

APPELLATE PRACTICE AND PRODUCT LIABILITY

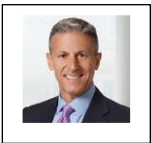
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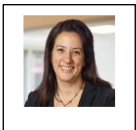
Defendants may have greater access to federal appeals courts thanks to a recent Supreme Court decision concerning district court remand orders. In that decision, the Supreme Court settled a circuit split over the authority of federal appeals courts to review district court remand orders, as well as the scope of that review, under 28 U.S.C. § 1447(d). In BP P.L.C., et al. v. Mayor and City Council of Baltimore, the court held that appellate courts have jurisdiction to review all of a district court's grounds for remand — not just those based on the propriety of federal officer or civil rights jurisdiction — where the case was removed, based at least in part on 28 U.S.C. §§ 1442 and/or 1443.

Supreme Court Settles Circuit Split Over Remand Orders Under 28 U.S.C § 1447(d)

ABOUT THE AUTHORS



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The **Appellate Practice Committee** is available to all members who routinely practice in state and federal appellate courts, as well as trial lawyers who handle their own appeals. The Committee publishes quarterly newsletters addressing various appellate related topics and recent trends in appellate practice. The Committee also offers CLE programs focusing on appellate related issues that often arise before, during, and after trial. Networking among members is also encouraged through Committee meetings held during bi-annual IADC meetings. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article contact:



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Defendants may have greater access to federal appeals courts thanks to a Supreme Court decision concerning district court remand orders. Earlier this year, the Supreme Court settled a circuit split over the authority of federal appeals courts to review district court remand orders, as well as the scope of that review, under 28 U.S.C. § 1447(d). In *BP P.L.C., et al. v. Mayor and City Council of Baltimore*, the court held that appellate courts have jurisdiction to review all of a district court's grounds for remand — not just those based on the propriety of federal officer or civil rights jurisdiction — where the case was removed, based at least in part on 28 U.S.C. §§ 1442 and/or 1443.

28 U.S.C. § 1442 provides that a civil action that is commenced in state court against “any officer (or any person acting under that officer) of the United States . . . for or relating to any act under color of such office . . .” may be removed from state court to the United States district court for the district in which the state court sits. While Congress has provided a number of situations in which defendants may remove cases commenced in state court, Congress has determined that federal officers need enhanced protections of a federal forum. “This policy should not be frustrated by a narrow, grudging interpretation of § 1442(a)(1).” *Willingham v. Morgan*, 395 U.S. 402, 407 (1969). Accordingly, a court must broadly construe a defendant's ability to remove under Section 1442(a)(1) to avoid frustrating this Congressional policy objective. See *id.* Moreover, Congress has made it easier for federal officers to remove cases to federal court by not requiring those defendants to

obtain the joinder or consent of any other defendants before the federal officer may remove the case.

The case was originally filed in Maryland state court by the City of Baltimore, which alleged that the defendant energy companies caused the city to sustain injuries related to climate change. Two defendants removed the case to the United States District Court for the District of Maryland on several grounds in addition to federal officer jurisdiction, including federal question jurisdiction, the bankruptcy removal statute, and the admiralty jurisdiction statute. With respect to federal officer jurisdiction, the defendant energy companies asserted that they were acting under the direction of federal officers in light of their alleged contractual obligations to the U.S. government. The city moved to remand the case, arguing that the federal court lacked subject matter jurisdiction.

The district court agreed with the city and entered an order of remand, saying in part that federal officer jurisdiction was lacking. The defendants appealed the district court's remand decision to the Fourth Circuit Court of Appeals.

28 U.S.C. § 1447(d) provides that a district court's remand decision is not generally reviewable on appeal. Congress did, however, carve out two exceptions to this general rule — allowing appellate review of “an order remanding a case . . . which was removed pursuant to section 1442 or 1443 . . .”

In denying the defendants' appeal, the Fourth Circuit held "that when a case is removed on several grounds, appellate courts lack jurisdiction to review any ground other than the one specifically exempted from § 1447(d)'s bar on review." As such, the Fourth Circuit made a distinction between remand based on a lack of federal officer jurisdiction and other grounds for the district court's remand, and reviewed only the district court's decision with respect to federal officer jurisdiction.

In reaching this decision, the Fourth Circuit took a very narrow view of 28 U.S.C. § 1447(d)'s exceptions that allow appellate review. In doing so, it considered only the district court's grounds for *remand*, as opposed to the defendants' grounds for *removal*. Accordingly, the Fourth Circuit interpreted the statute to permit appellate review of remand orders only when the grounds for *remand* are based on a finding that there is no federal officer or civil rights jurisdiction.

A majority of other circuits had previously adopted this same narrow interpretation of 28 U.S.C. § 1447(d), but there was a split in the circuits. The Seventh Circuit Court of Appeals, in *Lu Junhong v. Boeing Co.*, 792 F.3d 805 (7th Cir. 2015), instead analyzed the defendants' grounds for removal — not the court's grounds for remand — to allow appellate review of a remand decision as long as the case was *removed* under §§ 1442 or 1443, even if there were additional grounds for removal.

The Supreme Court granted certiorari to resolve the split in the circuits' analysis of the appellate rights afforded by 28 U.S.C. § 1447(d), which states:

An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to State court from which it was removed pursuant to section 1442 or 1443 of this title shall be reviewable by appeal or otherwise.

The Supreme Court based its decision on the plain language of this statute, and sided with the defendants. It held that an appeals court can review a remand "order," including *all grounds* for remand, even those grounds that generally are not reviewable pursuant to § 1447(d), when a case is removed, at least in part, based on 28 U.S.C. § 1442 or § 1443 — federal officer or civil rights jurisdiction.

The court began its analysis of the statute by deciphering the word "order," which it defined as a "written direction or command delivered by ... a court or judge," as noted in *Black's Law Dictionary* 1322 (2019). This makes an "order remanding a case" a formal command from a district court that returns a case to the state court, and the remand order from the district court in this case rejected all of the defendants' grounds for removal. The court reasoned that the plain language of the statute requires that "when a district court's removal order rejects all of the defendant's grounds for removal, §

1447(d) authorizes a court of appeals to review each and every one of them.”

The court then construed the phrase “removed pursuant to section 1442 or 1443.” It posited that to remove a case “pursuant to” these sections simply means that the defendant’s notice of removal must argue that “the case is removable ‘in accordance with or by reason of’ one of those provisions,” as noted in *Black’s Law Dictionary* 1402 (1968). Accordingly, once the defendants removed the case pursuant to § 1442, the entire remand order, including every ground for remand, became reviewable on appeal.

The court concluded its interpretation by finding that § 1447(d) contains no language that limits appellate review to the propriety of federal officer or civil rights jurisdiction, stating, “[i]nstead and again, § 1447(d) permits appellate review of the district court’s remand order — without any further qualification.”

In basing its holding on the plain language of the statute to reach its conclusion, the Court’s majority rejected the city’s public policy and statutory interpretation arguments, finding: (1) “‘even the most formidable’ policy arguments cannot ‘overcome’ a clear statutory directive,” quoting *Kloeckner v. Solis* (2012); and (2) that it has “no license to give statutory exemptions [such as those provided by §1447] anything but a fair reading,” per *Food Marketing Institute v. Argus Leader Media* (2019). It explained that its task is to interpret and apply the law’s plain meaning as faithfully as it can rather than “to assess

the consequences of each approach and adopt the one that produces the least mischief,” as noted in *Lewis v. Chicago* (2010).

The Supreme Court’s interpretation of 28 U.S.C. § 1447(d)’s exception to allow appellate review of remand “orders” when removed pursuant to §§ 1442 and 1443 rejects the narrow view held by a majority of circuit courts and potentially expands defendants’ access to federal courts, particularly those that contract to provide goods and services to the federal government. Defendants may now want to consider adding federal officer and/or civil rights jurisdiction as additional grounds for removal whenever they may do so, as they allow for the review of remand orders based on a number of other grounds that heretofore were barred from review. Defendants would, however, be wise to refrain from frivolously including federal officer and/or civil rights jurisdiction as a basis for removal just to ensure appellate review of any remand orders. As the Supreme Court warned, “a district court may order a defendant to pay the plaintiff’s costs and expenses (including attorney’s fees) if it frivolously removes a case from state court. *Id.* at 13.

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