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Tenth Circuit Confirms Extremely Limited Federal Appellate Review for Remand Orders

The Tenth Circuit joined the majority of circuit courts that have addressed the "except" clause in 28 U.S.C. §1447(d).

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In *Board of County Commissioners of Boulder County v. Suncor Energy (U.S.A.)*, No. 19-1330, 2020 WL 3777996 (10th Cir. July 7, 2020), the Tenth Circuit joined the majority of circuit courts that have addressed the "except" clause in 28 U.S.C. §1447(d). The appellate court confirmed that an appeal of a district court's remand order under U.S.C. §1447(d) is limited to removal issues under 28 U.S.C. §1442 and §1443, not plenary review of all issues addressed in the remand order.

Colorado Counties Sue Oil Companies in State Court for Allegedly Contributing to Global Warming

Three Colorado counties sued Suncor Energy and ExxonMobil in state court, alleging that the counties "face substantial and rising costs to protect people and property within their jurisdictions from the threat of global warming, including from increasing and intensified heat waves, wildfires, droughts, and floods across Colorado." *Id.* at *1. They alleged that the defendant oil companies, "[f]or decades after becoming aware of the dangers of global warming," nonetheless "continued to produce, promote, refine, market, and sell fossil fuels at levels that caused and contributed to negative climate alteration without disclosing the harms posed by continued fossil fuel overuse." *Id.* Based on that conduct, the counties raised claims for public and private nuisance, trespass, unjust enrichment, civil conspiracy, and violation of the Colorado Consumer Protection Act.

Suncor and ExxonMobil removed to the District of Colorado, asserting seven grounds for federal subject matter jurisdiction, including five grounds under 28 U.S.C. §1441(a) (which allows for removal where federal courts have original jurisdiction), one under the bankruptcy removal statute, and one under the federal officer removal statute, 28 U.S.C. §1442(a)(1).

Once in the District of Colorado, the counties moved to remand the case back to state court on the basis of no federal subject matter jurisdiction. The district court agreed, concluding that there was no basis for it to exercise jurisdiction over the counties' claims. Defendants appealed the district court's remand order to the Tenth Circuit.

Federal Appellate Review of Remand Orders

“The authority of appellate courts to review district-court orders remanding removed cases to state court is substantially limited by statute, namely, 28 U.S.C. §1447(d).” *Id.* at *3 (quotations omitted) (quoting *Mayor & City Council of Baltimore v. BP P.L.C.*, 952 F.3d 452, 459 (4th Cir. 2020)).

“Consequently, ‘the threshold question in an appeal of a remand order is whether the district court’s decision is reviewable notwithstanding the proscription set forth in 28 U.S.C. §1447(d).’” *Id.* (quoting *Am. Soda, LLP v. U.S. Filter Wastewater Grp.*, 428 F.3d 921, 924 (10th Cir. 2005)).

Section 1447(d) provides:

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 the State court from which it was removed pursuant to section 1442 or 1443 of this title shall be reviewable by appeal or otherwise.

Under this statute, a federal appellate court cannot review a remand order *unless* “(1) the remand was for a reason other than lack of subject matter jurisdiction or a defect in the removal procedure or (2) the ‘except’ clause of §1447(d) gives [the court] jurisdiction.” *Id.* (quoting *Miller v. Lambeth*, 443 F.3d 757, 759 (10th Cir. 2006)).

Section 1447(d) creates an exception to the general rule against appellate jurisdiction over remand orders and allows appellate courts to review of remand orders made under 28 U.S.C. §1442 and 28 U.S.C. §1443. Section 1442 allows “[a] civil action or criminal prosecution that is commenced in a State court and that is against or directed to any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending[.]” And Section 1443 provides for removal to federal court for certain civil rights cases.

The parties disagreed over the interpretation and application of the “except” clause in Section 1447(d). “Defendants assert[ed] that because their removal was premised partly on federal officer removal under §1442, [the court had] appellate jurisdiction to review the district court’s entire remand order, not just the portion dispensing with the federal officer removal argument.” *Id.* at *4. “The Counties disagree[d], asserting that the scope of [the court’s] review must be confined to the district court’s disposition of the §1442 argument.” *Id.* The Tenth Circuit had yet to answer the question, “which turns on statutory construction.” *Id.* After conducting the necessary statutory construction analysis, the court agreed with the counties.

Statutory Analysis of Section 1447(d)

As an initial matter, the court highlighted a circuit split on the scope of Section 1447(d)’s “except” clause. “Six circuits—the Second, Third, Fourth, Eighth, Ninth, and Eleventh—hold that a remand order premised on a §1447(c) ground is reviewable only to the extent it addresses a §1442

(federal officer) or 1443 (civil rights) removal argument.” *Id.* at *4. “In 2015, the Seventh Circuit fractured this unanimity on the scope of appellate review created by §1447(d), holding that the invocation of a §1447(d) exception allows for plenary review of all other removal bases addressed in a remand order.” *Id.* With this circuit split in mind, the court conducted the necessary statutory-construction analysis.

First, the court analyzed whether the “except” clause is ambiguous. The court “determined that the specific context in which ‘order’ is used in the ‘except’ clause creates ambiguity regarding the ambit of our jurisdiction over appeals of mixed remand orders like the one here.” *Id.* at *7.

Second, after considering the clause’s context, the court determined that the “except” clause should be narrowly construed because Section 1447(d)’s “overall thrust ... is to impose one of the most categorical bars to reviewability found anywhere in federal law.” *Id.* Relatedly, to do anything else would be to allow “a serious and unacceptable risk of the exception consuming the rule.” *Id.* at *8 (quoting *In re Woods*, 743 F.3d 689, 700 (10th Cir. 2014)).

Third, the court applied the presumption against federal jurisdiction to interpret Section 1447(d) in a way that would limit, rather than expand, the bases for removal to federal court. See *Merida Delgado v. Gonzales*, 428 F.3d 916, 919 (10th Cir. 2005) (“Because the jurisdiction of federal courts is limited, there is a presumption against our jurisdiction.”); see also *Romero v. Int’l Term. Op. Co.*, 358 U.S. 354, 379, 79 S.Ct. 468, 3 L.Ed.2d 368 (1959) (explaining “reluctance” of the Supreme Court “to expand the jurisdiction of the federal courts through a broad reading of jurisdictional statutes”). “[I]f there is ambiguity as to whether the instant statute confers federal jurisdiction over this case, [the court is] compelled to adopt a reasonable, narrow construction.” *Suncor Energy*, 2020 WL 3777996, at *13.

Fourth, the court invoked “legislative ratification.” It looked to the 2011 Removal Clarification Act, a federal statute that created a new ground for removal to federal court, and assumed that “Congress was aware of the universality of denying plenary review of remand orders under the §1447(d) ‘except’ clause when it augmented that provision with a second narrow statutory avenue for appeal.” *Id.* at *15.

Fifth, the court evaluated public policy considerations, including that expanding the scope of appealability for remand orders would delay litigation and “would encourage removing parties to assert frivolous federal officer claims in order to bring otherwise nonappealable removal arguments to the court of appeals.” *Id.* at *17.

Based on all these considerations, the court ultimately concluded that “while the text of §1447(d)’s ‘except’ clause is arguably ambiguous, statutory context clarifies that the ... proper construction of the statute is the narrower one adopted by the majority of federal circuits.” *Id.* The court “therefore [held] that when a district court issues a remand order premised on a §1447(c) ground, [it is] empowered to review that order only to the extent it addresses the removal bases explicitly excepted from §1447(d)—

in this case, removal under 28 U.S.C. §1442.” *Id.*

Federal Officer Removal Under Section 1442

The only question, then, that the court had jurisdiction to review was whether the district court properly rejected the defendants' arguments under Section 1442. Even though neither defendant was a federal officer, removal was still possible under “§1442(a)(1) if [one] can show: (1) that it acted under the direction of a federal officer; (2) that there is a causal nexus between the plaintiff's claims and the acts the private corporation performed under the federal officer's direction; and (3) that there is a colorable federal defense to the plaintiff's claims.” *Id.* at *18.

ExxonMobil asserted “federal officer removal jurisdiction based on its long-term mining of the Outer Continental Shelf ... for fossil fuels under government leases.” *Id.* The court disagreed. It explained, “[w]hile private contractors performing tasks for the government are sometimes covered under section 1442, ExxonMobil takes this idea too far.” *Id.* (quotations and alterations omitted). “Because ExxonMobil has not established it sufficiently assisted a federal superior's duties through its participation in the ... leasing program, we decline to reach the additional §1442(a)(1) removal requirements of a causal nexus and a colorable federal immunity defense.”

The court therefore affirmed the district court's remand order and dismissed the remainder of the appeal.

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