

## THIRD CIRCUIT HOLDS MOTION FOR RECONSIDERATION DOES NOT AVOID PROHIBITION OF APPELLATE REVIEW OF REMAND ORDERS

By Jonathan M. Stern

Not all federal trial court decisions are subject to appellate review. Most decisions to remand a case removed from state court are not reviewable, whether as of right or by extraordinary writ. A recent Third Circuit decision holds that the denial of a motion for reconsideration of a remand order also is not subject to review.

In *Agostini v. Piper Aircraft Corp.*, No. 12-2098, 2013 U.S. App. LEXIS 18457 (3d Cir., Sept. 5, 2013), the Third Circuit explained that a motion for reconsideration of a remand order is not one of a small breed of orders that may be reviewed as collateral to the remand order. Some case history is necessary to understand the holding and its ramifications.

The plaintiffs filed state law claims for wrongful death in the Court of Common Pleas of Philadelphia County. The case was removed to the U.S. District Court for the Eastern District of Pennsylvania on the basis of diversity of citizenship jurisdiction. Arguing that there was not complete diversity of citizenship, the plaintiffs moved for remand, which the trial court granted. One of the defendants then moved for reconsideration on the ground that the court had relied on matters outside the record to conclude that diversity was lacking. The trial court concluded that the standard for reconsideration was not met and denied the motion. The certified copy of the remand order was mailed to the state court after the motion for reconsideration was decided.

Section 1447(d) of Title 28 provides that remand orders are not reviewable, “except that an order remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of this title shall be reviewable by appeal or otherwise.” There-

fore, on its face, Section 1447(d) permits review of remands of cases removed under the federal officer (§ 1442) and civil rights (§ 1443) case removal statutes, but no others. The Supreme Court has held that the rule of nonreviewability applies even in the face of clear error by the trial court. The purpose of the statute is to prevent prolonged litigation over jurisdictional issues and the concomitant interruption of litigation on the merits.

The courts have interpreted the nonreviewability rule to apply only to remands within the scope of subsection 1447(c), which are lack of subject matter jurisdiction and defects in the removal procedure. Other grounds for removal, such as abstention or comity, are not covered. There also are other statutes (for example, 12 U.S.C. § 1819(b)(2)(C)) that override 1447(d) and provide for review. Finally, there are orders (such as those allowing fees and costs in connection with a remand) that are deemed collateral for purposes of the statute, and review of such collateral orders is permitted. The appellants in *Agostini* acknowledged the applicability of the prohibition to review the remand order but argued that the order denying reconsideration fell within the collateral order exception.

The Third Circuit made short shrift of the collateral order argument. First, it reiterated its previous holding that a remand order should not be reconsidered after a certified copy is transmitted to the state court, even though a fees and costs petition is collateral. Second, the court rejected an argument based on *Waco v. United States Fidelity & Guaranty Co.*, 293 U.S. 140 (1934). *Waco* permitted appellate review of a remand to state court following dismissal of a party.

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The Third Circuit's view was that *Waco* allowed appellate review because the appeal would address the propriety of the dismissal and not affect the remand order. Based on other circuits' interpretations of *Waco*, the Third Circuit held that the question is whether an aspect of the decision will have a conclusive effect on substantive rights and whether that aspect of the decision can be disaggregated from the remand order. Because reconsideration of the remand order would not be disaggregated from the remand order, review was barred in *Agostini*.

The Third Circuit also considered whether the trial court had jurisdiction to reconsider the remand order. It concluded that the transmission to the state court of the certified copy of the remand order is the controlling factor. Until that point, the trial court retains jurisdiction over the case and may change its ruling.

We offer two practice pointers from the *Agostini* case. First, if there is a good faith basis for including the federal officer statute as one basis for the removal, the prohibition against review of a remand may not apply. Federal officer removal is available when one or more actions that are the subject of the suit are taken under the auspices of a federal officer (*e.g.*, under certain government contracts). Second, if a remand order is entered and there are grounds worthy of a motion for reconsideration, promptly advise the court that a mo-

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tion for reconsideration will be filed and request that transmission of the certified copy of the remand order be withheld until the reconsideration motion can be briefed and decided. ♦

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