



Appellate Law, Litigation Practice Groups

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## SUPREME COURT FURTHER NARROWS APPELLATE JURISDICTION TO REVIEW DISTRICT COURT REMAND ORDERS

In a split decision, the United States Supreme Court has narrowed appellate review of remand decisions by holding that a district court's remand of a properly removed case for lack of subject-matter jurisdiction is governed by 28 U.S.C. § 1447(c) and, therefore, barred from appellate review by 28 U.S.C. § 1447(d).

This issue arose with the case of *Powerex Corp v Reliant Energy Services, et al*, 551 U.S. \_\_\_\_ (2007) when the State of California and other private and corporate citizens filed suit against several companies in the California energy market, who had allegedly conspired to fix prices in violation of state law.

After defendants filed cross claims for indemnity from several agencies and corporations, including Powerex (a Canadian corporation), cross-defendants had the entire case removed to federal court pursuant to 28 U.S.C. § 1441(d) and 28 U.S.C. § 1442. The district court remanded the case, finding that Powerex was not a "foreign sovereign" under the Foreign Sovereign Immunities Act (FSIA), that one cross-defendant was shielded by sovereign immunity, and that the other cross-defendants were immune from suit in state court, therefore depriving the court of jurisdiction over those claims.

Powerex and the other cross-defendants appealed to the U. S. Court of Appeals for the Ninth Circuit. Powerex argued that it qualified as a foreign sovereign under the FSIA. The other cross-defendants alleged that the district court should have dismissed them from the lawsuit on sovereign immunity grounds before remanding the case. The plaintiffs opposed remand, arguing that the appeals were jurisdictionally barred by 28 U.S.C. § 1447(d), which provides:

"An order remanding a case to the state court from which it was removed is not reviewable on appeal or otherwise..."[1]

The appellate court affirmed, ruling that §1447(d) did not preclude it from reviewing substantive issues of law that preceded the remand order. The appellate court further affirmed the district court's holdings that Powerex was not a "foreign state" under the FSIA and that several cross-defendants were protected by sovereign immunity. However, the Ninth Circuit reversed the district court's decision not to dismiss the remaining cross-defendants before remanding. Powerex sought certiorari review.

The U. S. Supreme Court vacated in part the appellate court's judgment and remanded the case for dismissal of Powerex's appeal based on lack of jurisdiction. Justice Scalia, writing for the court, began by recognizing that 28 U.S.C. §1447(d) substantially limits the authority of appellate courts to review district court orders remanding removed cases to state court. The Supreme Court reiterated its prior holding in

*Thermtron Products, Inc v Hermans-dorfer*, 423 U.S. 336, 345-46 (1976), that § 1447(d) is to be read *in pari materia* with § 1447(c), which provides, in pertinent part:

“A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under [28 U.S.C. §] 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.”

Such a conjunctive reading of § 1447(c) and § 1447(d) limits the prohibition on appellate review to remands based on either a defect in removal procedure or lack of subject-matter jurisdiction. See *Quackenbush v Allstate Ins Co*, 517 U.S. 706, 711-712 (1996).

The court rejected a “narrowing construction of §1447(c)s unqualified authorization of remands for lack of ‘subject matter jurisdiction’” and found that a case may require remand if it is properly removed, but lacks subject matter jurisdiction. In such situations, §1447(c) governs the remand and § 1447(d) protects it from appellate review.

Therefore, the Supreme Court concluded that the Ninth Circuit was precluded by §1447(d) from reviewing whether Powerex qualified as a foreign state under the FSIA. In so ruling, the court rejected Powerex’s alternative arguments that § 1447(d) does not preclude review of prior merit determinations made by the district court before the remand and that §1447(d) is inapplicable to a suit removed under the FSIA.

The *Powerex* decision reflects the Supreme Court’s continued trend of narrowing appellate review of remand orders. In effect, this decision will allow district court judges to decline to hear cases that are properly within their jurisdiction. Even if remand decisions are arbitrary or erroneous, Congress does not provide an avenue for review of those decisions.

For a complete copy of the U. S. Supreme Court’s decision on *Powerex v Reliant Energy Services*, [click here](#).

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[1] An exception exists for certain civil rights cases.