy of the order to the state court. On January 12, 1983, the defendant sought leave to amend its removal petition in order to correct the defects within it. The federal court agreed to consider the request because the federal court continued to have jurisdiction due to the clerk's failure to send a copy of the remand order to the state court.⁵⁹ Since the defendant's defective pleadings involved matters of form rather than of substance, and because the district court judge rather than opposing counsel noticed those defects, the court weighed the equities and concluded that the original order of remand had

50. *Nierbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165 (1939).

51. *See Bucy*, 125 F.2d at 215-16 (details time frame).

52. *Id.* at 217.

53. *Id.* at 217-18.

54. *Id.* at 218.

55. *See Browning v. Navarro*, 743 F.2d 1069, 1078 (5th Cir. 1984) (remand order did not self-execute, but executed upon mailing of certified copy).

56. *Id.* at 1078-79.

57. 558 F. Supp. 78 (N.D. Iowa 1983).

58. *Id.* at 79. The court stated that:

[T]he federal court is not completely divested of jurisdiction to reconsider or vacate the order of remand *until the order of remand has been entered and a certified copy of the order has been mailed to the clerk of the state court.*

Here the order of remand was entered of record on January 7, 1983. Normally, a certified copy should have been mailed to the clerk of state court on the same date. However, due to a mistake in the federal Clerk of Court's office, as of this date, *no such copy has been sent. Thus, this court has not been divested of jurisdiction and may reconsider the order of remand.*

Id. (emphasis added) (citations omitted). The fact that jurisdiction did not transfer until the remand order was mailed to the state court implicitly rejects Judge Healy's description of the transmittal of a remand order as a purely ministerial act. *See supra* notes 24-27 and accompanying text.

59. *J.C. Penney*, 558 F. Supp. at 79-80.

been ill-advised.⁶⁰ The narrowest interpretation of the statutory language supports the *J.C. Penney* court's holding that a federal court does not surrender jurisdiction until the state court clerk receives the remand order. Other cases, however, hold that the federal court does not surrender jurisdiction until the federal court clerk has placed the order of remand in a repository of the U.S. Post Office.⁶¹

In *First National Bank v. Langford*,⁶² for example, the federal court vacated a June 15, 1983, order of remand on June 23, 1983. The authors remain uncertain as to whether that federal court concluded that it retained jurisdiction because it had not yet mailed the remand order, or merely because the state court had not yet received the order. Presumably, though, a delay in entering or mailing that order enabled the federal court to vacate an order that the state court had not yet received.

The *First National Bank* decision also involved an interpretation of section 1447(d),⁶³ which declared that an order remanding a case back to the state court was not reviewable on appeal or otherwise.⁶⁴ Courts universally recognize that an appellate court cannot review a district court's order remanding a case back to the state court on appeal.⁶⁵ An appellate court can review a federal district court's order of remand only on mandamus, when the district court has exceeded its authority by remanding a case for some reason not authorized by the statute, for example, the overcrowded nature of the removal court's docket.⁶⁶

In *First National Bank* the district court decided to vacate its June 15, 1983, remand order on June 23, 1983, because the district court believed information in the defendant's "previously filed and timely papers setting forth the basis entitling it to denial of the bank's argument to remand the case."⁶⁷ The defendant submitted those papers to the court five days after the original order of remand. The plaintiff objected to the district court's reconsideration of its previous order of remand, which occurred as a result of the defendant's June 20, 1983, motion. The plaintiff complained that the district court's reconsideration of its earlier remand order constituted a violation of section 1447(d)'s declaration that an "order remanding a case. . . is not reviewable on appeal or otherwise."⁶⁸ The district court rejected that argument and concluded that the court possessed jurisdiction to reconsider

60. *Id.* at 80.

61. See *infra* notes 62-63 and accompanying text.

62. 570 F. Supp. 697 (S.D. Fla. 1983).

63. 28 U.S.C. § 1447(d) (Supp. II 1985).

64. *First Nat'l Bank*, 570 F. Supp. at 697.

65. See *Gravitt v. Southwestern Bell Tel. Co.*, 430 U.S. 723, 723-24 (1977) (court of appeals cannot review remand); *Royal v. State Farm Fire & Casualty Co.*, 685 F.2d 124, 126-27 (5th Cir. 1982) (remand due to improvident removal or improper jurisdiction not subject to review by appellate court). The statute prohibits not only federal appellate court review of the federal district court decision, but also Supreme Court review of a final judgment in the highest court of the state to which the case was remanded. *Metropolitan Casualty Ins. Co. v. Stevens*, 312 U.S. 563, 568 (1941).

66. *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 343-44 (1976).

67. *First Nat'l Bank*, 570 F. Supp. at 698.

68. 28 U.S.C. § 1447(d) (Supp. II 1985).

its remand order, because the federal court was not reviewing the order, on appeal or by mandamus.⁶⁹ The court concluded that the statute prohibited appellate review in order to avoid jurisdictional interruptions.⁷⁰ Since a district court's immediate reconsideration of an order that it had rendered on incomplete information would not result in prolonged litigation over questions of the district court's jurisdiction, however, that rationale did not apply to the *First National Bank* case.⁷¹ Thus, the *First National Bank* decision stands for the proposition that a federal district court can reconsider, modify, or vacate an order of remand at any time before the state court regains jurisdiction, which apparently occurs when the state court receives a copy of the remand order, if the party opposing remand can convince the federal court that the court order to remand was ill-founded or based on incomplete information.

In a series of other cases federal courts have intimated that remand does not occur until the federal district court has mailed a certified copy to the state court, at which time the state court regains jurisdiction. In *Browning v. Navarro*,⁷² for example, a panel of the Fifth Circuit declared that once the federal court mails a certified copy of the order to the clerk of the state court, the federal court loses jurisdiction.⁷³ Other federal courts have arrived at almost identical conclusions in *FDIC v. Santiago Plaza*,⁷⁴ *In re La Providencia Development Corp.*,⁷⁵ and *Rosenberg v. G.V.W. Travel, Inc.*⁷⁶

In *In re La Providencia Development Corp.* the plaintiffs commenced an original cause of action in the Superior Court of Puerto Rico. One month later, in July 1968, all of the defendants except one filed a petition to remove the action to the district court on the ground of diversity. The plaintiff-petitioners filed a motion to remand, which the court granted on August 19, 1968. Almost immediately thereafter, the plaintiff-petitioners filed a copy of the remand order in the Puerto Rico court. The Puerto Rico court resumed jurisdiction. The federal court shortly thereafter reconsidered its remand order and entered an order purporting to vacate the remand on September 25, 1968. The plaintiff-petitioners filed an appeal from the federal district court orders, and the First Circuit intervened to stay any further action by the federal district court.

The First Circuit ruled that the federal district court had lost the jurisdiction necessary to reconsider and vacate its previous order of remand.⁷⁷ The

69. *First Nat'l Bank*, 570 F. Supp. at 698.

70. *Id.* at 698.

71. *Id.*

72. 743 F.2d 1069 (5th Cir. 1984).

73. *Id.* at 1078. The court noted that a "federal court is *completely divested* of jurisdiction once it mails a certified copy of the order to the clerk of the State court." *Id.* (emphasis added).

74. 598 F.2d 634, 636 (1st Cir. 1979).

75. 406 F.2d 251, 252-53 (1st Cir. 1969).

76. 480 F. Supp. 95, 97 n.3 (S.D.N.Y. 1979). In dictum, the court noted in a footnote that "[e]ntry of an order of remand and mailing a certified copy to the State Court under 28 U.S.C. § 1447(c) completely divests the federal court of jurisdiction and reinvests the State Court with jurisdiction to proceed." 480 F. Supp. at 97 n.3 (citing *United States v. Rice*, 327 U.S. 742, (1946)).

77. *La Providencia*, 406 F.2d at 252-53.

appellate court attached importance to the fact that the state court had actually received the federal district court's remand order, and had reassumed jurisdiction over the case.⁷⁸ The First Circuit concluded that appellate review of a remand order was impermissible, either by appeal or pursuant to an order of remand.⁷⁹ The court commented that "[t]his is not only in the interest of judicial economy, but out of respect for the state court and in recognition of principles of comity. The action must not ricochet back and forth depending upon the most recent determination of a federal court."⁸⁰

The First Circuit's opinion did not address the question of when the state court reacquired jurisdiction, since clearly the state court actually had received the remand order before the federal district court could vacate that order. Still, the First Circuit recognized that one exception to the general rule that remand orders cannot be reviewed by appeal or otherwise could exist.⁸¹ That exception would apply "when the remand order has not been completed by the re-entry of the case in the state court,"⁸² for example, when the state court had not yet received the federal district court's remand order.

In *Poindexter v. Gross & Janes Co.*⁸³ the court indicated that, in order to divest a federal court of jurisdiction, the entry of the remand order and its mailing to the state court were necessary.⁸⁴ The *Poindexter* case, however, contains some ambiguity since one can also cite *Poindexter* in support of the broader proposition that a federal court does not surrender jurisdiction over the removed case until and unless the state court receives the federal court's remand order. In *Poindexter* James Albert Poindexter and Peggy Jean Poindexter brought a wrongful death action against the Gross & Janes Company, a Missouri corporation that had its principal place of business located in Arkansas. The Poindexters filed their complaint on September 15, 1958, in the Circuit Court of Oachita County, Arkansas. The defendant filed a removal petition and an original answer in the federal court on October 6, 1958. Gross & James Company petitioned for removal on the grounds that the case sounded in federal diversity jurisdiction, even though their answer admitted that Arkansas was the company's principal place of business.

The plaintiffs filed a motion to remand the next day, on October 7, 1958, and advised the federal court that it had no jurisdiction over the removed case because the defendant had judicially admitted in its answer that its principal place of business was in Arkansas, the plaintiffs' forum state. On Octo-

78. *Id.*

79. *Id.*

80. *Id.* at 252. Federal courts avoid reviewing district court orders of remand on the grounds that the prolonged delays that would result from litigation over questions of the district court's jurisdiction would unduly interrupt the orderly process of a civil suit. See *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 351 (1976); *United States v. Rice*, 327 U.S. 742, 751 (1946); *Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Hayda*, 637 F.2d 391, 396 n.9 (5th Cir. 1981).

81. *La Providencia*, 406 F.2d at 252.

82. *Id.*

83. 167 F. Supp. 151 (W.D. Ark. 1958).

84. *Id.* at 155.

ber 14, 1958, the federal court granted the motion to remand, and the federal judge wrote a letter to all counsel of record informing them of the basis of his decision. The judge also entered an order of remand and caused the federal court's clerk to file a certified copy of that remand order in the state court. All of the court's actions took place on the same day.⁸⁵ On October 30, 1958, Gross & James filed a motion requesting the federal court to set aside the October 14, 1958, order of remand, on the grounds that its answer had admitted only that the company was a Missouri corporation, but not that its principal place of business was in Arkansas.

The federal court denied that motion to set aside because of its conclusion that the order of remand divested the court of the jurisdiction necessary to entertain the defendant's motion.⁸⁶ Thus, the state clerk's receipt of a certified copy of that remand order on October 14, 1958, divested the federal court of power to consider the defendant's motion to set aside, which the defendant filed sixteen days later. Since the federal court's clerk apparently certified a copy of the remand order and mailed it to the state clerk on that same day, the federal court's refusal to engage in an unnecessary attempt to determine precisely when the federal court surrendered jurisdiction over the case is not surprising.

Even when federal judges have not explicitly addressed the issue of jurisdiction over the remanded case, those judges apparently believed that the mailing of the remand order constituted an essential element of the remand process.⁸⁷ In fact, the usual order of remand explicitly directs the federal court clerk to make a certified copy of the remand order and to send it to the clerk of the state court from which the case was originally removed.⁸⁸ Thus, if the federal court does not lose jurisdiction over the removed case until the federal court's clerk actually places a signed copy of the remand order in a

85. The opinion is unclear as to how that "filing" occurred, although the state court apparently received the order on the date the federal court clerk mailed it. *Id.* at 154.

86. *Id.* The court noted that:

Ordinarily a court has inherent power to vacate or modify its own orders upon a timely application for such orders, but because of the rule that the federal court loses jurisdiction after remand and the petition for removal becomes "functus officio", the court is without jurisdiction to set aside an order remanding the cause to the state court. Particularly is this true if the state court has been notified of the entry of the order remanding the case to it. *The record shows that the Clerk of this Court filed a certified copy of the order with the Clerk of the Circuit Court of Ouachita County, Arkansas, on October 14, 1958, the date of its entry.*

Id. (emphasis added) (citation omitted).

87. See *E.D. Sys. Corp. v. Southwestern Bell Tel.*, 674 F.2d 453, 457 (5th Cir. 1982). The Fifth Circuit panel approvingly observed that "[w]hen Judge Hughes remanded the divorce action, she ordered that 'the clerk of [the federal] Court make a certified copy of the motion to remand and this order and that she forward the same to the clerk of the 303rd Judicial District of Dallas County, Texas.'" *Id.*

88. See *City of Winston-Salem v. Chauffeurs*, 470 F. Supp. 442, 449 (M.D.N.C. 1979). The court stated, "it is therefore recommended that plaintiff's motion to remand be granted and that pursuant to the provisions of 28 U.S.C. § 1447(c), the clerk of this Court will mail a certified copy of the Order of Remand to the Clerk of the Superior Court of Forsyth County, North Carolina." *Id.* (emphasis added); see also *Hook v. Hook & Ackerman, Inc.*, 96 F. Supp. 1021, 1022 (W.D. Pa. 1951) (court stated, "And now, . . . as required by 28 U.S.C. § 1447(c) the . . . case will be, and hereby is, remanded to the Court of Common Pleas of

repository of the United States mail for delivery to the clerk of the state court, then the federal court retains jurisdiction to consider an ill-advised oral order to remand a case. Since a federal judge possesses the inherent power to order the remand of a case *sua sponte*,⁸⁹ a federal district court judge may have good reason to reconsider a hasty or an ill-informed decision, especially in circumstances in which the district court judge acted without entertaining the argument of counsel.⁹⁰ If the federal court immediately and irrevocably loses jurisdiction at the moment that the court orally orders the remand of a removed case, then it possesses no power to correct an unwise decision.⁹¹ If the remand statute is construed to require not only an oral order of remand, but also the mailing of a written remand order, however, then the federal court retains jurisdiction until such time as the federal court clerk places a certified copy of the federal remand order in a repository of the United States mail, if not longer.⁹²

*C. Decisions Holding that the Federal Court is Not Deprived of
Jurisdiction Until the State Court's Clerk Receives a Certified
Copy of the Federal Remand Order*

Not all federal courts agree that they lose jurisdiction upon the mailing of the remand order. In another line of decisions federal district courts have stated or implied that a federal court retains jurisdiction over a removed case until the state court's clerk actually receives a certified copy of the federal remand order.⁹³ In some of those cases, the district court has explicitly stated that the state court does not actually regain jurisdiction until its clerk receives the certified copy of the remand order that the federal court's clerk had placed in the mail, pursuant to the procedure set forth at 28 U.S.C.

Allegheny County, Pennsylvania, with costs, and the clerk is directed to mail a certified copy of this order to the Prothonotary of that Court").

These literal interpretations of 28 U.S.C. § 1447(c) (Supp. II 1985) find support in James W. Moore's and Brett A. Ringle's summary of the applicable jurisdiction, when they made the following observation:

Under the prior statute, despite the strong language to the effect that when the district court orders the case remanded "such demand shall be immediately carried into execution," it was held that this did not instantly deprive the district court of jurisdiction. This meant that steps were to be taken promptly to carry the remand into effect, but until these steps were taken the district court had power to vacate its order. *This is true under the present statute since it does not command immediate execution of the remand order. But the entry of the order of remand and the mailing of a certified copy to the clerk of the state court completely divests the federal court of jurisdiction so that it is powerless to vacate the order of remand.*

J. MOORE & B. RINGLE, *supra* note 35, ¶ 0.169 [2.-1], at 696-97 (emphasis added).

89. See *Trent Realty Assoc. v. First Fed. Sav. & Loan Ass'n*, 657 F.2d 29, 36 (3d Cir. 1981); *Murdock v. Safety Casualty Co.*, 138 F. Supp. 145, 147 (S.D. Tex. 1956).

90. *Three J Farms, Inc. v. Alton Box Bd. Co.*, 609 F.2d 112, 114, (4th Cir. 1979), *cert. denied*, 445 U.S. 911 (1980).

91. *Leslie v. Floyd Gas Co.*, 11 F. Supp. 401, 402 (E.D. Ky. 1935).

92. *First Nat'l Bank v. Langford*, 570 F. Supp. 697, 698 (S.D. Fla. 1983).

93. See *infra* notes 95-99 and accompanying text.

section 1447(c).⁹⁴

In *Yarborough v. Blake*,⁹⁵ for example, the United States District Court for the Western District of Arkansas observed that "upon receipt by the Clerk of the State court of the certified copy of the order, the State court was authorized to proceed with the case."⁹⁶ In the much older case of *Empire Mining Co. v. Propeller Tow-Boat Co.*⁹⁷ a federal district court and a state court vigorously disputed the issue of jurisdiction after the federal district court had attempted to vacate an order of remand that had returned a removed case to the state court from where it came. In the state court proceeding the defendant asked to remove the case to the United States Circuit Court for the District of South Carolina on December 17, 1898. Subsequently, the plaintiff filed a motion to remand, which the federal court granted on May 22, 1899. On that same day, the state clerk filed a certified copy of the remand order in the state court. The state court thereupon resumed jurisdiction. On June 7, 1899, the federal court vacated that order of remand and sought to regain jurisdiction over the case, which the state court refused. The state court refused to surrender jurisdiction because it contended that the federal court had lost jurisdiction over the case when the state court filed the remand order. The state court argued:

The moment the order of remand was executed by filing in the state court, the jurisdiction of the federal court was yielded, and the jurisdiction of the state court, which had been suspended by the removal to the federal court, was restored, or became again operative in the cause. It was then not only the right, but the duty, of the state court to proceed with the cause. Some steps had been taken in the state court after the filing of the order of remand and before the filing of the order vacating, and it is hardly conceivable that, if judgment had been rendered in the interim, it would be void for want of jurisdiction, since jurisdiction was restored by the order of remand. It being the duty of the state court to accept the order of remand as final, and proceed with the cause, its jurisdiction could in no wise be affected by the vacating order, which was made after the federal court had lost possession and control of the cause.⁹⁸

This discussion of the effect of a state court's receipt of a federal remand order on the federal court's right to reconsider, modify, or vacate its order of remand is as intelligent and applicable today as when the court wrote it almost eighty-seven years ago. Although disputes can arise as to whether the state court is right to resume jurisdiction after the federal court's mailing of a remand order, clearly the state court may reassert its jurisdiction once its clerk has actually received and file-stamped the federal court's remand

94. For a discussion of the potential effect of this receipt analysis, see *infra* notes 97-98 and accompanying text.

95. 212 F. Supp. 133 (W.D. Ark. 1962).

96. *Id.* at 145.

97. 108 F. 900 (C.C.D.S.C. 1901).

98. *Chisholm v. Propeller Tow-Boat Co.*, 59 S.C. 549, 550, 38 S.E. 156, 157 (1901); *cf.* *Travelers' Protective Ass'n v. Smith*, 71 F.2d 511, 513 (4th Cir. 1934) (court stated that remanding order not made on ground of improper removal and not executed may be vacated).

order.⁹⁹

IV. AN ARGUMENT FOR DETERMINING THAT A FEDERAL COURT
DOES NOT LOSE JURISDICTION OVER A REMOVED CASE
UNTIL THE STATE COURT'S CLERK ACTUALLY
RECEIVES A CERTIFIED COPY OF THE
FEDERAL COURT'S REMAND ORDER

Federal courts have ruled that state courts are reinvested with jurisdiction over a case that had been removed from that state court on three separate occasions:

- (1) immediately upon the *oral order* of the federal court to remand the case to the state court;¹⁰⁰
- (2) upon the federal court clerk's *mailing* of the federal remand order to the state court; and¹⁰¹
- (3) upon the state court's *receipt* of the federal remand order.¹⁰²

One can make a few generalizations about the cases described above. Since Congress enacted the Judicial Code in 1940,¹⁰³ no federal court has ruled that an oral order of remand immediately and irrevocably divests a federal court of jurisdiction over a case removed from a state court. This absence of case law reflects the change effected by the 1948 amendment,¹⁰⁴ when the legislature replaced the statutory commandment that the remand "shall be immediately carried into execution"¹⁰⁵ with language requiring the federal court's clerk to mail "[a] certified copy of the order of remand . . . to the clerk of the State court," so that the state court could "thereupon proceed with such case."¹⁰⁶

As one federal appellate court declared, the remand procedure under the current statute "is not self-executing."¹⁰⁷ The remand statute requires more than a mere oral order. The statute requires the written entry of that order and the mailing of that order to state court.¹⁰⁸ State courts that have con-

99. See *Three J Farms, Inc. v. Alton Box Bd. Co.*, 609 F.2d 112, 114, 116 (4th Cir. 1979) (federal court cannot vacate remand order and retrieve file allegedly mistakenly returned to state court thirteen days after federal court's clerk forwarded original pleadings and certified copy of docket entries to state court, which had presumably resumed proceedings in case), *cert. denied*, 445 U.S. 911 (1980); *FDIC v. Santiago Plaza*, 598 F.2d 634, 636 (1st Cir. 1979) (reversing federal district court's order vacating remand and staying proceedings in Puerto Rico court that occurred four months after federal district remanded case to Puerto Rico court, because "the state court's jurisdiction, however it may be measured, had resumed"); *State v. Lehman*, 203 Neb. 341, 278 N.W.2d 610, 615 (1979) (jurisdiction of state court restored after receipt of federal remand order).

100. See *supra* notes 15-46 and accompanying text.

101. See *supra* notes 47-92 and accompanying text.

102. See *supra* notes 93-99 and accompanying text.

103. 28 U.S.C. §§ 51-2254 (1940) (current version in scattered sections of 28 U.S.C.).

104. Act of June 25, 1948, ch. 646, 62 Stat. 939 (codified at 28 U.S.C. § 1447 (Supp. II 1985)).

105. 28 U.S.C. §§ 71, 80 (1940) (current version at 28 U.S.C. § 1447(c) (Supp. II 1985)).

106. *Id.* § 1447(c) (Supp. II 1985) (amending 28 U.S.C. §§ 71, 80 (1940)).

107. *Browning v. Navarro*, 743 F.2d 1069, 1078 (5th Cir. 1984) (citing *Bucy v. Nevada Constr. Co.*, 125 F.2d 213, 217-18 (9th Cir. 1942)).

108. 28 U.S.C. § 1447(c) (Supp. II 1985).

strued the statute to immediately and irrevocably divest the federal court of jurisdiction over the removed case¹⁰⁹ simply have failed to recognize that the case law upon which they have relied is inapplicable to the law as it now appears on the books.

Although a number of old federal court cases squarely held that an order of remand immediately and irrevocably divests the federal court of jurisdiction, and therefore imply that such an order is "self-executing,"¹¹⁰ one can, and now should, disregard those cases because the courts decided them under a prior statute that has since been changed substantially. We can therefore conclude that federal court judges do not surrender their jurisdiction over a removed case merely by advising the parties or their counsel that the court will return the lawsuit to the state court. Instead, the federal district court judge must enter a written order of remand in the federal court's docket, and then cause the federal court's clerk to mail a certified copy of that remand order to the state court from which the case was removed.¹¹¹

Several consequences result from this analysis of the old federal cases and the newer state court cases. Because the federal court judge does not surrender jurisdiction until he has entered the remand order and caused his clerk to mail a certified copy of it to the state court, the judge remains free to reverse or modify his earlier order of remand at any time prior to the mailing or, alternatively, the actual delivery, of the certified copy of the remand order to the state court. Often one or several days will elapse between the time that the federal court first considers the issue of remand, *sua sponte* or at the request of the plaintiff, and the time that the clerk actually sends a certified copy of the remand order to the state court. Astute defense counsel will use this time in order to file a motion requesting the court to reconsider or to vacate this original remand order.

Considerations of policy favor a federal court's retention of jurisdiction until the federal court clerk mails a copy of the remand order to state court. Not only does this judicial construction comport with the statutory language, it also enables the federal district court judge to render an intelligent and well advised decision. This intelligent decision will arise because the judge possesses an opportunity to reconsider, modify, or vacate the remand order that otherwise would not be available. Review of the case law reveals that federal courts have taken the opportunity to correct hasty or ill-advised decisions.¹¹² Since no opportunity exists for an appeal or a mandamus once the state court has resumed jurisdiction over the remanded case, the federal court only possesses "one shot" to render the correct decision.¹¹³

One could argue that the federal court's retention of jurisdiction does not accord with the policy that requires federal courts to construe strictly the

109. *See Reimer v. Scott*, 666 S.W.2d 384, 385 (Tex. App.—Houston [14th Dist.] 1984, writ *dism'd*).

110. *See supra* notes 15-46 and accompanying text.

111. *See supra* notes 47-92 and accompanying text.

112. *Bucy v. Nevada Constr. Co.*, 125 F.2d 213, 217 (9th Cir. 1942); *Cook v. J.C. Penney Co.*, 558 F. Supp. 78, 79 (N.D. Iowa 1983).

113. *In re La Providencia Dev. Corp.*, 406 F.2d 251, 253 (1st Cir. 1969).

right to remove a state court lawsuit to a federal court.¹¹⁴ If an oral order of remand is both immediate and irrevocable, then improvidently removed cases would be expeditiously returned to the state courts from where they came, without any possibility for the federal court to regain jurisdiction over the case by vacating or modifying an ill-advised or hasty order. This approach would reduce the federal judiciary's caseload of removed cases, and also shorten the time that an improvidently removed case would remain in federal court prior to its remand to state court. As laudable as these goals appear, however, the means used to achieve them appear inappropriate. In a large number of cases a party should never remove to a federal court. Furthermore, the improper removal of a case can seriously disrupt a state court's trial procedures.¹¹⁵ When the removal has been improper, the delays and expenses associated with the removal can threaten the comity between federal and state courts.¹¹⁶ The solution, however, should not deprive a federal district court judge of the right to correct a mistake.

The proper manner in which to discourage wrongful removals makes the attorneys who file meritless removal petitions pay dearly for the privilege. Courts may accomplish this by assessing attorney's fees pursuant to rule 11 of the Federal Rules of Civil Procedure and 28 U.S.C. section 1927. If the federal court considering the defendant's right to removal determines that the removal petition is well grounded in fact, and that existing law or a good faith argument for the extension, modification, or reversal of existing law warrants removal, then the court should not impose sanctions, even if the federal court returns the case to state court.¹¹⁷ If the court concludes that a party's counsel removed a case solely to impede justice or to delay the entry of a verdict, then the court should sanction the lawyer severely. In one recent case, the Fifth Circuit affirmed a sanctions award in the amount of \$38,843.99 because the court found that the removal petition had not been well grounded in law or fact.¹¹⁸ Federal court sanctions of this kind will deter attorneys from filing wrongful removals and will punish them if they are not deterred.

To summarize, a federal court's order of remand is not self-executing. The federal court must enter the order of remand and mail it to the state court from which the case was removed, pursuant to 28 U.S.C. section

114. *Schwinn Bicycle Co. v. Brown*, 535 F. Supp. 486, 487 (W.D. Ark. 1982); *McCurtain County Prod. Corp. v. Cowett*, 482 F. Supp. 809, 812 (E.D. Okla. 1978).

115. *Ramahi v. Hobart Corp.*, 47 Or. App. 607, 615 P.2d 348, 351-52 (1980); *see also* *Natural Gas Pipeline v. White*, 436 S.W.2d 944, 946 (Tex. Civ. App.—Amarillo 1968) (commenting upon procedure nullity of *plaintiff's* attempt to remove civil case to federal court), *aff'd on other grounds*, 444 S.W.2d 298 (Tex. 1969).

116. *Ramahi v. Hobart Corp.*, 47 Or. App. 607, 615 F.2d 348, 351-52 (1980); *see also* *FDIC v. Santiago Plaza*, 598 F.2d 634, 636 (1st Cir. 1979) (court considers comity between federal and state courts in decision); *In re La Providencia Dev. Corp.*, 406 F.2d 251, 253 (1st Cir. 1969) (court added that comity between federal and state courts is factor to be considered in mandamus proceeding, but is not determinative factor).

117. *See* FED. R. CIV. P. 11.

118. *Davis v. Veslan Enters.*, 765 F.2d 494, 496-97 (5th Cir. 1985); *cf.* *Schwarz v. Folloder*, 767 F.2d 125, 133-34 (5th Cir. 1985) (vacating and remanding federal district court's denial of defendant's motion for attorney's fees under FED. R. CIV. P. 11 and 28 U.S.C. § 1927 (1980)).

1447(c). A state court, accordingly, does not regain jurisdiction over a removed case until either: (1) the federal court's clerk mails, or otherwise sends, a certified copy of the remand order to the state court, or (2) the state court's clerk actually receives the copy of the federal court's remand order.¹¹⁹ Even if the federal district judge has ruled and entered the remand order in the docket, the failure of the federal court clerk to mail the order of remand to the state court enables the federal court to retain jurisdiction over the case and to vacate its original order of remand.¹²⁰ In the interim between the federal district judge's oral order of remand and the federal court clerk's execution of the remand order, the federal court judge may reconsider, modify, or vacate the remand order.

Clearly, therefore, the state court does not regain jurisdiction over the remanded lawsuit until the remand order is executed by certification to the state court. Certification to the state court can occur either at the time of the remand order's mailing or at the time of its receipt.¹²¹ When the federal court places the order in the mail a delay of one to several days ensues. The period is sometimes longer in a large metropolitan area, or when the federal court is located at a considerable distance from the state court from which the defendant removed the case. A defendant may enjoy an even longer respite if the federal court mailed the order on a Friday.¹²² The delay can be significant, for aggressive defense counsel can utilize this brief period of time to file an emergency motion for reconsideration of the order granting remand. If the federal court has acted *sua sponte* or has ruled hastily on the basis of incomplete information, the delay in mailing offers defense counsel a final opportunity to take the "one shot" that removal offers.

Although a federal court's retention of jurisdiction over a case until the moment that a copy of the remand order arrives at the state court will increase the number of removed cases that remain in federal court, this does not mean that retention of jurisdiction conflicts with the policy of strict construction that governs removal cases.¹²³ A policy of strict construction should not countenance erroneous interpretation. If the federal court has mistakenly remanded a case to state court, the federal court should have every opportunity to eliminate the error in the period before the state court resumes proceedings.

Retention of federal jurisdiction over a removed case until the time that the state court actually receives the federal court's remand order makes sense for a number of reasons. A requirement that the state court forgo proceedings until the state court clerk files the remand order allows the federal court's remand order to become part of the state court's record.¹²⁴ The presence of the remand order in the state court's record is particularly im-

119. *See supra* text accompanying notes 47-99.

120. *Cook v. J.C. Penney Co.*, 558 F. Supp. 78, 79 (N.D. Iowa 1983).

121. *See supra* notes 47-99 and accompanying text.

122. *See First Nat'l Bank v. Langford*, 570 F. Supp. 697, 698 (S.D. Fla. 1983).

123. *See supra* notes 114-116 and accompanying text.

124. *E.D. Sys. Corp. v. Southwestern Bell Tel.*, 674 F.2d 453, 457 (5th Cir. 1982).

portant if the federal court has ordered a partial order of remand¹²⁵ or a conditional order of remand.¹²⁶ These conditional remand orders have been appearing with greater frequency in recent years.¹²⁷ Needless to say, the state court judge should read the federal court's remand order before reconvening proceedings, if for no other reason than to determine if the state court's jurisdiction over the case is restricted or conditioned upon a specific set of circumstances.

Furthermore, requiring the state court to forgo any further action until it receives the federal court's remand gives all of the parties a better opportunity to resume the state court proceedings in an orderly and timely fashion. Although a state court judge could resume proceedings without advising the defendant's counsel of those resumed proceedings, the defendant's counsel would likely have had an opportunity to learn of the federal court's action and to prepare for trial. This result comports with the due process requirement that a party obtain an opportunity to be heard "appropriate to the nature of the case."¹²⁸ Thus, considerations of policy and the canons of statutory construction strongly suggest that a federal court is not divested of jurisdiction over a removed case until the state court clerk receives and files a copy of the federal court's remand order.

125. *Id.* at 458; see also *In re Calabria*, 5 Bankr. 73, 75 (D. Conn. 1980) (court remanded basic foreclosure action to state court except portion that determined bankrupt's real estate exemption and avoidance of any judicial liens upon property).

126. Rule 11(f) of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation discussed conditional remand orders extensively. See MANUAL FOR COMPLEX LITIGATION § 5.22 (pt. 2), at 340 (1982) (supplement to C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE (1969-1985)); see also *In re A.H. Robins Co.*, 453 F. Supp. 108, 109 n.2 (J.P.M.L. 1978) (discussing decision to utilize show cause proceeding rather than rule 11(f), J.P.M.L. conditional remand order). The Fifth Circuit has questioned the validity of conditional remand orders. *Browning v. Navarro*, 743 F.2d 1069, 1079 (5th Cir. 1984). Judge Randall observed that "[c]onditional remand orders seem to be contrary to the principles underlying the concept of remand." *Id.* One bankruptcy court in Texas has construed that decision as rejecting the validity of conditional remand orders. See *In re Pacific Tuna Corp.*, 48 Bankr. 74, 78 (W.D. Tex. 1985).

127. *Browning v. Navarro*, 743 F.2d 1069, 1079-80 & n.29 (5th Cir. 1984).

128. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

